

Attention: **Electric Generation Board**

Date: 10/29/03

Company:

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From: **Tom FitzGerald**

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Subject:

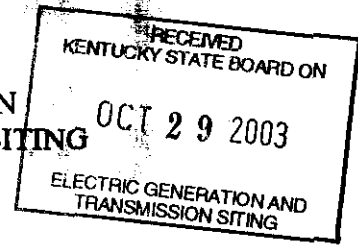
Comments:

Please file this in Case No. 2002-00150 and get a copy of it to Becky Goodman. All parties have been served by mail and the original and 10 copies are in the mail today for filing.

Thanks very much!

Tom FitzGerald

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) CASE NO. 2002-00150
CONSTRUCTION CERTIFICATE IN)
MUHLENBERG COUNTY, KENTUCKY)

RESPONSE OF INTERVENOR GARY WATROUS TO THOROUGHBRED
GENERATING COMPANY, LLC'S MOTION TO STRIKE TESTIMONY

Comes Intervenor Gary Watrous ("Watrous") by counsel, and responds to the motion of Thoroughbred Generating Company, LLC, ("Thoroughbred") to strike his pre-filed direct testimony. For the reasons presented below, Watrous respectfully requests that the Motion To Strike be overruled.

1. THE RULES OF PROCEDURE FOR THE ELECTRIC
GENERATION AND TRANSMISSION SITING BOARD DO NOT
PROVIDE FOR FILING MOTIONS TO STRIKE

The motion to strike the Intervenor Watrous' testimony fails to cite the statute or regulation granting the right to file a motion to strike. There is, in fact, no statutory or regulatory basis to support the filing of a preemptive motion to strike testimony, and for this reason alone, the motion should be overruled.

While the Kentucky Rules of Civil Procedure provide a mechanism for seeking to strike a defense as insufficient, or for striking other matter from the record, the rules of procedure are inapplicable since the rules "govern procedure and practice in all actions of a civil nature in the Court of Justice except special statutory proceedings[.]" The Electric Generation and Transmission Siting Board is *not* a Court of Justice under the Kentucky

Constitution, but instead is an administrative agency and as such is not bound by the rules of procedure. Department of Human Resources v. Redmon, 599 S.W.2d 474 (Ky. App. 1980).

The motion to strike should be overruled as unauthorized under Board procedural rules.

2. TO THE EXTENT THAT A MOTION TO STRIKE IS PERMISSIBLE THOROUGHbred HAS FAILED TO DEMONSTRATE ENTITLEMENT TO THE RELIEF REQUESTED

Motions to strike are authorized, in courts of justice, under Kentucky Civil Rule 12.06 which provides that:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him, or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any sham, redundant, immaterial, impertinent or scandalous matter.

Assuming, for the sake of argument, that a motion to strike *were* authorized, Thoroughbred has failed to demonstrate entitlement to such drastic remedy for several independent and sufficient reasons.

First, a motion to strike is a mechanism for challenging the sufficiency of a defense or other pleading, and is *not* a tool for peremptorily discarding witness testimony. While the Electric Generation and Transmission Siting Board has adopted the mechanism from Public Service Commission practice of pre-filing testimony, the testimony is *not* a "pleading" within the meaning of the civil rule and a motion to strike is not available to remove from the record the testimony of an intervening party that has been granted full participation rights.

Second, motions to strike matters from pleadings "are disfavored and are infrequently granted", Phillips, 6 Kentucky Practice p. 241 (West, 1995), and should not be granted if there are disputed factual issues that should be determined at a hearing on the merits. *Id.* In considering a motion to strike, the truth of the statements averred must be admitted. *Id.* In this instance, the Direct Testimony of Gary Watrous is directly relevant to the statutory requirements to which Thoroughbred is bound, including KRS 278.706(2)(i), which requires the "analysis of the proposed facility's economic impact on the affected region and the state." Additionally, one of the approval criteria for the construction certificate requires the consideration of the "economic impact of the facility upon the affected region and the state." Jefferson County is a part of the state, and the affected region, and the testimony of Mr. Watrous speaks directly to his concerns that the applicant failed to fully assess the potential economic impacts of the facility and its consumption of air quality through air emissions, on the economic health of the region and state. Mr. Watrous' testimony focuses on the economic health of the community, the link between air quality and the local economy, and the potential impact of additional emissions of ozone precursors, fine particulates and mercury from the proposed plant on the Mammoth Cave and Jefferson County regions. Concerning the failure of the applicant to include information concerning transmission lines, the testimony is directly relevant, since the statutory definition of "merchant electric generating facility" requires that associated facilities be considered as part of the facility. KRS 278.700(2).

That Thoroughbred may disagree with Mr. Watrous is not a sufficient basis for summarily striking his testimony. Mr. Watrous was granted intervention status as a lay witness, and the weight to be accorded his testimony will be determined by the Board aft


consideration of all of the facts and testimony of all parties. The basis for his direct testimony can be tested by any adverse party and intervenor on cross-examination. There is sufficient factual disagreement concerning relevant matters to demonstrate that is not appropriate for summary rejection of the testimony through a motion to strike.

Finally, the motion to strike was untimely. A motion to strike should be brought before responding to a pleading or within twenty days after service of the pleading. The rebuttal testimony filed by Thoroughbred, in particular that of Mr. DeBusschere, responded to the Direct Testimony of Mr. Watrous, and any motion to strike that direct testimony should have been brought *prior* to the rebuttal testimony, and yet was not served until after 4:30 on the afternoon before the scheduled hearing.

Conclusion

The motion to strike the testimony of Intervenor Gary Watrous should be rejected as unauthorized by the Board's rules of practice, as untimely, and as failing to meet the standards for such a drastic and disfavored remedy. The Direct Testimony of Mr. Watrous speaks to statutory criteria for review and approval of a construction certificate, is relevant and is well within the bounds of the Order granting him full intervention status. For each and all of these reasons, Mr. Watrous respectfully requests that the Motion to Strike be overruled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following individuals, by first-class mail, postage prepaid:

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and that a copy of the Reply was sent by telefax and that the original and ten (10) copies of this motion were mailed to the Public Service Commission, this 29th day of October, 2003.



Tom FitzGerald