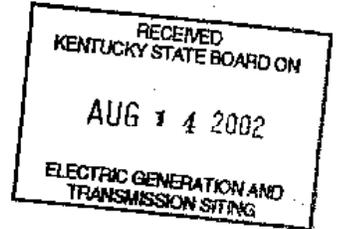


BEFORE THE KENTUCKY STATE BOARD
ON ELECTRIC GENERATION AND TRANSMISSION SITING
211 SOWER BOULEVARD
FRANKFORT, KENTUCKY 40601

In the Matter of:

THE APPLICATION OF KENTUCKY)
MOUNTAIN POWER, LLC /)
ENVIROPOWER, LLC FOR A)
MERCHANT POWER PLANT)
CONSTRUCTION CERTIFICATE IN)
KNOTT COUNTY, KENTUCKY)
NEAR TALCUM)

CASE NO.
2002-00149



POST-HEARING BRIEF OF INTERVENOR PAULINE STACY

Comes now the Intervenor, Pauline Stacy, by counsel and submits this Post-Hearing Brief concerning the application of Kentucky Mountain Power, LLC for a certificate of construction approval from the Kentucky State Board on Electric Generation and Transmission Siting.

INTRODUCTION

Pauline Stacy is a resident of the community of Ary, Kentucky, living along Kentucky Route 1087 with a mailing address of Post Office Box 386 in Bulan, Kentucky 41722.

Ms. Stacy submitted a request for hearing in a timely manner, and was granted full intervention status by the Board in this proceeding. Ms. Stacy timely filed Direct Testimony, and participated in the formal evidentiary hearing conducted before the Board on August 7. Pursuant to the Procedural Order entered in this case, this post-hearing brief is tendered on August 14, 2002.

SUMMARY OF ARGUMENT

The application of Kentucky Mountain Power, LLC for siting approval should have been deemed administratively incomplete pending submittal of information satisfying Senate Bill 257, Kentucky's siting law, regarding construction, design, configuration and mitigation relating to those transmission lines constructed with the primary purpose of supporting the plant and connecting the power plant to the transmission grid. Subsequent commitments to transfer ownership of the plant to a regulated utility do not obviate the necessity of including in the site assessment the impacts of routing, design and configuration of transmission lines and structures intended primarily to move electrons from the merchant generation plant onto the grid as facilities associated with the generation plant siting, and the failure to have required inclusion of those lines within the application served to deprive the public of reasonable notice and a meaningful opportunity to be heard concerning siting of those support facilities.

Assuming, *arguendo* that the application was properly deemed complete, or that the deficiency is remedied as proposed by Intervenor below, the conditions proposed by the Board's Consultant BBC Research and Consulting Co. to mitigate the adverse impacts of the proposed siting are appropriate, but are insufficient in two key areas and must be supplemented and strengthened in order to assure accountability to the Board and public and appropriate enforceable mitigation of impacts by the applicant or any successors.

Finally, with respect to the sufficiency of reporting, Ms. Stacy concurs in principle with the reporting requirements, with certain suggestions to strengthen

accountability by providing more detail in the close-out reporting and in requiring reporting of the resolution of citizen complaints.

ARGUMENT

1. THE BOARD HAS THE STATUTORY AUTHORITY TO IMPOSE MITIGATION CONDITIONS THAT IT DEEMS APPROPRIATE TO ADDRESS IDENTIFIED SITING IMPACTS AND IS NOT CONSTRAINED IN IMPOSING SUCH CONDITIONS TO THE ENUMERATED MATTERS LISTED IN THE STATUTE

Senate Bill 257 was enacted in order to enable the Commonwealth to control the siting and the environmental consequences of new electric generation and transmission facilities. Among the requirements of the statute are the establishment of a Board for hearing requests for approval of construction certificates for proposed merchant power plants, and criteria for determining whether and under that conditions that approval would be granted.

It has suggested that the Board's jurisdiction and ability to impose mitigation requirements is constrained or limited by reference to the specific enumerated criteria for approval outlined in Section 6(1) of the Act. In truth, the ability of the Board to impose mitigation conditions is broader than the criteria for grant or denial of the construction certificate. Under Section 5(6) of the Act, the Board may require "as a condition of approval for an application to obtain a construction certificate," that the applicant implement "any mitigation measures that the board deems appropriate" based on the evidence presented by the applicant *and* based on other sources of analysis and information, such as that provided by the consultant(s) to the Board, intervenors or from public comment.

Statutes such as Senate Bill 257 that a remedial in purpose are, in accordance with accepted principles of statutory construction, to be given liberal construction with a view towards promoting their objects and carrying out the intent of the General Assembly. *Roland v. Kentucky Retirement Systems*, Ky.App. 52 S.W.3d 579 (2001), (applying KRS 446.080(1) to broadly construe unemployment insurance law to benefit covered workers). In this case, bounded by the requirement that the condition not be "arbitrary," the Board has broad remedial powers to respond to adverse impacts associated with the siting of the plant and associated facilities identified by the applicant, by the public and by the staff and consultants, and to craft reasonable conditions to mitigate such impacts. The overarching goal of the law is to require that merchant plants and, on a parallel review track, regulated utilities better internalize the full range of "costs" of doing business in the Commonwealth.

2. ASSUMING THAT THE APPLICATION WAS COMPLETE AND WAS PROPERLY PROCESSED, THE PROPOSED MITIGATION CONDITIONS ARE GENERALLY SUFFICIENT EXCEPT IN THE AREAS OF PREVENTING UNAUTHORIZED USE OF THE COAL HAUL ROADS FROM KY 1087 AND LICK BRANCH ROAD; AND IN THE PROTECTION OF ROADWAYS FROM INUNDATION BY THE PROPOSED WATER IMPOUNDMENT

As argued below, there exists a significant threshold question as to whether the application was complete with respect to the routing and construction of transmission facilities intended to support the movement of electrons from the new power plant onto the grid. Assuming that the application was complete, the issuance of any construction certificate must be rigidly bounded by conditions to mitigate the potential adverse effects of traffic routing on KY 1087, as well as the

potential for damage to that roadway and interference with its use or public safety on the road associated with the breach of the proposed power plant water impoundment.

Residents living along Kentucky Route 1087, which transects the community of Ary, Kentucky, have suffered significant adverse impacts associated with the use of two coal haul roads associated with the Starfire Mining Complex that exit onto Kentucky Route 1087; the former coal haul road that exits onto Lick Branch Road and then KY 1087 (the use of which for coal haulage was prohibited after extensive litigation by order of the federal Office of Surface Mining), and another coal haul road exiting directly to Kentucky 1087. The testimony of Ms. Stacy concerning the nature of the road and the incompatibility of heavy truck traffic with the residential use of the road stands unchallenged in this case.

The BBC Research and Consulting Co. *Review and Evaluation of Kentucky Mountain Power Site Assessment Report* itself noted that

[] Construction of the new access road by the Commonwealth of Kentucky, the applicant and Knott County from KY 80 to the site is a key mitigating feature of the site development plan and should be called out as a specific commitment. In the absence of the new access road, there is the potential for substantial increases in truck and vehicle traffic along KY 1087 which is a narrow and winding road used by local residents as well as the Starfire Mine.

In addition, there should be an explicit commitment by the project to issue strict instructions to employees and vendors traveling to the site to minimize use of KY 1087 or other pre-existing access approaches to the project.

The BBC *Review* supports imposition of strict and enforceable conditions to prevent use of KY 1087 for site access. As Ms. Stacy testified,

Route 1087 is a small narrow residential road, and the residents that live along it like me already carry the burden of coal truck traffic. Dust, mud, diesel fumes, safety risks from truck traffic, have all caused annoyance and discomfort to myself, my husband, who suffers from lung problems, and my neighbors. The addition of more heavy truck traffic for fuel delivery, as well as construction equipment, facility components and other heavy machinery, and additional truck traffic associated with the proposed industrial park, is not compatible with the residential nature of the community and will further impact our homes, their property value, and our quality of life.

The BBC firm, by letter dated August 12, offered draft permit conditions for consideration as binding conditions of any issuance by the Board of a certificate of construction. Specific to this issue, the consultants propose two conditions that affect the use of KY 1087 at Ary and the preferred routing of site access and other traffic to KY 80 at Talcum:

6. Construction and use of new bridge and access road

KMP shall encourage and support the Commonwealth of Kentucky, Knott County, and any other parties in their effort to design, construct, operate and maintain the turn-out lane from Kentucky 80 to Talcum, the new bridge and the new paved access road to the plant site. KMP shall encourage and in no way inhibit the construction of this new access road to occur as soon as possible after project construction commences.

7. Use of certain roadways

Prior to completion of the new bridge and access road, KMP shall encourage to the maximum extent possible that its contractors, vendors and employees use Kentucky Highway 80, Kentucky Highway 15, and the access to the plant site at Talcum which crosses Kentucky 1087 heading directly to the plant site. Without violating existing laws or breaching existing contracts, KMP shall instruct its employees, vendors, contractors and their sub-contractors to utilize the existing Talcum access to the plant from Kentucky 80, and subsequently the new bridge and access road when it is completed, to the maximum extent practicable. Exceptions would include emergencies where other routes are necessary, access by employees or vendors who currently reside along other access roads to site or other similar circumstances where the use of the preferred route would

be clearly unreasonable.

With all due respect, the proposed conditions are substantially unenforceable, would mire the Board in constant intervention to determine the extent to which failure to avoid KY 1087 was appropriate, and would provide little comfort to a community which would be forced to rely on a Board with no dedicated inspection or enforcement staff to police a binding condition riddled with subjective exceptions.

As to the construction of the new bridge and access road, the applicant should be required as a binding condition of any certificate, to move construction of the new bridge and access road to the *first* phase of the project and to *demonstrate that it has acquired all necessary access on private lands to support the new road and connection to the public right-of-way.* "Encouragement" is far too weak an obligation, and allows the company to indefinitely use existing access without upgrade for the entire construction phase, when the conflict between residential traffic and heavy equipment and truck traffic may be most acute.

With respect to the use of the existing Talcum haul road for site access, the proposed condition **lacks meaningful standards or enforceable requirements** in these key areas:

* Rather than requiring that use of the Talcum access be mandated in all contracts for labor, materials and supplies, and even though the testimony was that no such contracts had yet been executed, the BBC recommendations require only that KMP **encourage** such use **to the maximum extent possible.** Neither phrase is capable of objective evaluation or meaningful oversight by the Board.

* Rather than requiring that all such traffic be routed through that access, and requiring that KMP make it a condition of their contracts (including renegotiating that term for existing contracts, which would be a minor adjustment in the contracts) the BBC recommendation makes the use of the road subservient to any existing contracts and requires KMP only to ask that the proper road be used by the contractors **to the maximum extent practicable**. Whether it is KMP or the contractor, who might find it faster to cut through the back route through Ary, to applies this amorphous phrase, the Board and consequently the public will not be able to hold either accountable.

* The "emergency" clause is broad enough to drive more than one truck through, allowing the company to consider as an "emergency" any case in which a vendor might find it more convenient, because of its location, to use KY 1087, any time that the use of the other routes are "necessary," and other cases where use of the preferred route would be "unreasonable" though to whom it is not indicated.

In order to properly mitigate the potential adverse impacts to the Ary residents and their property, clear, unambiguous, measurable and enforceable conditions should be imposed:

1. KMP must include in all contracts for goods or services, including construction material, labor, fuels, supplies, associated with the proposed plant, a requirement that all traffic is to use the Talcum route exiting directly to the site from Route 80 and crossing 1087 at Talcum. The condition should require the applicant and any successor to: (a) include in any contract for delivery of materials, fuel, construction or operational equipment, a contract provision requiring use of the access road; (b) include in any contract or subcontract regarding labor that all personnel associated with site construction or development or plant construction and operation, utilize the Route 80 access road at Talcum.

2. KMP should be required to control site access and to not utilize nor allow to be utilized any site access from the Lick Branch haul road or other roads

exiting onto 1087 in the Ary Community, for site access or egress, except by emergency medical, fire or police vehicles or for site egress by personnel in the case of medical emergencies, fire or other natural disaster. The only exception should be for fuels mined and delivered directly from the Starfire mining complex across internal roads. Where an "emergency" necessitates use of any other route for site access or egress, that should be reported to the Board by verbal and written notice.

3. Inasmuch as the proposed project includes donation of lands under KMP's control for an industrial park, the Board should require KMP to include in any lease, sale or donation of land for the industrial park, a condition requiring any occupants of the park to similarly restrict development and use of access and egress to the route to the access route at Talcum to Rte 80. Such deed restrictions are common in land development.

4. As noted in the testimony during the hearing, the specific right of access to the proposed plant site for the existing haul road and proposed new access at Talcum is less than clear. In order to assure the usage of that access, any certificate should be conditioned on the filing with the Board and all parties of the necessary easements, rights-of-way, or other documents reflecting informed consent by the owners of all lands across which such access traverses or is proposed, to the construction and use(s) of the road to service the power plant and proposed industrial park. Failure to obtain or maintain necessary rights-of-access across private land should not be considered an "emergency" but instead, failure to demonstrate those rights within a 120 day-period should result

in a reopening and reconsideration of the case, since it is as noted by BBC a "key" mitigating feature.

Regarding the issue of the use of a permanent embankment-type earthen impoundment for water storage and use for the facility, the Response to Data Request of Intervenor filed by KMP indicates that it intends to use a impoundment in the Lick Branch watershed for storage of up to 1.4 billion gallons of water. The testimony of the applicant's witnesses indicated that the water will be pumped into and from the impoundment, resulting in changes in elevation associated with pumped storage and usage, and that the applicant does not intend to obtain a water discharge permit nor to decant water from the impoundment except by pumpage or through the spillway in the dame ombankment.

The portion of the CBC Report attached by KMP to the Response to Data Request indicates that the impoundment is located on a side hollow of Lick Branch of Balls Fork Creek, and that the distance from the toe of the dam to Lick Branch is approximately one-half mile and to County Road 1087 is one mile downstream, where the stream flows through a double rectangular culvert under County Road 1087 to Balls Fork.

Based on a dams-breach analysis described in that report excerpt, in the event of failure of the embankment, the county road would be overtopped with water.

In order to assure that the retention and use of the impoundment has been adequately evaluated by the agency with current jurisdiction and the agency that

will assume regulatory responsibility once the performance bond is released on the mine site, Intervenor Stacy proposes this condition:

1. As a condition of approval of the certificate, KMP agrees to submit a within thirty (30) days of approval a complete copy of all analytical reports, engineering certifications, and computer simulation modeling runs, conducted on the proposed retention and intended usage of the impoundment, to the Water Resources Branch of the Division of Water, with a request that that agency review the assessment and determine whether additional evaluation is needed and what structural changes or modifications should be made to assure that the structure can safely pass the design storm events and that in the event of failure, no damage will occur to downstream properties not under the applicant's control, or to public roads.

2. A copy of the assessment received from the Division of Water shall be filed and served on all parties.

With these additions, Intervenor Stacy supports the remaining conditions proposed by BBC for inclusion as binding enforceable conditions of any site construction certificate.

3. ASSUMING THAT THE APPLICATION WAS COMPLETE AND WAS PROPERLY PROCESSED, THE PROPOSED REPORTING CONDITIONS ARE GENERALLY SUFFICIENT EXCEPT IN TWO AREAS

The proposed reporting protocols and frequency appear sufficient as a template for use in Board decisions approving construction certificates. Three areas need modification, however:

a. Each annual report and the final completion report should include engineering certifications that the facility and proposed mitigation conditions requiring construction have been implemented as required.

b. On receipt of notice by the applicant that the requirements of the certificate of construction are completed, a "close-out" inspection will be conducted, with notice to all parties to the case, and a final determination will be made by the Board as to compliance by the applicant with the certificate requirements.

c. The section concerning public comments and responses is supported; however the certificate holder should be required to include as attachments the responses to any complaints and comments received, and to note the status of resolution of the complaint.

4. THE KMP APPLICATION LACKED INFORMATION NECESSARY FOR THE PUBLIC OR BOARD TO ASSESS THE IMPACTS OF THE CONSTRUCTION OF DEDICATED TRANSMISSION LINES INTENDED TO DISTRIBUTE THE ELECTRIC POWER GENERATED BY THE PLANT AND FOR THAT REASON THE APPLICATION SHOULD HAVE BEEN DEEMED INCOMPLETE PENDING SUBMITTAL AND REVIEW BY BOTH THE BOARD AND PUBLIC OF THAT INFORMATION

The KMP application reflects that some twenty-five (25) miles of new transmission lines are to be constructed in order to serve the proposed merchant power plant. However, the application lacked any reference in the siting assessment report of the proposed routing and the visual and other impacts to homeowners and property owners along the routes of the lines.

The application contains reports concerning the interconnection of the proposed power plant with the AEP system, including documentation describing the new transmission facilities that will be modified or constructed to support the

interconnection. From the application it appears that Kentucky Mountain Power will construct and own certain "interconnection facilities" including a step-up transformer and associated equipment, one 138 kV radial circuit and associated equipment, and that Kentucky Mountain Power will construct and then deed to AEP other "facilities to be installed by Generating Company and Owned by [AEP]" including the Talcum Switching Station, and four new 138kV transmission lines for a total of some 25.5 miles of new right-of-way construction and associated land disturbance.

What is missing from the application is *any* site assessment or other required information concerning the siting of those associated transmission lines. First, as to the lines and facilities that will be constructed by and retained by KMP, there is no serious dispute that the application should have, yet did not, contain an assessment of the siting impacts including alternative routes considered.

With respect to those structures and lines that will ultimately be owned by AEP and for which the maintenance obligation will be retained by Kentucky Mountain Power, there is no question but that those transmission lines were proposed *not* by AEP as part of a PSC filing in which the new lines were determined necessary to support distribution of native load to customers, but instead are associated directly with this particular facility. They certainly are not an independent merchant transmission line project such as would be reviewed under Section 8 of the Act.

The structure of the Act reflects a legislative intent that transmission lines constructed to support particular merchant plants and moving electrons from that

plant onto the grid would be reviewed in conjunction with the siting review of the generating plant itself. The law defines a "merchant electric generating facility" is defined by the Act to include "associated facilities" and these lines are plainly associated with the generating facility and exist to support that plant's interconnection with the grid. Where the construction of new transmission lines are not associated with a particular merchant plant, under Section 8 of the Act an application for the transmission siting approval is required as a stand-alone application.

To allow the applicant to avoid Board consideration of the new transmission lines because they have been in part configured to tie to the grid at two points and to allow movement of electrons in two directions is of no consequence for the Board's jurisdiction over this matter, since it is the fact that the construction of the lines is intended primarily to support a merchant plant, and not their later ownership, or incidental benefits that the lines may have in enhancing the existing grid, that determines the whether they are associated facilities and whether the mitigation of impacts associated with construction and siting should be assessed.

The application should have been deemed incomplete pending submittal of information meeting the requirements of the application and site assessment for all associated facilities, including interconnection facilities such as the switching station and new transmission lines. Plainly, even as staff apparently interprets the distinction, those dedicated lines and facilities associated with KMP over

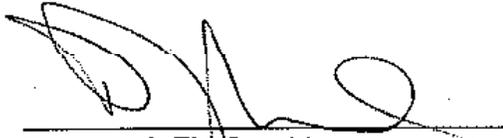
which KMP will retain ownership or control, should have been subject to site assessment and public notice and scrutiny.

In order to remedy this failure, Ms. Stacy suggested in her direct testimony that a condition be imposed requiring that KMP publish notice in those counties where the line is proposed, provide a period for public review and comment of the proposed corridors, and propose mitigation measures concerning the screening, configuration and location within the proposed rights-of-way as are possible to address the concerns of residents whose property adjoins the corridors, in order that the purpose of the site assessment would be satisfied without having to remand the case for incompleteness.

CONCLUSION

For the reasons stated herein, Intervenor Pauline Stacy respectfully requests that any construction certificate issued for the Kentucky Mountain Power LLC plant include those conditions and reporting requirements proposed by BBC Research and Consulting in the August 12, 2002 letter as supplemented and modified by the conditions and reporting requirements proposed in this Post-Hearing Brief, and that absent imposition of such conditions and reporting requirements the application be denied, and for any and all other relief to which Intervenor may appear entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Intervenor Pauline Stacy was served this 14th day of August, 2002 by first-class mail to:

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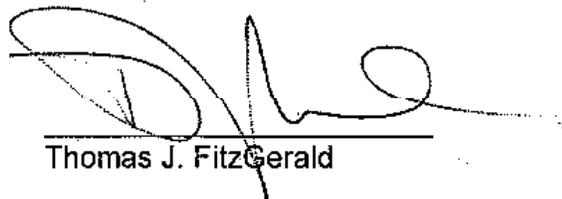
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and that the original was lodged by mail, this 14th day of August, 2002, with the offices of the Board, 211 Sower Boulevard, Frankfort, Kentucky 40601.



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