



Kentucky Mountain POWER

NEW ENERGY FOR EASTERN KENTUCKY

July 18, 2002

Stephanie Bell
Kentucky State Board on Electrical
Generation and Transmission Siting
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40602

Re: Case No. 2002-00149
Request by Estate of Joe D. Weddington, Sr. to Intervene

Dear Ms. Bell:

After reviewing the July 15, 2002 request to intervene ("Motion") filed by Michael D. Lyons on behalf of his client, the heirs of the estate of Joe D. Weddington, Sr. (the "Estate") and the June 18, 2001 letter referenced therein, it is the opinion of Kentucky Mountain Power, LLC ("KMP") that the stated basis for the Estate's is not germane to these proceedings. The applicable legislation governing KMP's application for certificate to construct a power plant in Knott County, Kentucky ("Application") sets forth multiple factors for the Kentucky State Board on Electrical Generation and Transmission Siting (the "Board") to consider in ruling on KMP's application, none of which include a purported property dispute between an "interested party" and the applicant.

The issue as to the Estate's legal claim to the property in question has been extensively litigated and its relevance in governmental permitting actions was specifically addressed less than two months ago by the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet (the "Cabinet") and the Office of Administrative Hearings under File No. DWM-25351-037. Upon the recommendation of the hearing officer in that matter, the Secretary denied the Estate's protest of KMP solid waste permit on the basis that permitting actions are not appropriate forums for deciding land disputes. See Hearing Officer's Report and Recommended Order and the Amended Secretary's Order attached hereto. KMP believes that the Hearing Officer's reasoning is persuasive with regard to the validity of the Motion and that the Board should follow the Cabinet's lead with regard to the disposition of land disputes in permitting actions, or their equivalent.

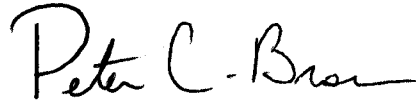
In short, the basis of the Motion is not relevant to the factors under consideration by the Board in ruling on KMP's application. To the extent the Board would like further information

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with regard to KMP's position, including the aforementioned action before the Cabinet, KMP will promptly supplement its response to the Motion. If you have any questions concerning this matter, please don't hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Peter C. Brown". The signature is fluid and cursive, with the first name "Peter" being the most prominent.

Peter C. Brown
Director of Contract Administration
EnviroPower, LLC

cc: Randy Bird
Robin Morecroft

322-KMP-Bell-Siting-Motion-Intervene-Response

COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
FILE NO. DWM-25351-037

FILED

APR 15 2002

Office of Administrative Hearings

ESTATE OF JOSEPH WEDDINGTON, SR.,

PETITIONER,

VS.

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
and
KENTUCKY MOUNTAIN POWER, LLC,

RESPONDENT.

* * * * *

HEARING OFFICER'S REPORT AND RECOMMENDED ORDER

This matter is before the undersigned on motions to dismiss filed by Respondents, the Cabinet and Kentucky Mountain Power LLC.

This case was initiated by Petitioner Estate of Joseph Weddington, Sr. to challenge a special waste landfill permit issued on July 29, 2001, to Kentucky Mountain Power on the basis that the landfill is located on property owned by Petitioner by deed for which Kentucky Mountain Power owns no right of access or use of the property.

Respondents urge that this is essentially a property dispute over which this Office has no subject matter jurisdiction. Kentucky Mountain Power submitted a lease between Appalachian Realty Company and EnviroPower LLC (of which Kentucky Mountain Power is a

subsidiary) in conjunction with its application for the special waste landfill.¹ The Cabinet considered the lease to be a legitimate document pertaining to the land on which the company will conduct the activity for which the permit was sought, disposal of fly ash and bottom ash.

In its response to the motions to dismiss, Petitioner presents documents to support its claim that it owns the subject property by deed.² Petitioner states that Joe D. Weddington, Sr. and his wife purchased certain land patents in 1967 which were never conveyed and are still owned by the estate. Petitioner argues that even if the Cabinet lacks authority to resolve property disputes this does not absolve the Cabinet of the responsibility and obligation to consider evidence of record. Petitioner urges that the Cabinet has a duty to investigate the basis of Kentucky Mountain Power's claim of interest in the property and was negligent by simply relying on Kentucky Mountain Power's representation. Petitioner urges that the Cabinet has a duty to investigate these matters *before* issuance of the permit, *during* consideration of the permit and *after* the permit is issued.

Petitioner acknowledges that there is as yet no circuit court action which has been filed as it relates to this particular permit or as to the parties to this administrative case because it believes that it must exhaust its administrative remedies by raising this issue first in this forum. In addition, this issue was not raised during the permitting process because Petitioner

¹ Kentucky Mountain Power was issued a federally enforceable Title V/PSD permit by the Kentucky Division of Air Quality on May 4, 2001. At the time of oral arguments on the motions to dismiss, January 29, 2002, all necessary permits to construct the power plant had been secured, contracts for construction were being finished, and various financing alternatives were being considered.

² Attached to Petitioner's response are the following: deed between Insurance Investors Trust Company and Joe Weddington; deed between Joe Weddington and Joyce Weddington and Great Southern Inc.; title opinion of John E. Clontz dated July 11, 1995 for patents Nos. 43704-43710 located in Knott County; title opinion of Ralph H. Stevens dated August 1, 1997 and January 25, 1999, for the same patent numbers; affidavit of surveyor Johnny R. Justice; unsigned agreement between Robert Loy and Joe Weddington; agreement between Joe D. Weddington and Kathleen DeWeese; and options which were negotiated but not exercised with regard to these land patents.

states that at that time it was as yet uncertain where the plant would be located on the ground. Now, however, Petitioner urges that the Cabinet has a duty to look at this issue and either revoke the permit or hold it in abeyance until this issue is resolved. There is an action which was filed in Perry Circuit Court in 1996 between the Estate of Joseph Weddington, Sr., and Cyprus Amax, et. al, which puts at issue the title to the property at issue in this administrative case. That case is still pending. Petitioner argues that Kentucky Mountain Power, which knew about the Perry Circuit Court litigation, had the obligation to disclose this litigation to the Cabinet.

Kentucky Mountain Power states that it provided the Cabinet with the legal source of its right to be on the property, which is all that the permit application requires. In addition, Kentucky Mountain Power states that it believed that there had been federal litigation which had disposed of this issue (e.g. whether certain DeGroot patents were *void ab initio*). Kentucky Mountain Power states that Petitioner's remedy lies in Perry Circuit Court where it could file a motion to prevent Kentucky Mountain Power from depositing any ash on its property until the property dispute is adjudicated.

Having considered the written filings made by the parties, as well as oral arguments, the following conclusions are made.

This special waste landfill permit was issued pursuant to 401 KAR Chapter 45 which sets forth the type of permit which must be obtained prior to engaging in the disposal or management of special waste. Pursuant to 401 KAR 45:030, Section 8(1)(a), a person applying for a special waste landfill permit shall use form DEP7094A, which requires the legal

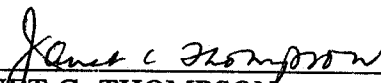
source of the applicant's right to be on the property. As stated, Kentucky Mountain Power provided a legal source of its right to be on the property.

Petitioner's contention is that now that it has brought to the Cabinet's attention that it allegedly has a superior right to the property, the Cabinet has a duty of investigation to determine which party has the superior claim to the subject property. However, accepting this responsibility would place the Cabinet in the role of adjudicating the property dispute. The Cabinet cannot adjudicate private property disputes or decide disputed property ownership, which is within the sole jurisdiction of the appropriate circuit court. NREPC v. Stearns Coal and Lumber Co., Ky, 563 S.W.2nd 471 (1978).

Thus, the only option is for the permit to be suspended or held in abeyance until the issue is resolved by the circuit court. When parties to an administrative case are involved in a circuit court action which will resolve a property dispute, they usually both request that the administrative action be held in abeyance until the issue is resolved. However, because there is no circuit court case between these two parties even pending, this Office would be remiss in holding this case in abeyance for the filing of a suit. As the Cabinet points out, under 401 KAR 45:140 Section 1(7), issuance of the permit has not conveyed any property rights or any exclusive privilege to Kentucky Mountain Power. Therefore, Petitioner is not without redress if Kentucky Mountain Power conducts any activity on the subject property for which it lacks the legal right to do so.

Based on the foregoing, it is RECOMMENDED that the motions to dismiss be granted and this case be DISMISSED for lack of subject matter jurisdiction.

So RECOMMENDED this 15th day of April, 2002.



JANET C. THOMPSON
HEARING OFFICER
OFFICE OF ADMINISTRATIVE HEARINGS
35-36 Fountain Place
Frankfort, Kentucky 40601
Telephone: (502) 564-7312
Fax: (502) 564-4973

EXCEPTION RIGHTS

Pursuant to KRS 224.10-440, any party may file exceptions to this Report and Recommendation within fourteen (14) days of receipt of this Report. The Secretary will then consider this Report, any Exceptions, and the recommended Order and decide this case.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Hearing Officer's Report and Recommended Order was, on this 15th day of April, 2002, mailed by first-class mail, postage prepaid to:

HON RONALD G COMBS
PO BOX 1039
HAZARD KY 41702-1039

KENTUCKY MOUNTAIN POWER LLC
2810 LEXINGTON FINANCIAL CENTER
LEXINGTON KY 40507

HON WILLIAM GROVER ARNETT
HON MICHAEL D LYONS
PO BOX 489
SOUTH CHURCH STREET
SALYERSVILLE KY 41465-0489

HON RICHARD D HEIDEMAN
1714 N STREET NW
WASHINGTON DC 20036-1009

and hand-delivered to:

Hon. JACK BATES
Natural Resources and
Environmental Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601



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**COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
FILE NO. DWM-25351-037**

ESTATE OF JOSEPH WEDDINGTON, SR.,

PETITIONER,

VS.

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
and
KENTUCKY MOUNTAIN POWER, LLC,

RESPONDENT.

SECRETARY'S ORDER

THIS MATTER is before the Secretary upon the Report and Recommended Order of the Hearing Officer. Having considered said Report and Recommendations and any exceptions thereto, and being otherwise fully and sufficiently advised:

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The Hearing Officer's Report and Recommendation entered in the record on April 15, 2002, is ADOPTED and incorporated hereby reference.
2. Respondents' motions to dismiss are DENIED.
3. This case is HEREBY DISMISSED.
4. This is a final and appealable order.

So ENTERED this _____ day of _____, 2002.

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

JAMES E. BICKFORD, SECRETARY

APPEAL RIGHTS

In accordance with the provisions of KRS 224.10-470 and KRS 151.186, appeals may be taken from Final Orders of the Cabinet by filing in Circuit Court a Petition for Review. Such Petition must be filed within thirty (30) days from the entry of the Final Order, and a copy of the Petition must be served upon the Cabinet.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Secretary's Order was, on this ____ day of _____, 20____, mailed by first-class mail, postage prepaid to:

HON RONALD G COMBS
PO BOX 1039
HAZARD KY 41702-1039

KENTUCKY MOUNTAIN POWER LLC
2810 LEXINGTON FINANCIAL CENTER
LEXINGTON KY 40507

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HON MICHAEL D LYONS
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Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601

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**COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
FILE NO. DWM-25351-037**

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Office of Administrative Hearings

ESTATE OF JOSEPH WEDDINGTON, SR.,

PETITIONER,

VS.

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
and
KENTUCKY MOUNTAIN POWER LLC

RESPONDENT.

AMENDED SECRETARY'S ORDER


THIS MATTER previously came before the Secretary upon the Report and Recommended Order of the Hearing Officer on May 17, 2002, and the Secretary on today's date recognizing that a clerical or typographical error occurred in paragraph no. 2 of the Order, and having considered the error, Report and Recommendations and any exceptions thereto, and being otherwise fully and sufficiently advised:

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The Hearing Officer's Report and Recommendation entered in the record on April 15, 2002, is ADOPTED and incorporated hereby by reference.
2. Respondents' motions to dismiss are GRANTED, as expressly recommended by the Hearing Officer at the bottom of page 4 of the Report. The error in the May 17, 2002 Order misstating that the motions were "DENIED" is hereby corrected.
3. This case is HEREBY DISMISSED.
4. This is a final and appealable order.

So ENTERED this 4th day of June, 2002.

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET


JAMES E. BICKFORD, SECRETARY

APPEAL RIGHTS

In accordance with the provisions of KRS 224.10-470 and KRS 151.186, appeals may be taken from Final Orders of the Cabinet by filing in Circuit Court a Petition for Review. Such Petition must be filed within thirty (30) days from the entry of the Final Order, and a copy of the petition must be served upon the Cabinet.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Amended Secretary's Order was, on this 4th day of June, 2002, mailed by first-class mail, postage prepaid, to:

HON. RONALD G. COMBS
P.O. BOX 1039
HAZARD, KY 41702-1039

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