COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

THE APPLICATION OF THOROUGHBRED GENERATING COMPANY, LLC FOR A MERCHANT POWER PLANT CONSTRUCTION CERTIFICATE IN MUHLENBERG COUNTY, KENTUCKY	)))	CASE NO. 2002-00150

RESPONSE TO THOROUGHBRED'S MOTION TO STRIKE THE TESTIMONY OF MICK DURHAM AND GARY WATROUS

Intervenor, Big Rivers Electric Corporation ("Big Rivers"), through counsel, submits the following Response to the Motion to Strike the prefiled testimony of Mick Durham and Gary Watrous filed by Thoroughbred Generating, LLC ("Thoroughbred"). The Kentucky State Board on Electric Generation and Transmission Siting (the "Board") has already ruled on the extent of its jurisdiction. Big Rivers has established a direct and irrefutable link between Thoroughbred's emissions and adverse economic impacts. Therefore, Thoroughbred's Motion to Strike should be denied.

ARGUMENT

A. The Board Ruled on October 1, 2003 That it Has Jurisdiction to Consider Adverse Economic Impacts Associated With Air Emissions.

The testimony of Mick Durham is probative evidence that Thoroughbred's air emissions will have a number of adverse economic impacts on the region and the state. Those impacts include a direct impact on Big Rivers' ability to develop additional generating capacity at the D.B. Wilson Station ("Wilson"), and a limiting effect on future economic development and growth in the region and the state.

Thoroughbred argues that the Natural Resources and Environmental Protection Cabinet ("NREPC"), not the Board, has exclusive jurisdiction to consider economic impacts of air emissions. On page 5 of its Motion Thoroughbred contends that the Board has held that it "is not the proper entity to make factual determinations regarding air emission impacts." (Motion to Strike at 5). This view is intellectually irreconcilable with Thoroughbred's concession on Page 2 of its Motion that the Board has said it can consider emissions and discharges from Thoroughbred's facility "to the extent that they have an economic impact on the region or the state."

In fact, there is nothing equivocal about the Board's position in this case regarding its jurisdiction to consider the economic impacts of emissions and discharges from Thoroughbred's facility on the region and the state in the course of deciding whether to grant or deny Thoroughbred a construction certificate for its project. Thoroughbred's motion ignores the Board's October 1, 2003 admonition to Thoroughbred on this very subject:

> [T]he Board finds that one of the factors to be considered in deciding whether to grant a construction certificate is the economic impact of the facility on the region and the state. See KRS 278.710(1)(c). Nothing in the statute indicates that the economic impact analysis is limited to any specific factors or that the economic impact of emissions and discharges are to be excluded in such an analysis. *To the extent that emissions and discharges from a merchant generating plant have an economic impact on the region and the state, that impact can be considered by the Board.*

Order dated October 1, 2003 at page 2-3. (emphasis added).

Thoroughbred misrepresents that Big Rivers is asking the Board to make contradictory findings to those made by NREPC in its air permit proceedings. The fact that Thoroughbred's emissions will fall within proscribed limits (entitling it to an air emissions permit) does not entitle Thoroughbred to a certificate from this Board with no further

scrutiny of the impacts of the emissions and discharges from the facility. The Board's review, based on a balancing of the factors listed in KRS 278.710, is entirely separate and distinct from NREPC's air emission permit review under KRS Chapter 224.

KRS 224.10-100 sets forth NREPC's general powers and duties. Nothing in the statute grants the agency the authority to consider economic impacts in a particular permitting decision. Subsection 3 of the statute, cited by Thoroughbred, simply authorizes NREPC to encourage the best usage of land areas, and says nothing about an economic cost/benefit analysis. Except for purposes of best available control technology (BACT) analysis, which does not involve analysis of economic impacts to other facilities, NREPC does *not* believe it has authority to require a permit applicant to conduct a cost/benefit analysis. See, Ex. 1, Public Comments on the Thoroughbred Generating Station (TGS) Draft Permit, and Division For Air Quality Responses, p. 6.[1] Consistent with this statement by NREPC, there are no statutory or regulatory provisions that require an applicant to prepare a cost/benefit analysis in connection with the issuance of a PSD permit aside from the BACT analysis nor any that establish procedures for the NREPC to follow in conducting that proceeding. Interestingly, the only authority that Thoroughbred provides for its position regarding the "inherent authority" of NREPC is the testimony of its economic witness Meyers.

In Senate Bill 257, the Kentucky General Assembly granted express authority to the Siting Board to consider a proposed merchant generating facility's economic impacts on the region and the state. KRS 278.710(1)(c). In its October 1, 2003 Order, the Board correctly

[1] Nor does NREPC believe that it has authority to require Thoroughbred and Peabody to reclaim the site, responding to a commenter that such issues are within the purview of the Public Service Commission. See Public Comments on the Thoroughbred Generating Station (TGS) Draft Permit, and Division For Air Quality Responses, p. 19.

and expressly notes that its duty to consider economic impacts was not limited by the General Assembly. Order dated October 1, 2003 at p. 2.

Even if this express grant of authority to the Board did arguably conflict with the "inherent authority" of the NREPC under KRS 224 or another agency of the Commonwealth, under rules of statutory construction, the General Assembly would be presumed to know the extent of NREPC authority at the time of enactment of the Siting Board Legislation. Kentucky Ins. Guar. Assn. v. Jeffers, 13 S.W.3d 606, 610 (Ky. 2000). Furthermore, it is also a rule of statutory construction that inconsistent statutory provisions must be harmonized if possible, and where two constructions of a statute are possible, by one of which the entire act may be made harmonious while the other will create discord between the provisions, the former should be adopted. Schwindel v. Meade County, 113 S.W.3d 159, 165 (Ky. 2003). Here, Thoroughbred proposes a construction of the two statutes that would create discord between statutory provisions of KRS 278.706, KRS 278.710 and KRS Chapter 224.

The nonbinding New York Siting Board decision cited by Thoroughbred is inapposite because it involves New York statutes that are substantially different from the enabling statutes of the NREPC and the Board. Furthermore, that case involved a request by an opponent of the facility for the Board to directly review permitting decisions of the environmental agency. Nevertheless, it is useful to note that the decision expressly states that the New York Siting Board considers the *overall* environmental impact of a facility, and balances that impact against the project benefits to determine whether the project is in the public's best interests. See App. by Mirant Bowline, LLC, 2001 N.Y. PUC LEXIS 443 at 12 (N.Y. PUC 2001). Furthermore, under a prior version of New York's siting legislation, a

New York appellate court held that the New York Siting Board has authority to consider economic impacts of a facility *even if the economic impacts had also been reviewed by the New York Public Service Commission*, Mass. v. New York State Bd. on Elec. Generation Siting and the Env't, 197 A.D.2d 97, 105-06, 610 N.Y.S.2d 341 (N.Y. App. Div. 1994) (Exhibit 2) (holding that the failure of an applicant to provide a copy of a power sales agreement prevented the board from making an informed decision regarding the economic impact of a pending application.)

Finally, Thoroughbred's assertion that Mick Durham's testimony conflicts with NREPC findings is simply wrong. (See Motion to Strike Page 6-7). Durham's testimony is taken directly from an August 23, 2002 letter from the Department of Interior (DOI) that is found in NREPC's files regarding the Thoroughbred air permit application. The letter is attached as Exhibit 2 to Durham's Rebuttal Testimony, and the letter speaks for itself. In the letter, the DOI withdrew its prior determination of adverse visibility impacts. However, in withdrawing its determination, the Department expressly stated that it still found modeled visibility impacts at the lower emission level and requested that Thoroughbred seek to lower its emissions limit. Thoroughbred agreed to do so by adding a permit condition. In this regard, Mr. Durham's testimony and the August 23, 2002 letter provide a clear example of the difficulties that subsequent permit applicants will face when required to demonstrate to the DOI that no adverse visibility impacts will occur.

B. Mick Durham's Testimony Regarding the Impact of Thoroughbred's Emissions on Big Rivers and on Economic Development in the Region Forms Meets the Standards for Admissibility of Evidence in this Proceeding.

Thoroughbred seeks to have the testimony of Mick Durham stricken in its entirety

based on broad charges that it is speculative and irrelevant. Mr. Durham's Direct and Rebuttal Testimony and testimony offered by Thoroughbred demonstrate otherwise.

The standard for admissibility of evidence before the Siting Board is very broad. In evidentiary hearings, the Board is not bound by the technical rules for exclusion of evidence. KRS 278.712(2). Furthermore,in civil and criminal proceedings to which the Kentucky Rules of Evidence do apply, the Kentucky Supreme Court recently set forth an expansive standard for admissibility in Tuttle v. Perry, 82 S.W.3d 920 (Ky. 2002).

In ruling that cross examination of expert witnesses as to the amount of their fees is relevant and admissible in a malpractice action, the Supreme Court observed that "all relevant evidence is admissible" except as otherwise provided, and "evidence which is not relevant is not admissible" 82 S.W.3d at 922, citing KRE 402. The Court noted that "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." Id., citing KRE 401. The court also quotes Professor Lawson as follows: "the law of evidence tilts heavily toward admission over exclusion, for there is an inclusionary thrust in the law that is powerful and unmistakable." Id., citing Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.05, p. 53 (3d. Ed. Michie 1993).

Furthermore, "Relevancy is established by any showing of probativeness, however slight." Springer v. Commonwealth, 998 S.W.2d 439, 449 (Ky. 1999). And in Turner v. Commonwealth, 914 S.W.2d 343 (Ky. 1996), the Court stated as follows:

An item of evidence, being but a single link in the chain of proof, need not

> prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not . . . . It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without the evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable.

914 S.W.2d at 346, quoting Lawson, The Kentucky Evidence Law Handbook § 2.05, p. 53 (3d ed. Michie 1993).

Even if the technical rules of evidence applied to his proceeding, Mick Durham's testimony would be relevant and admissible. Mr. Durham's testimony is offered to prove that the Thoroughbred facility will have economic impacts in the region and the state. It is also offered to disprove Thoroughbred's repeated assertions of fact that there are no negative impacts from the facility. See, e.g., Rebuttal Testimony of Diane Tickner, p. 5, line 16 (stating that ". . . there is no negative impact from Thoroughbred's facility."). Durham's testimony is also relevant to assess the credibility of Thoroughbred's witnesses.

After explaining the implementation of the PM2.5 regulatory program, Mr. Durham calculates the impact of Thoroughbred's PM2.5 emissions on regional ambient air quality using Thoroughbred's own data. Direct Testimony of Mick Durham, p. 3, line 14 – p. 4, line 3; p 5, line 6 – 20. Mr. Durham also points out that Thoroughbred inappropriately relies on the NREPC publication "A Cumulative Assessment of the Environmental Impacts Caused by Kentucky Electric Generating Units" as a basis for concluding that the facility will have minimal impact on PM2.5 ambient air quality. p. 4, line 13 – p. 5, line 4.

Mr. Durham explains that the nonattainment of the PM2.5 ambient air quality standards can have significant economic consequences for new sources seeking to locate in the area. Direct Testimony of Mick Durham, p. 3, lines 4-8. As an example, Thoroughbred

witness Debusschere testifies that in the event of nonattainment with the PM2.5 standard, regulatory authorities are likely to impose limitations on existing sources like Wilson rather than new sources like Thoroughbred. Rebuttal Testimony of Michael Debusschere, p. 9, line 21 – p. 10, line 2. Mr. Durham points out that if Ohio County is in nonattainment status when Big Rivers submits an application to construct Wilson 2, Big Rivers will likely be forced to secure reductions in PM2.5 emissions from other sources in the area, at a cost in the millions of dollars. Direct Testimony of Mick Durham, p. 6, lines 6-12.

Mr. Durham also testifies regarding the effects of Thoroughbred's SO_2 emissions on consumption of Class I increment. Direct Testimony of Mick Durham, p. 6-10. Mr. Durham explains that increments are intended to limit increases in ambient pollutant concentrations caused by new major sources or major modifications. Direct Testimony of Mick Durham, p. 7, lines 12-14. Thoroughbred witness Debusschere *confirms* by citation to the Federal Register that increment consumption can restrict economic growth, and that the restriction will be more significant until at least two years after the Thoroughbred plant is in operation. Rebuttal Testimony of Michael Debusschere, p. 14, lines 10-12.

Mr. Durham testifies that Thoroughbred will consume virtually all of the Class I increment for sulfur dioxide for the 24 hour averaging period, notwithstanding direct statements by Thoroughbred in this proceeding that it will not consume Class I increment. Direct Testimony of Mick Durham, p. 7, lines 17-26. Mr. Durham points out that in addition to Big Rivers, any other new source locating within 100 kilometers of Mammoth Cave will be required to take Thoroughbred's emissions into account, and that if Thoroughbred consumes all of the Class I increment, new plants, or significant expansions at existing plants

will be significantly limited in the amount of sulfur dioxide that may be emitted. Direct Testimony of Mick Durham, p. 9, line 24 – p. 10, line 3. In his rebuttal testimony, Mr. Durham points out that there are currently fifteen other facilities within 100 kilometers of Mammoth Cave National Park, and over thirty industrial parks or industrial sites being marketed to prospective businesses in the thirty-four county area for which analysis is required. Rebuttal Testimony of Mick Durham, p. 2-4.

Thoroughbred witness Debusschere testifies that he cannot predict the potential impacts to additional units at Wilson caused by Thoroughbred without computer modeling. Rebuttal Testimony of Mike Debusschere, p. 13, lines 5-10. In response to an untimely data request by Thoroughbred, Mr. Durham provided results of computer modeling demonstrating that the construction of additional units at Wilson will be affected by Thoroughbred's increment consumption. See, Response of Big Rivers Electric Corporation to Thoroughbred Energy's Data Request Dated October 10, 2003, Q2, p. 1-2.

A wealth of evidence from both parties establishes that plans for construction of additional generating capacity at Big Rivers' D.B. Wilson station are quite serious. Since 2000, Thoroughbred and its parents have held numerous meetings with Big Rivers to discuss construction of the facility. Direct Testimony of Jacob Williams, p. 4, lines 10 – p. 5, line 10. Big Rivers and others have taken numerous affirmative steps toward construction of new generation capacity at Wilson, and Peabody has even proposed to be the coal supplier for the new Wilson units. Rebuttal Testimony of David Spainhoward, p. 2, lines 8-21; Exhibit DAS-3. Western Kentucky aluminum smelters who are retail customers of Big Rivers' members have stated publicly that they support the construction of additional

generating capacity by Big Rivers and that they are considering financing and long term contracts regarding the project. See Direct Testimony of David Spainhoward, Ex. DAS-1; public comments of Century Aluminum filed in this matter on October 24, 2003. The participants in the study are at the stage of contributing funds to conduct monitoring and initial permitting activities. Rebuttal Testimony of David Spainhoward, p. 2, lines 14-16.

Through Mr. Durham's testimony, Big Rivers establishes that Thoroughbred's emissions and discharges will directly impact the region and state, including causing increased costs of construction or a complete prohibition of construction of additional units at Wilson. Thoroughbred witness Debusschere confirms that nonattainment can cause increased costs to existing sources and restrict new sources, and that Class I increment consumption can restrict economic growth. Given the demonstrated direct impacts at Wilson, the Board can draw reasonable inferences regarding the effects on other industrial prospects or existing facilities in the area.

Thoroughbred cites cases arising under Federal law for the proposition that agencies should not consider possibilities and impacts that are based upon speculation. Two of the cases involve the evaluation of alternatives to a proposed action by a federal agency under the National Environmental Policy Act (NEPA). Both cases are easily distinguishable. The proposed alternative found to be speculative in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) was the consideration of the broad concept of "energy conservation" as an alternative to the construction of the Plant. 435 U.S. at 552-553. Big Rivers' objections are much more focused and specific. And in Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm., 869 F.2d 719 (3d. Cir. 1989), the court *refused* to

find that the risks of a nuclear accident were so speculative as to preclude the NRC from evaluating such risks. 869 F.2d at 740-741. There the court stated *"[w]e are troubled by the NRC's seeming insistence on defining serious risks as remote and speculative, hence not considering their environmental impacts, until experience proves them wrong."* 869 F.2d at 740, n.25. The Board should view Thoroughbred's position regarding economic impacts with a similar skeptical view.

Natural Resource Defense Council v. EPA, 859 F.2d 156 (D.C. Cir. 1986), is clearly inapposite. In that case, the Environmental Protection Agency attempted to justify a regulation in a legal challenge without pointing to any evidence in the record indicating that it had actually studied the problems. Without any information in the record justifying its decision, the agency position was deemed to be speculative. Here, Big Rivers has provided direct evidence to support its position.

Finally, Horsehead Resource Dev. Co. v. Browner, 16 F.3d 1246 (D.C. Cir. 1994) actually supports Big Rivers' position. In that case, environmental groups were determined to have standing to challenge an interpretation of the Resource Conservation and Recovery Act by EPA even though the only alleged injury was that the members of the groups would be exposed to greater *risks* than under an alternative interpretation. The court held that such an injury was *not* speculative for purposes of standing. See also, Hazardous Waste Treatment Council v. EPA, 861 F.2d 270 (D.C. Cir. 1988).

Conclusion

The testimony of Mick Durham is highly relevant and admissible in this proceeding. The testimony will assist the Board in determining the economic impact on the region and

the state from Thoroubred's air emissions. The Board Board should deny Thoroughbred's Motion to strike the testimony of Mick Durham and Gary Watrous.

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PUBLIC COMMENTS ON THE THOROUGHBRED GENERATING STATION (TGS) DRAFT PERMIT, AND DIVISION FOR AIR QUALITY RESPONSES

The Division for Air Quality (DAQ) has given each commentor an abbreviation, as follows:

AC	Atmospheric Conservation (Adam Chambers - 2/27/2002)
Baker	Frances B. Baker (2/28/2002)
CATF	Clean Air Task Force, Environmental Defense & Hoosier Environmental Council (2/28/2002) Clean Air Task Force (8/23/2002)
EEPA/VC	Evansville Environmental Protection Agency/Vanderburgh County Ozone Office (2/25/2002) ***[also incorporates IDEM 2/7 comments]***
EPA	Environmental Protection Agency (2/26/2002 and 8/18/2002)
Finto	Kevin Finto
IDEM	Indiana Department of Environmental Management (2/7/2002 and 8/23/2002)
KRC	Kentucky Resources Council, Inc. (2/28/2002) ***[also incorporates NPS 2/14 Comments and previous comments]***
Loeschner	Stephen A. Loeschner (2/21 and 2/25/2002)
McGhee	Jerry McGhee, homeowner (2/21/2002)
Mitch	Charles Mitch (2/11/2002 and 8/24/2002)
NPS	U.S. Dept. of Interior, National Park Service (2/14/2002) ***[comments do not include review of revised modeling analysis received 2/6/2002]***
NPCA	National Parks Conservation Association (2/28/2002)
NRDC	Natural Resources Defense Council (2/28/2002)
OVCG	Ohio Valley Common Ground (2/20/2002)
SC(Bhatt)	Sierra Club Cumberland Chapter (2/24/2002)
SC(Landers)	Serra Club Cleveland Office (2/28/2002) ***[also incorporates American Lung Association of Metropolitan Chicago, et al. 8/24/2002]***
SC(Dew)	Sierra Club Cumberland Chapter (2/28/2002)
VW	Valley Watch, Inc. (2/26/2002 and 8/22/2002) ***[also incorporates NPS 2/14 and IDEM 2/7 comments]***
JCAPDC	Jefferson County Air Pollution Control District (4/20/02 & 7/12/02)
Richards	Steve Richards (8/08/02)
SMW	Sheet Metal Workers' International Association (8/23/02)
OBTC	Owensboro Building and Trade Council (8/24/2002)

Response: The Division takes note of these comments. Health impacts as they relate to the air permitting process are addressed by ensuring the National Ambient Air quality Standards are protected.

Cost/benefit analysis

AC requested a thorough cost/benefit analysis.

Response: The application and supporting documentation submitted by the applicant and reviewed by the Division include the required cost/benefit analysis as part of the BACT determination (volume 1, section 4 of the application). No further cost/benefit analysis is required of the applicant.

Endangered Species

Multiple comments (KRC, NRDC, NPS) were received requesting a demonstration under the Endangered Species Act, since the area is habitat for the Indiana Bat, Gray Bat, and Eggert's Sunflower and other species that are under review.

Response: This permitting action is being performed under the authority and regulations of the Commonwealth of Kentucky. Only when a source is obtaining a Federal permit is it required to address the Federal Endangered Species Act.

Acid Rain

AC had concerns about compliance with the Acid Rain Program requirements.

Response: As indicated in the application and supporting documents submitted by the applicant and reviewed by the Division, the applicant will comply in all respects with the Acid Rain Program established under the CAA (40 CFR Part 175). The Division notes that federal law preempts state law in this area.

Dust, Noise.

McGhee had concerns regarding haul road impacts and emissions in general.

Response: As indicated in the application and supporting documentation submitted by the applicant and reviewed by the Division, the design of the facility is such that haul roads usage on site will be limited. Material is transported to the site by barge or rail and then conveyed to points using partial and/or full enclosures, as well as other emission control devices (e. g., baghouse, fogging, etc.) There may be some transport of waste material (perhaps gypsum or flyash), but all haul roads are required to use BACT level controls of paving and cleaning.

FLM notice was defective.

Four commentors (NRDC, NPS, NPCA and VW) had concerns that the FLM notice was defective and that the Federal Land Manager (FLM) did not have adequate time to review the application. NPS and NPCA believe the public was not notified of the NPS's concerns or why KDAQ agrees or disagrees.

Response: As required by regulations, analyses have been completed for Hazardous Air Pollutants (HAPs). Initial and revised air modeling was done using the Calpuff model. Numerous iterations were performed by varying the values used for receptor height, urban/rural classification, receptor grid, etc. while using Calpuff. This program has been approved by the U.S. EPA for use in predicting pollutant concentrations at the proposed site and in surrounding areas. None of the modeling runs showed concentrations exceeding regulatory levels. Consequently, the Division has concluded that pollutant emission concentrations resulting from this facility, as permitted, would not require additional restrictions in order for the plant to comply with any applicable Commonwealth or federal regulation. To ensure that the emission limits contained in the permit are not exceeded, the Division has included requirements for continuous monitoring of emissions in the permit.

SMW asked once the plant has outlived its use, will Peabody restore the site to its original pristine beauty?

Response: The Division does not have authority in this area of concern. Questions of this nature should be addressed to the Public Service Commission.

SMW asked if this permit (if granted), provides both construction and operating authority?

Response: Yes

OBTC states that the permit is deficient because the language of the permit does not explicitly identify which applicable requirements in the permit are federally enforceable and which elements are state-only enforceable.

Response: Kentucky's permitting regulation states that unless a condition is identified as a "state-only" requirement that all conditions are federally enforceable. All conditions in this permit are federally enforceable unless identified otherwise.

Confidential Business information

OBTC and several other commentors had concerns about material submitted by TGS that was later returned to them.

Response: This material consisted of input files used by TGS to produce the Calpuff modeling runs required by the Division. Commentors are correct that this information was not entitled to treatment as trade secret or Confidential Business information under 401 KAR 1:050:

(3) "Trade secret" means a novel or unique plan or process, tool, mechanism or compound, known only to its owner, his employees or former employees, or persons under contractual obligation to hold the information in confidence, which has been perfected and appropriated by the exercise of individual ingenuity, and which gives him an opportunity to retain or obtain an advantage over competitors who do not know it;

1 of 100 DOCUMENTS

In the Matter of Commonwealth of Massachusetts et al., Petitioners, v. New York State Board on Electric Generation Siting and the Environment et al., Respondents. (Proceeding No. 1.)
In the Matter of Concerned Citizens for the Environment, Inc., Petitioner, v. New York State Board on Electric Generation Siting and the Environment et al., Respondents. (Proceeding No. 2.)

68356A, 68356B

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

197 A.D.2d 97; 610 N.Y.S.2d 341; 1994 N.Y. App. Div. LEXIS 3860

April 14, 1994, Decided
April 14, 1994, Entered

PRIOR HISTORY: [*1]**

Proceedings instituted in the Appellate Division of the Supreme Court in the Third Judicial Department pursuant to Public Service Law former § 148 (1) to review a determination of respondent New York State Board on Electric Generation Siting and the Environment which granted a certificate of environmental compatibility and public need to construct an electric cogeneration unit in Saratoga County.

LexisNexis (TM) HEADNOTES- Core Concepts:

COUNSEL:

Scott Harshbarger, Attorney General, Boston, Massachusetts *(Matthew Brock* of counsel), for Commonwealth of Massachusetts, petitioner.

Jeffrey L. Amestoy, Attorney General, Montpelier, Vermont *(J. Wallace Malley, Jr.,* of counsel), for State of Vermont, petitioner.

Bernstein, Cushner & Kimmell, P. C., Boston, Massachusetts *(Jeffrey M. Bernstein* of counsel), for Sierra Club, Inc., petitioner.

Kenneth G. Dufty, Schaghticoke, Concerned Citizens for the Environment, Inc., petitioner *pro se.*

Twomey, Latham, Shea & Kelley, Riverhead *(John F. Shea, III,* of counsel), for petitioners.

William J. Cowan, Albany *(Jonathan D. Feinberg* of counsel), for New York State Board on Electric Generation Siting and the **[***2]** Environment, respondent.

Cohen, Dax, Koenig & Wiles, P. C., Albany *(Jeffrey C. Cohen, John W. Dax, Ben Wiles* and *Richard B. Miller* of counsel), for Inter-Power of New York, Inc., respondent.

JUDGES: Cardona, P. J., Mercure, White and Weiss, JJ., concur.

OPINIONBY: Crew III, J.

OPINION: [*99] [343]**

Crew III, J.

In October 1988, respondent Inter-Power of New York, Inc. filed an application with respondent New York State Board on Electric Generation Siting and the Environment (hereinafter the Siting Board), pursuant to Public Service Law former article VIII, n1 for a certificate of environmental compatibility and public need to construct a 210-megawatt coal-fired cogeneration facility (hereinafter the project or the facility) in the Town of Halfmoon, Saratoga County. The application included, **[*100]** *inter alia,* a power sales contract entered into by Inter-Power and Niagara Mohawk Power Corporation, an electrical utility and would-be purchaser of the power to be generated by the proposed facility. The contract was entered into in 1988 pursuant to an order issued by the Public Service Commission (hereinafter PSC) and required, *inter alia,* that the **[***3]** facility be operational by December 31, 1993. Inter-Power's application also included a brief description and analysis of the possible alternatives to the proposed project.

n1 In 1972, the Legislature enacted Public Service Law former article VIII, which established the Siting Board and created a uniform procedure for decisionmaking concerning the siting and approval of major steam electric generating facilities in the State *(see,* L 1972, ch 385; *see also, Consolidated Edison Co. v Town of Red Hook, 60 NY2d 99, 103; Koch v Dyson, 85 AD2d 346, 358-359).* This initial enactment of Public Service Law former article VIII was to expire on January 1, 1979 *(see,* L 1972, ch 385, § 8), and in 1978 the Legislature reenacted Public Service Law former article VIII, which was set to expire again on January 1, 1989 *(see,* L 1978, ch 708, § 4, as amended by L 1983, ch 721, § 2). Public Service Law former article VIII remains in effect, however, in those instances where, as here, the application in question was filed on or before December 31, 1988 *(see, ibid.).*

[*4]**

Inter-Power's application was deemed complete on March 29, 1989 and a series of public hearings followed. Ultimately, in March 1991, the Administrative Law Judge (hereinafter ALJ) who presided over the hearings issued a recommended decision, wherein he concluded that a natural gas-fired facility was preferable to a coal-fired facility and, therefore, recommended that the proposed facility not be certified. In May 1991, the Siting Board voted 5 to 2 to approve Inter-Power's application but thereafter rescinded its decision due to, *inter alia,* the Department of Environmental Conservation's discovery of certain errors in the base line inventory of emission sources that Inter-Power had utilized in modeling the air quality studies for the project. The Siting Board then ordered additional hearings on air quality issues and Inter-Power was permitted to submit, over petitioners' objections, additional air quality analyses. Additionally, the Siting Board removed the ALJ who had presided over the initial hearings and replaced him with another ALJ.

While these additional hearings were pending, it became apparent that Inter-Power was not going to be able to meet the December 31, 1993 **[***5]** in-service deadline imposed under its 1988 contract with Niagara Mohawk, and petitioners requested a hearing on, *inter alia,* how this would impact Inter-Power's application. The Siting Board denied this **[**344]** request but, *inter alia,* permitted the parties to brief this issue at a later date. The Siting Board thereafter voted to approve Inter-Power's application and, by decision and order dated September 24, 1992, granted Inter-Power the requested certificate pursuant to Public Service Law former article VIII. The certificate was subject to a number of conditions, however, including Inter-Power's ability to obtain a power sales contract on or before December 31, 1992. The Siting Board's decision further provided that it would leave to the PSC the review and resolution of any outstanding contract issues.

Thereafter, the Siting Board granted Inter-Power's numerous **[*101]** requests for additional time in which to obtain a power sales contract, ultimately imposing a deadline of March 12, 1993. When it became apparent that Inter-Power again would be unable to meet the required deadline, the Siting Board decided to "shelve" the certificate. Under the terms of the **[***6]** Siting Board's decision, the certificate would lapse on September 13, 1994 unless Inter-Power could, *inter alia,* obtain a revised power sales contract, justify the contract prices and demonstrate that the health and environmental impacts identified in previous studies had not changed materially since March 12, 1993. Petitioners' subsequent request for a rehearing was denied.

Petitioners Commonwealth of Massachusetts, State of Vermont and Sierra Club, Inc. thereafter commenced a proceeding in this Court (proceeding No. 1) pursuant to Public Service Law former § 148 to challenge the Siting Board's grant of a certificate to Inter-Power, and petitioner Concerned Citizens for the Environment, Inc. commenced a separate proceeding (proceeding No. 2) seeking similar relief. The Siting Board's subsequent application for a stay of these proceedings until it was determined whether Inter-Power would be able to obtain a contract within the requisite period of time was denied by this Court.

Although petitioners have challenged the Siting Board's determination on a number of substantive and procedural grounds, petitioners' arguments essentially distill to whether the Siting Board properly **[***7]** discharged the statutory duties imposed upon it by Public Service Law former article VIII. As such, before we address the specific challenges raised by petitioners, a brief review of the relevant statutory provisions is in order.

Public Service Law former article VIII has been characterized as a "one-stop certification" statute (Governor's Mem, 1978 McKinney's Session Laws of NY, at 1838) and was designed to "provide for the expeditious resolution of all matters concerning the location of major steam electric generating facilities [within the State] in a single proceeding" (L 1972, ch 385, § 1). Under the terms of Public Service Law former article VIII, a developer seeking a certificate of environmental compatibility and public need must first submit to the Siting Board an application containing, *inter alia,* a description of the proposed site and facility *(see,* Public Service Law former § 142 [1] [a]), a description of alternate practical sources of power to the proposed facility, together with a **[*102]** description of the comparative advantages and disadvan-

tages of each source *(see,* Public Service Law former § 142 [1] [b]), estimated cost information, **[***8]** including the total generating cost per kilowatt-hour *(see,* Public Service Law former § 142 [1] [d]), and a statement explaining the need for the facility *(see,* Public Service Law former § 142 [1] [e]). The application must also include a $150,000 fee to be used to establish a fund to defray expenses incurred by municipal and other local parties to the proceeding *(see,* Public Service Law former § 142 [6]).

Once the Chair of the Siting Board determines that the application is complete, public hearings are scheduled before a presiding and associate ALJ who at the conclusion of the hearing, issue a recommended decision *(see,* Public Service Law former §§ 143, 145). The Siting Board then reviews the record and renders a decision either granting or denying the application in question *(see,* Public Service Law former § 146 [1], [2]). Before the Siting Board may grant the requested certificate, it must first "find and determine" several factors including, *inter alia,* (1) the public need for the facility, (2) the nature of the probable environmental impact of the facility, (3) that the facility represents the minimum adverse environmental impact **[***9]** and **[**345]** is compatible with the public health and safety, (4) that the facility is consistent with the long-range planning objectives for electric power in the State, and (5) that the facility is in the public interest *(see,* Public Service Law former § 146 [2] [a]-[g]). Assuming the statutory criteria have been satisfied, the Siting Board may issue a certificate authorizing construction of the proposed facility.

We now turn to the specific arguments advanced by petitioners. As a threshold matter, we must determine whether the Siting Board lost jurisdiction over Inter-Power's application by extending the certification process beyond the two-year deadline set forth in Public Service Law former § 143 (4). n2 Although this two-year period has been construed as directory and not mandatory, the Siting Board will be deemed **[*103]** to have lost jurisdiction over Inter-Power's application upon a showing of substantial prejudice to petitioners *(see, Matter of County of Suffolk v Gioia, 96 AD2d 220, 224-225; cf., Matter of Sarkisian Bros. v State Div. of Human Rights, 48 NY2d 816, 818).*

n2 The statute requires that proceedings under Public Service Law former article VIII, including the Siting Board's issuance of its final decision, be completed within two years of the date the underlying application is deemed complete. The Siting Board may, however, waive the two-year deadline "in order to give consideration to specific issues necessary to develop an adequate record" (Public Service Law former § 143 [4]). Here, the record indicates that although the Siting Board exceeded the two-year deadline, it did so in order to fully develop the record with respect to the project's economic and environmental impacts, and we therefore reject petitioners' assertion that the Siting Board lost jurisdiction over Inter-Power's application merely by extending the administrative process past the two-year mark.

[*10]**

Petitioners' argument on this point is two-fold. First, petitioners contend that they were prejudiced by the Siting Board's decision to grant Inter-Power additional time to amend or correct its initial application and to submit additional air quality studies. Although responding to the changes in Inter-Power's application and reviewing the revised air quality studies was no doubt costly and time-consuming, the record indicates that petitioners had the opportunity to and did indeed challenge Inter-Power's submissions in this regard, and we are therefore unable to conclude that petitioners were substantially prejudiced by this precertification delay. Nor are we persuaded that the Siting Board's handling of this matter after the project was conditionally certified operated to divest it of jurisdiction. Assuming, for purposes of this discussion, that the conditional certificate issued is otherwise valid, we note that although the postcertification delay has been rather lengthy, and the administrative proceeding as a whole arguably less than expeditious, Inter-Power has not been granted an indefinite extension *(cf., Matter of County of Suffolk v Gioia, supra).* The conditional **[***11]** certificate will lapse by its own terms in September 1994 if the outstanding economic issues are not resolved before then. Additionally, although the filing of a revised power sales contract and the passage of additional time may trigger the need for further hearings on project economics and environmental impacts, the need for such hearings is uncertain at this point, and we are therefore unable to conclude, based upon the record presently before us, that petitioners have suffered substantial prejudice. In the event a revised power sales contract is filed before the conditional certificate lapses and the need for additional hearings is demonstrated, it may well be that the scope and cost of such hearings, together with the additional delay occasioned by them, will result in substantial prejudice to petitioners. Unless these events come to pass, however, petitioners' claim of prejudice is speculative and, in our view, premature. n3

n3 For similar reasons, we reject petitioners' assertion that the Siting Board's handling of this matter also violated *State Administrative Procedure Act § 301 (see generally, Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 177-178, cert denied 476 US 1115)*. Petitioners further contend that the Siting Board violated *State Administrative Procedure Act § 303* by removing the ALJ who had presided over the initial hearings and replacing him with another ALJ. *State Administrative Procedure Act § 303* provides, in relevant part, that "[w]henever a presiding officer is disqualified or it becomes impractical for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom". Here, the proffered excuse for the ALJ's removal and replacement was his then-impending retirement. Petitioners recognize that this would indeed constitute an acceptable reason for removing/replacing an ALJ and, after reviewing the record before us, we are unable to conclude that petitioners were substantially prejudiced by the Siting Board's decision in this regard. Accordingly, under the circumstances present here, we are unable to conclude that there has been a violation of *State Administrative Procedure Act § 303*.

[*12]**

[*104]

[346]** Having concluded that the Siting Board has not lost jurisdiction over Inter-Power's application, the issue then becomes whether the Siting Board's decision to grant the conditional certificate was proper. In this regard, we note that our scope of review is limited to, *inter alia,* whether the Siting Board's determination is (1) supported by substantial evidence in the record, (2) within the Siting Board's statutory jurisdiction or authority, (3) made in accordance with Public Service Law former article VIII and the applicable rules and regulations, and (4) arbitrary, capricious or an abuse of discretion *(see,* Public Service Law former § 148 [2] [a]-[e]).

Petitioners' primary contention regarding the substance of the Siting Board's determination is that the Siting Board failed to properly discharge the duties imposed upon it by Public Service Law former article VIII prior to granting the conditional certificate. Specifically, petitioners argue that absent a valid power sales contract, the Siting Board could not properly review the economics of the proposed facility and, further, that by delegating to the PSC the review and resolution of **[***13]** any outstanding contract issues, the Siting Board abrogated its independent duties in this regard. n4 We agree.

n4 We note in passing that inasmuch as petitioners' challenges in this regard are based upon questions of pure statutory interpretation, dependent upon only the accurate apprehension of the Legislature's intent, there is no need for this Court to rely upon or defer to the Siting Board's particular expertise *(see generally, Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459)*.

As we observed at the outset, Public Service Law former article VIII was designed to balance, in a single proceeding, the public's need for electricity and their environmental concerns **[*105]** *(see,* L 1972, ch 385, § 1; L 1978, ch 708, § 1). n5 To that end, the statute requires the applicant to submit, *inter alia,* estimated cost information, i.e., a power sales contract, studies identifying the expected environmental impact of the proposed facility during both its construction and operation, and a statement **[***14]** explaining the need for the proposed facility *(see,* Public Service Law former § 142 [1] [a]-[f]; *16 NYCRR 815.2*). Similarly, before the Siting Board may certify the proposed facility, it must "find and determine", *inter alia,* that there is a public need for the facility, that the facility represents the minimum adverse environmental impact considering, among other factors, the state of available technology and the nature and economics of any alternatives, and that the facility is in the public interest, in view of the environmental impact, the cost to society as a whole and the range of alternatives available *(see,* Public Service Law former § 146 [2] [a]-[g]).

n5 In enacting the initial version of Public Service Law former article VIII, the Legislature recognized the competing economic and environmental forces at play and stated: "[I]t is essential to the public interest that meeting power demands and protecting the environment be regarded as equally important and that neither be subordinate to the other in any evaluation of the proposed construction of major steam electric generating facilities" (L 1972, ch 385, § 1). Although the Legislature acknowledged that there may be instances in which the public's need for electricity outweighs the competing environmental concerns, or vice versa, it is clear that economic and environmental factors were to be given equal consideration *(see, ibid.)*.

[*15]**

As the foregoing provisions illustrate, Public Service Law former article VIII imposes upon the Siting Board very specific obligations, all aimed at ensuring that the Siting Board has before it and indeed considers the economic and environmental data necessary to render an informed decision. In our view, the absence of a valid power sales contract precluded the Siting Board from thoroughly and properly evaluating the economic impact of Inter-Power's proposed facility and, in turn, from discharging its statutory duty to weigh and balance project economics against the anticipated environmental impact.

[347]** We are similarly persuaded that the Siting Board's review under Public Service Law former article VIII is qualitatively and analytically distinct from the type of review performed by the PSC under the Public Utility Regulatory Policies Act of 1978 *(see, 16 USC § 2601 et seq.),* and we reject the notion that the Siting Board can fulfill its statutory obligation to evaluate project economics by having the PSC determine that the rates imposed by any revised power sales contract are "just and **[*106]** reasonable". Respondents essentially take the position that **[***16]** because the PSC is responsible for ensuring that utilities purchase electricity from cogenerators at prices that are just and reasonable to the consumer and not more than the avoided costs for purchases *(see, 18 CFR 292.304* [a]; *see also, 16 USC § 824a-3),* they may reasonably expect and/or conclude that the price set forth in any revised power sales contract "would be reduced to something similar to, if not the same as", the PSC's latest long-run avoided cost estimates. n6 Thus, the argument continues, if the contract price reflects the utility's avoided costs of generating power, it must be deemed "economic". Respondents' argument misses the mark, however. The mere fact that the PSC must ensure that the prices reflected in any revised power sales contract are just and reasonable to consumers does not absolve the Siting Board of its independent obligations under Public Service Law former article VIII. In other words, although the PSC's "just and reasonable" review may ultimately represent yet another hurdle for the applicant to clear, it cannot be deemed the functional equivalent of, and in our view was not intended to supplant, the Siting Board's review under Public **[***17]** Service Law former article VIII. n7

n6 Long-run avoided costs (hereinafter LRAC) are estimates made by the PSC as to the future cost of electricity that a utility, such as Niagara Mohawk, would have to pay if it generated the power itself as compared to purchasing the electricity from a developer, such as Inter-Power. It appears that the most recent LRAC estimates were made by the PSC in 1992.

n7 Finally, petitioners challenge the Siting Board's failure to hold a hearing to address the project's economic aspects once it became apparent that Inter-Power no longer had a valid power sales contract with Niagara Mohawk. Inasmuch as the underlying factual issues were essentially uncontested, we see no need to disturb the Siting Board's determination in this regard, and we reject petitioners' assertion that the failure to hold a hearing under these circumstances violated Public Service Law former § 143 (2) and (3) and *State Administrative Procedure Act § 301.*

Accordingly, we are of the view that **[***18]** the Siting Board failed to fulfill its duties under and comply with the mandates set forth in Public Service Law former article VIII and, as such, the conditional certificate issued by the Siting Board is invalid. In light of this conclusion, we need not address the remaining arguments advanced by petitioners, except to note that absent the required economic data, the Siting Board could not properly find and determine under Public Service Law former § 146 (2) (a) that there is a public need for the proposed facility. **[*107]**

Cardona, P. J., Mercure, White and Weiss, JJ., concur.

Adjudged that the determination is annulled, with costs, and petitions granted to the extent that the certificate of environmental compatibility and public need issued by respondent New York State Board on Electric Generation Siting and the Environment to respondent Inter-Power of New York, Inc. is revoked.