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CERTIFICATE OF SERVICE

TO: Parties or Record in Case No. 2002-00172
Estill County Energy Partners, LLC
Merchant Power Plant Application

I, Beth O'Donnell, Executive Director of the Public Service Commission on behalf of The Kentucky State Board on Electric Generation and Transmission Siting, hereby certify that the enclosed attested copy of the Commission's Order in the above case was served upon the addressee by U.S. Mail on October 12, 2004.

Sincerely,

Beth O'Donnell
Executive Director
on behalf of
The Kentucky State Board on
Electric Generation and Transmission Siting

BOD/jc

Enclosure

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

THE APPLICATION OF ESTILL	)	
COUNTY ENERGY PARTNERS, LLC,	)	
FOR A CERTIFICATE TO CONSTRUCT	)	CASE NO. 2002-00172
A COAL COMBUSTION/ELECTRIC	)	
GENERATING FACILITY	)	

I N D E X

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

THE APPLICATION OF ESTILL COUNTY ENERGY PARTNERS, LLC, FOR A CERTIFICATE TO CONSTRUCT A COAL COMBUSTION/ELECTRIC GENERATING FACILITY	)))))	CASE NO. 2002-00172

O R D E R

PROCEDURAL HISTORY

On June 14, 2004, Estill County Energy Partners ("ECEP" or "Applicant") filed an application with the Kentucky State Board on Electric Generation and Transmission Siting ("Board") for approval to construct a 110 megawatt coal-fired electric generating plant in Estill County, approximately two miles west of Irvine, Kentucky. On June 17, 2004, the Board Staff issued a letter to the Applicant stating that the application met the minimum filing requirements. Based on June 17, 2004 as the official filing date, the Board issued an initial procedural schedule on July 2, 2004 establishing that the Order in this case had to be issued no later than October 12, 2004. The Board issued a revised procedural schedule on July 16, 2004 adding a local public hearing in Irvine and a date for a site visit by the Board.

On July 14, 2004, DLX, Inc. and Harry LaViers, Jr., as Trustee of a Trust created under the Will of Maxie LaViers, ("DLX") moved to intervene. Will Herrick also moved to intervene on the same date. On July 20, 2004, ECEP responded to both motions to

intervene. The Board granted both interventions by Order dated July 21, 2004 and further explained that decision in a subsequent Order on July 23, 2004.

On July 22, 2004, the Board's consultant, Brighton A & E, Inc., ("Brighton" or "Consultant") filed its Review and Evaluation of Estill County Energy Partners, LLC Site Assessment Report ("Brighton Report"). Throughout the latter part of July 2004, the parties conducted discovery.

On August 4, 2004, the following parties filed direct testimony:

- Gerard B. Mack and Dell Jaggers on behalf of ECEP;
- Harry LaViers, Jr. and Donald G. LaViers on behalf of DLX; and
- Will Herrick on his own behalf.

On August 12, 2004, the Board received public testimony at a local hearing in Irvine. Local public support, although not unanimous, was overwhelmingly positive toward the project. Witnesses speaking in favor of the application especially focused on the creation of jobs and the clean-up of the present site.

The hearing-in-chief in this matter was held in Frankfort on August 24, 2004. On that date, DLX filed a motion to dismiss. ECEP filed responses to post-hearing data requests on August 31, 2004, and all parties filed post-hearing briefs on September 13, 2004.

BACKGROUND

ECEP proposes to build a merchant electric generating plant on a 620-acre site where a coal processing plant was operated until the end of the 1990's. The plant will be constructed on a 28-acre site, and the remaining area contains waste coal generated by the prior operation. ECEP proposes to fuel the plant primarily with this waste coal. The estimated cost to construct the plant is $150 million.

ECEP estimates that the site contains 25-30 years of waste coal reserves. As the waste coal is burned, portions of the site will be reclaimed and permitted as a disposal area for ash from the plant. Due to the expected variability of the waste coal quality, a small amount of additional regional coal, constituting 5-10 percent of total fuel consumed by the plant, will be delivered, stockpiled, and blended at times with the on-site waste coal.

ECEP and Fox Trot Properties, LLC ("Fox Trot Properties") are affiliated, limited liability companies. The only member of ECEP is Calla Energy Partners, LLC ("Calla"), whose sole member is Jacquelyn Yates. Ms. Yates is also the sole officer and shareholder of Fox Trot Corporation, which is the sole member of Fox Trot Properties. In the application, ECEP states that Fox Trot Properties owns the property site, although ECEP itself has no interest in the property.

STATUTORY REQUIREMENTS

Introduction

The statutes require the Board to consider the factors delineated in KRS 278.706, 278.708, and 278.710 in reviewing an application for a Siting Board certificate. In this section, the Board will look at those factors in light of the statutory provisions.

Interest in the Property

The intervenors maintain that the application should not be granted unless Applicant can show a sufficient interest in the property to allow it to build the plant there. ECEP, on the other hand, maintains that a demonstrated interest in the property is not a statutory requirement and is therefore beyond the Board's jurisdiction to require. This

issue has two components, namely the interest of Fox Trot Properties and that of ECEP.

The statutory requirement applicable to this issue is embodied in KRS 278.706(2)(l) and 278.708(3)(a)2. The first of those sections requires, as a part of a "completed application" for a certificate to construct a merchant electric generating facility, "[a] site assessment report as specified in KRS 278.708." Paragraph (3)(a)2 of that latter statute in turn requires inclusion in a "completed site assessment report" of "[t]he legal boundaries of the proposed site." The parties differ significantly as to how the Applicant must satisfy that requirement.

As a preliminary matter, the Board turns to Applicant's argument that the June 17, 2004, letter from Board Staff to ECEP that its application was "administratively complete," under the terms of KRS 278.710(1), was a ruling, on behalf of the Board, on the merits of this issue. Such a letter, as ECEP points out, "is necessary to begin the Board's consideration of an application, and to 'start the clock ticking' on that consideration, under KRS 278.710(1)." ECEP Post-Hearing Brief at 14. Board Staff uses a checklist created from the siting statutes to determine if an applicant for a certificate from the Board has responded to each statutory requirement. A determination that an applicant has addressed each item on the checklist, however, does not constitute a decision on whether the applicant has also carried its burden of proof to satisfy the requirements. If the June 17, 2004 letter were also a ruling on the merits, most of the other statutes on electric generation and transmission siting, KRS 278.700-278.716, would be meaningless. For example, if the Board's letter is on the merits, then there would be no reason for the Board to review the site assessment

report (KRS 278.708), there would be no need for a hearing, and the Board would not need to make any of the findings required by KRS 278.710.

Specifically on the property dispute issue, Applicant met its original burden of going forward on the requirement of KRS 278.708(3)(a)2 by supplying maps and asserting ownership. Once that assertion is challenged, however, the Board may require whatever additional proof is required to demonstrate that ECEP has met its ultimate burden of satisfying the statute. By requiring additional proof on this issue, the Board is not countermanding the June 17, 2004 letter. The original application was "administratively complete" under the terms of KRS 278.710(1) on that date. Once intervenors challenged the accuracy and veracity of the statements in the application, however, the burden shifted back to ECEP to show that it has satisfied the requirements for approval. Applicants rely on *Phelps v. Salle*, 529 S.W.2d 361, 365 (Ky. Ct. App. 1975), but the Board finds that case to be inapplicable here. The June 17, 2004 letter in this case was simply an indication that the application was "administratively complete" and in no way served as a decision on the merits.

Turning first to the interest of Fox Trot Properties, the Board understands that, although the parties disagree on the acreage of the land dispute, they do agree that at least 80 acres is currently being contested in Case No. 98-522637 in Bankruptcy Court in Northeastern Kentucky. Applicant maintains that only that 80 acres is in dispute and, because it contains only waste coal, ECEP testified that it will build the plant regardless of how the dispute is resolved. *E.g.*, Tr. 123. DLX, on the other hand, claims that more than the 80 acres is contested, and it asserts that the 28-acre tract on which Applicant

proposes to site the generator is part of the contested area. ECEP agrees that if it does not own that 28 acres, it will not construct the proposed plant. Tr. 69-70.

The Board is mindful that Applicant and DLX have both repeatedly requested that the Board avoid wading into the merits of the property dispute here. *E.g.*, DLX Post-Hearing Brief at 8; Tr. 16. Any unconditional decision on the merits here, however, could put the Board squarely into that maelstrom. For the Board to grant the application may be seen as a decision in favor of Applicant's property claim; but to deny it on the basis of the property dispute could be viewed as a decision in favor of DLX's claim. The Board therefore reaffirms its ruling from July 23, 2004, "that it has no jurisdiction to decide the title issues currently pending in the Bankruptcy Court or, for that matter, any other real property title disputes."

Applicant and DLX spent a great deal of time at the evidentiary hearing in Frankfort attempting to show that the other's property claims were not valid. While the Board accepted various maps and testimony into evidence, that admission was not for the purpose of issuing any ruling on the real estate issue, but simply to understand the parties' positions on the extent of the dispute. While the parties apparently agree that the 80-acre tract is in dispute, that agreement simply defines the minimum acreage that is contested. Instead, the Board needs to understand the total area that is in dispute. Based on the record in this case, the Board finds that the dispute includes the 80-acre tract of waste coal, the 28-acre tract on which Applicant proposes to build the plant, and apparently some unknown additional amount of land.

Because of our limited approach to this issue, the Board denies the motion to strike filed by DLX as part of its post-hearing brief. DLX claims that it was denied the

opportunity to cross-examine Mr. Jaggers and Mr. Mack adequately on their testimony as to "the nature and extent of DLX's and the Trust's claims and boundaries." Because the Board has considered this testimony only to understand the extent of the property dispute, DLX has not been prejudiced by the limits on its cross-examination.

As discussed in detail later in this Order, the Board's conditional approval in this case is based, to a large degree, on facts as presented in ECEP's application. To the extent the conditions may vary depending on the size and location of the ultimate plant site, the Board will need a revised site assessment report once those facts are finally determined. For example, among the factors listed in KRS 278.708(3) are (1) evaluation of anticipated peak and average noise levels associated with the facility's construction and operation at the property boundary and (2) the impact of the facility's operation on road and rail traffic to and within the facility, including anticipated levels of fugitive dust created by the traffic and any anticipated degradation of roads and lands in the vicinity of the facility. A significant reduction in the amount of waste coal to which ECEP will have access could have impacts on these and other statutory factors that would require a re-examination of the conditions related to them.

The Board is therefore conditioning approval of this application on a filing by ECEP in which it can demonstrate a clear possessory right to the site on which Applicant intends to build and operate the plant. This filing is necessary to satisfy the Board's statutory requirement to consider "[t]he legal boundaries of the proposed site." This demonstration should be in the form of deeds, a certified boundary survey, or other

proof of ownership or right of possession.[1] If the boundaries in this filing differ from those in the application, the filing must also include a complete discussion either of how other statutory conditions are affected or why they are not affected. This filing should be a supplement to the original site assessment report, and at a minimum must discuss the following factors: noise,[2] road and rail traffic,[3] setback requirements,[4] and fugitive dust,[5] but Applicant should also include a discussion of any other factors that the Board must consider pursuant to KRS 278.706, 278.708, and 278.710 that are impacted by any changes in the property rights. Ultimately, the plant should be built in substantial compliance with the application, as amended by this later filing.

DLX claims that its due process rights will be violated by a post-hearing filing of such a survey.[6] The Board is cognizant that other parties may want an opportunity to respond to Applicant's filing of this demonstration of property rights. Once ECEP makes

[1] Given that the application is based on ownership by Fox Trot Properties, the Board assumes this filing will be a demonstration that Fox Trot Properties owns all or part of the site, but ECEP may demonstrate a right to the property in another manner (e.g., a lease from the rightful owner) as long as it is consistent with the overall thrust of the application.

[2] KRS 278.708(3)(a)8 and (4), 278.708(3)(d), 278.710(1)(b).

[3] KRS 278.708(3)(a)5, 278.708(3)(e), 278.710(1)(a).

[4] KRS 278.706(2)(e), 278.710(1)(g).

[5] KRS 278.708(3)(e) and (4).

[6] *E.g.*, DLX Post-Hearing Brief at 24. DLX has also claimed myriad other constitutional violations, including that some or all of the provisions of KRS 278.700-716 are unconstitutional. There can be no clearer axiom of administrative law than that "an administrative agency cannot decide constitutional issues." *Commonwealth v. DLX, Inc.*, 43 S.W.3d 624, 626 (Ky. 2001). Hence the Board cannot and will not rule on those claims.

its filing required by this Order, the Board will set a schedule for responses and any request for a reopening of the hearing. The issues at any hearing, however, will be restricted to those matters impacted by ECEP's filing, and such a hearing will expressly not be a rehearing of the whole case.

Even if Fox Trot Properties demonstrates to the satisfaction of all parties and the Board that it has sufficient property rights in the proposed site, Applicant itself has not shown that it has any rights to the property. This issue generated considerable interest at the hearing and in the subsequent briefs. ECEP argued that a property right in the Applicant is not a statutory criterion. Intervenors responded that a property interest is an implicit requirement, without which ECEP has no standing to apply for approval to build a plant.

The Board finds this issue to be no small matter. The consequences of our ruling may have effects far beyond this case. If an applicant need not show any property interest whatsoever to file before the Board, anyone with an abundance of money and malice could bring applications that are nothing more than "academic exercises," Herrick Post-Hearing Brief at 5, and effectively tie up the agency's resources.[7]

Intervenor Herrick's brief argues that ECEP cannot pursue this application without showing some right to occupy the land. Both he and DLX point to statutes that they argue cannot be satisfied unless Applicant has a possessory right. For example,

[7] The Board recognizes that an applicant must post sufficient fees to cover expenses, KRS 278.706(5), but that requirement does not address the time the Board and Staff spend on Board business. Time spent on a fanciful application is time that cannot be spent on legitimate Board or Public Service Commission business. See KRS 278.702(3), making the Commission Staff "permanent administrative staff for the board."

KRS 278.708(4) refers to possible mitigating factors such as "planting trees, changing outside lighting, erecting noise barriers, and suppressing fugitive dust," which, if ordered by the Board, would require some right to occupy and change the property.

Applicant insists that the Board cannot stray beyond explicit statutory criteria, which it argues do not include a showing of a possessory interest. Intervenors, however, state that certain basic requirements are implied in the statute.

ECEP's statement of the law on this issue is incomplete. In *Boone County Water and Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997), the Supreme Court stated the general administrative law rule: "The powers of the PSC are purely statutory and it has only such powers as are conferred expressly or by necessity or fair implication." (emphasis added)

Applicant cites *Department for Natural Resources and Environmental Protection v. Stearns Coal and Lumber Company*, 563 S.W.2d 471 (Ky. 1978), in support of its position. There the court ordered the Department to issue the coal company a strip mining permit even though there was a dispute over mining rights on the property. This case is distinguishable from the present case, however. There the applicant had demonstrated to the Department as part of its application that it had the right to possess by submitting a deed. Applicant here has made no such demonstration. Thus the *Stearns Coal* case is not controlling in this setting.

Applicant includes one final point in arguing that it does not need to show a possessory interest. At page 35 of the Post-Hearing Brief, ECEP states:

> Jacquelyn Yates, indirectly owns and controls both Fox Trot Properties, which has contracted to buy the Site from the Bankruptcy Court, and ECEP, which will lease the Site from Fox Trot Properties and construct the proposed Facility. If ECEP were not under common ownership and control

> with the contract purchaser of the Site, it may be appropriate for ECEP to obtain an option to acquire the Site, or to enter into a lease for the Site, in order for ECEP to be assured that the Site will be available for its proposed project. Under the circumstances, for ECEP and Fox Trot Properties to do so would be an empty act because Mrs. Yates would be contracting with herself.

Not all affiliated companies work in total harmony. Certainly, the law views separate corporations and partnerships as separate entities, so a lease or option between ECEP and Fox Trot Properties would not legally involve "Mrs. Yates. . . contracting with herself." The Board finds this standing issue to be significant and will require some documentation that Applicant, as opposed to Fox Trot Properties, has a possessory interest in the property before we find that this condition is satisfied.

Finally, DLX has filed a motion to dismiss the application based on the property dispute. Given our ruling on this issue, the Board denies DLX's motion to dismiss.

Impact on Scenic Surroundings, Property Values, Adjacent Property, and Surrounding Roads

KRS 278.710(1)(a) directs the Board to consider the impact of a proposed merchant power plant on scenic surroundings and property values before deciding whether to grant or deny a construction certificate. The statute also requires the Board to consider the impact that the facility will have on surrounding roads and adjacent properties.

With regard to scenic surroundings, Brighton concluded that removal of the existing coal processing plant facilities will improve the appearance of the site because the existing buildings have been poorly maintained for the last several years. The Consultant conducted a "scenic viewshed analysis" that showed the proposed facility would not be observable from most area observation points.

Brighton had two recommendations to minimize the visual impact, both of which ECEP has agreed to follow. Recommendation 7 reads, "The proposed facility should utilize neutral colors for structures within industry standards." Recommendation 8 reads, "The proposed facility should be lighted to industry standards to minimize off-site glare." The Board makes compliance with these two recommendations conditions on the certificate in this case.

Applicant's appraisal report of surrounding property values concluded that the proposed plant would have little or no impact on real property values in the market area. If anything, the report suggested values might actually increase. Brighton reviewed this report, found it to be adequately supported, and had no recommendations on this issue.

With regard to impact on surrounding roads, the Applicant and Consultant agreed on one recommendation to limit impact on the Coal Wash Road residential areas. The Commonwealth has plans to build an industrial access road in the area. Brighton recommended (Recommendation 2) and Applicant agreed that, when that road is constructed, truck traffic should access KY 499 directly via the new idustrial access road, rather than continuing to use Coal Wash Road. The Board makes compliance with this recommendation a condition on the certificate in this case.

Applicant and Consultant, however, disagreed on several issues. Brighton recommended that the hours of truck deliveries be restricted (Recommendation 13.1)[8] and that ECEP conduct a capacity analysis if it decides to dispose of ash offsite (Recommendation 13.2). ECEP argued that the overall impact on traffic was so

[8] The Brighton Report included two recommendations numbered 13 and two numbered 15. In this Order, those recommendations will be referred to as 13.1, 13.2, 15.1, and 15.2.

insignificant that Recommendation 13.1 was unwarranted and that Recommendation 13.2 was beyond the Board's jurisdiction because it purported to regulate beyond the construction stage and into the operation stage.

The Board believes that the increased traffic associated with large truck deliveries could pose a safety issue that can easily be mitigated and would not be burdensome to ECEP. The Board accepts Brighton's recommendation that truck deliveries to and departures from the facility during construction shall be scheduled at non-peak hours to avoid traffic associated with the arrival and departure of children from school and makes it a condition on the certificate in this case. The Board also strongly encourages ECEP to continue to work with Estill County on this issue after construction is complete and the plant is operating.

Also, even though ECEP has no plans currently to dispose of its ash offsite or to increase significantly the amount of coal that is trucked into the facility, those events could indeed occur. ECEP has not conducted any traffic studies on the local roads considering either of those possibilities. To the extent that trucks are utilized to transport the ash offsite or to bring in significant amounts of coal, heavy trucks could degrade local road conditions, as well as interfere with local traffic. Both of these events could pose a safety risk to local motorists and pedestrians. The Board is especially concerned that increased truck traffic not pose an increased safety risk when children are being transported to and from school. Therefore, if either event were to occur, the Board strongly recommends that ECEP conduct traffic capacity analyses and work with Estill County officials to minimize any disruption to school traffic and to avoid the degradation of local roads.

Applicant and Consultant agreed on one recommendation regarding fugitive dust. As recommended by Brighton (Recommendation 14), ECEP has agreed to pave the new entrance road from Coal Wash Road to the secured perimeter of the plant. The Board makes compliance with this recommendation a condition on the certificate in this case.

On a second recommendation, however, ECEP and the Consultant disagreed. Brighton's Recommendation 15.1 addressed the potential fugitive dust from waste coal reclamation operations, suggesting the use of gravel roads, water, and dust palliatives to minimize the problem. ECEP argues that fugitive dust is already regulated by the Division of Surface Mine Reclamation and Enforcement ("DSMRE"), and further regulation by the Board would be duplicative.

Under 405 KAR 8:030, Section 35, and 405 KAR 16:170, DSMRE does appear to have jurisdiction over regulation of fugitive dust at this facility, but only during the operations stage. The Board nevertheless takes official notice of 401 KAR 63:010 in which the Division of Air Quality, Department of Environmental Protection, apparently has regulatory authority over fugitive dust during the construction stage. The Board does not want to duplicate other agency authority and will therefore defer asserting regulation over this area for as long as those sister agency administrative regulations are in effect and enforced.

Brighton's final traffic-related recommendation, Recommendation 15.2, encouraged ECEP to use rail to the extent financially feasible. Applicant agreed that it would operate its business in a fiscally sound manner, but it argued that this restriction contradicted the preference for local labor and businesses. The Board believes ECEP

will conduct its business in the way it finds most financially feasible without the need to require compliance with this recommendation.

Anticipated Noise Levels

KRS 278.710(1)(b) requires the Board to consider the anticipated noise levels expected to result from the construction and operation of the proposed facility. ECEP's application states that noise levels from the generating facility will be equal to or less than noise levels produced by operation of the former coal-washing facility. Applicant further states that the facility will not interfere with normal activities and will be compatible with the surrounding community and neighboring properties. (Application at 33 and Tab H; and ECEP Post-Hearing Brief at 23.) ECEP's application contained estimated noise levels generated from various construction activities and types of operational equipment at its property boundaries and at the nearest residence. During the construction phase of the project, the highest expected noise level at the nearest residence, 2,170 feet away from the facility, is 53 dBA[9] from a single source. From all sources combined, the average expected noise level is 36 dBA. During the operational phase of the project, the highest expected noise level at the nearest residence is 39 dBA. The average expected noise level from all sources is 38 dBA. (Brighton Report at C-32; Response #7 to Staff's Second Data Request). To further mitigate noise from steam blows, ECEP, in accord with Brighton's Recommendation 9, has

[9] According to Brighton, noise levels are measured in decibels (dB), but a so-called "A" weighting, which reflects that human hearing is more sensitive at mid-range frequencies, "most closely represents the response of the human ear to sound." This measure for A-weighted levels is dBA. (Brighton Report at C-28).

agreed to install silencers. (ECEP Post-Hearing Brief at 24). The Board makes compliance with this recommendation a condition on the certificate in this case.

The Board agrees with the Consultant that ECEP's proposed facility likely will not generate unacceptable noise levels. Also, the Board agrees that ECEP's data fully meets the statutory criteria. The Board believes that installing silencers will sufficiently mitigate noise from steam blows and, therefore, will not restrict the timing of those events.

The Brighton Report provided a discussion of noise level measurement. (Brighton Report at C-30 through C-32). As part of that discussion, the Consultant identified a Day Night Average Sound Level ("DNL") of 65 dB as the "generally accepted threshold level of aviation noise and other sources of community noise, which are significant." (Brighton Report at C-31). The Consultant goes on to say, "Although originally developed in relation to airports, DNL is applicable to other situations also, and power plant noise would be characterized well by this metric." (*Id.*). The Board recognizes that a certain amount of noise was generated during the operation of the coal-washing facility and that ECEP's new facility is not expected to produce a great noise level. The coal-washing facility has not been operational for at least 5 years, though, and the surrounding households and businesses may well have become accustomed to a lower level of background noise. The Consultant stated that "it is likely that the 24 hour DNL at the nearest sensitive receiver would not exceed 65 DNL" (Brighton Report at C-32).

Economic Impact on the Affected Region

KRS 278.710(1)(c) requires the Board to consider the economic impact that the proposed facility will have upon the affected region and the Commonwealth. ECEP estimates that $118,413,000 of total value will be added to the Kentucky economy during the construction phase of the project. ECEP also estimates that, during that phase, as many as 1,490 persons could be directly employed, with a possible total of 2,835 jobs being created. During the operational phase, Applicant estimates the facility will add an additional $13,442,000 of total value annually to the Kentucky economy. Finally, during the operational phase, a total of 46 new jobs will be created, with a possible total employment effect of 103. (Application at Tab 10 and Tab K).

Intervenor Herrick challenged ECEP's economic study as incomplete because it did not take into account the possible social and economic cost to Kentucky from the project. In addition, he claimed certain costs related to the environmental impacts were not considered. (Herrick Testimony at 2 and Herrick Brief at 7-9).

The study ECEP submitted explicitly states that the study did not take into account the social and economic costs of the project. Thus, ECEP's stated project benefits represent gross, rather than net, benefits to Kentucky. Even though ECEP's economic study did not consider all social and economic costs, the record does not contain any evidence to suggest that the ECEP project would generate a net cost to Estill County and to Kentucky. In addition, the Board notes that there is strong public support for ECEP's project and that most people believe that the benefit of the additional jobs that would be created outweigh other concerns. (See comments generally from Public Hearing Transcript).

At the evidentiary hearing, a question arose over the specter of Kentucky's air quality credits being used up and the possibility of further economic development being stifled. (Tr. 113-117). A similar issue was raised in Case No. 2002-00150.[10] In the Thoroughbred case, one of the intervenors was an electric generating utility that would have to obtain air permits and to obtain credits (Class I increments) in the open market if it wanted to build and operate additional generating facilities sometime in the future. The intervenor utility argued it and its ratepayers would suffer economic detriment because the project would consume virtually all the available air resources in a designated non-attainment region. (Thoroughbred Order dated December 5, 2003, at 14-15). In that proceeding, the Board concluded that the record did not contain any concrete evidence that new sources planned to locate in the affected area in the near future, and it specifically found that the intervenor utility's plans for additional generation were tentative. (*Id*. at 15). ECEP notes that no electric generation utility has intervened in the case and that its facility is not being located in a non-attainment region. (ECEP Post-Hearing Brief at 26). While it is possible that a shortage of Class I increments might have an impact upon the region, the Board points out the lack of involvement in this case by utilities or other entities that may be directly affected by a shortage of air credits and the further lack of any concrete evidence on the issue in this case. Therefore, the Board holds that the availability of future Class I increments is not a substantive issue in this proceeding.

[10] Case No. 2002-00150, The Application of Thoroughbred Generating Company, LLC For a Merchant Power Plant Construction Certificate in Muhlenberg County, Kentucky.

Intervenor Herrick also argued that Applicant's economic impact analysis was incomplete because it did not address how the plant would operate after all the on-site waste coal has been burned, which would be at least 20 or 30 years from commencement of plant operations. The Board believes an analysis of such a long-term impact is too speculative at this point to consider. As ECEP pointed out on cross-examination, a power plant's life "can be extended through maintenance and refurbishment." (Tr. 98). To require Applicant or this Board to attempt to determine the economic impact of such an extension before the plant is even built, is not reasonable under the charges of Chapter 278.

While the Board is hopeful that the ECEP project will result in economic growth for the Estill County region, the Board believes that any positive economic impact resulting from this project greatly depends upon the extent to which ECEP employs local workers and utilizes local resources. In approving this project, the Board relies upon ECEP's commitments to hire construction and operation workers from the local population and to utilize local materials whenever practical and possible.

Existence of Other Generation Facilities

KRS 278.710(1)(d) provides that the Board must consider whether a merchant power plant is proposed for a site upon which facilities capable of generating 10 MW or more of electricity are already located. Pursuant to KRS 278.706(2)(g), Applicant specifically addressed this question in the application (Application Tab 7) and addressed it at the hearing on cross-examination (*E.g.*, Tr. 86-88). ECEP states that it picked this location because of the presence of the waste coal, and to transport that coal to another location (where another plant might be located) would make the project

economically infeasible. In the absence of any proof to the contrary, the Board believes Applicant's decision on the location of the proposed plant is sound and meets the statutory requirements.

Local Planning and Zoning Requirements

KRS 278.710(1)(e) provides that the Board must consider whether the proposed facility will meet all the local planning and zoning requirements that existed on the date the application was filed. Here, however, Estill County has no local planning and zoning regulations. (Application at Tab 5 and Tab Q). Therefore, the Board need not consider the issue of ECEP's compliance with local zoning laws in rendering its decision.

Impact on Transmission Grid

KRS 278.710(1)(f) requires the Board to consider whether the additional load imposed upon the electricity transmission system by the merchant plant will adversely affect the reliability of service for retail customers of electric utilities regulated by the Public Service Commission. Staff sent letters to all utilities potentially affected by the plant, including the Tennessee Valley Authority, and all responded that customers would not be adversely impacted. In the absence of any contrary evidence, the Board finds that ECEP has satisfied this statutory requirement.

Compliance With Statutory Setback Requirements

KRS 278.710(1)(g) states the general rule that the Board must consider is whether the exhaust stack of the proposed facility is at least 1,000 feet from the property boundary of an adjoining property owner and 2,000 feet from any residential neighborhood, school, hospital, or nursing home facility. KRS 278.704(5), however, provides, "If the facility is proposed to be located on a site of a former coal processing

plant in the Commonwealth where the electric generating facility will utilize on-site waste coal as a fuel source, then the one thousand (1,000) foot property boundary requirement . . . shall not be applicable."

In its application, ECEP states that the proposed site is on the site of a former coal-washing facility and, because there is no local planning and zoning commission in Estill County to establish any setback requirements, the project satisfies the required statutory setback requirements. (Application at Tab 5). ECEP stated that the facility had not been utilized for coal washing or processing since the 1998-1999 time period and is not operable currently. (*E.g.,* Tr. 216, 219-20)

Intervenor Herrick claims that the site does not constitute a "former" coal-processing facility because "the site appears to be 'current' in terms of the ability to use the site for coal processing." (Herrick Testimony at 3-4). ECEP has admitted that surety bonds connected to the coal-washing facility are still in effect. In addition, DSMRE permits are in effect that would allow for the processing of coal. (*E.g.*, Tr. 206-212). The companies that owned and operated the coal-washing facility, though, have gone into bankruptcy. Kentucky Processing Company, the holder of the DSMRE permit, has been out of business since 2001. In the intervening time, the ownership of the facility and property has changed hands. According to the Applicant, new water withdrawal permits would have to be secured and the facility would have to be renovated before the facility could begin processing coal again. (ECEP Post-Hearing Brief at 32). Finally, ECEP stated in its application that much of the old coal-processing facility would be razed to make room for its new generating facility.

The Board is not persuaded by arguments that the coal-processing facility can be considered a "current" facility. The Board believes that the record sufficiently indicates that the proposed site is a "former" coal processing facility under KRS 278.704(5).[11] Therefore, the 1,000-foot setback requirement does not apply to the proposed plant. However, other setback requirements under KRS 278.704(2) still apply. ECEP shall comply with all applicable setback requirements.

As discussed in the preceding section of this Order concerning the property dispute, the results of the current bankruptcy litigation could affect the site and property boundaries as reflected in ECEP's application. At this point the record does not unequivocally demonstrate that the setback requirements, especially for the stack, will be satisfied. As part of the supplemental site assessment report required by this Order, ECEP should include a certified boundary survey that demonstrates the plant will be in full compliance with all applicable setback requirements.

History of Environmental Compliance

KRS 278.710(I)(I) requires the Board to consider the environmental history of the applicant. The record is void of any indication that either ECEP or any person with a current ownership interest in ECEP or Calla has violated any federal or state environmental laws, rules, or administrative regulations. In addition, there is no evidence in the record that indicates any judicial or administrative actions are pending against any of those people or companies. (ECEP Post-Hearing Brief at 34). Nevertheless, a question arose at the hearing with regard to adequate environmental

[11] Even if the Board accepted the argument (which we do not) that the coal processing facility is currently active, it will clearly not be so when its buildings are demolished and replaced by the proposed plant.

compliance and disclosure concerning Charles E. Yates. (Tr. 147-148, 208). He is the husband of Jacqueline Yates, who is the sole member of Calla, which is the sole member of ECEP. Mr. Yates was the Vice-President and CEO of ECEP who personally signed the interconnection agreement with MISO on April 8, 2004. (Tr. 134-35; Application Tab O). Applicant stated in response to the Board's data request at the hearing that he served in those positions from April 1 to May 30, 2004, resigning less than a month before ECEP filed the subject Application. (ECEP Post-Hearing Data Request Response No. 3). Even though the Board is somewhat concerned with these events as they relate to a history of environmental compliance, it believes that there is insufficient evidence in the record to find that the Board should deny the application based on any negative environmental history of ECEP.

Legislative Policy of Encouraging the Use of Coal

KRS 278.710(2) authorizes the Board to consider the policy of the General Assembly to encourage the use of coal as a principal fuel for electric generation. The Board has considered that policy in this case and favorably points out that, not only is Applicant proposing to use coal as the primary fuel, but it is moreover using waste coal from an old coal-processing plant that it proposes to clean up.

Efficacy of Proposed Mitigation Measures

KRS 278.710(1)(h) requires the Board to consider the efficacy of measures proposed to mitigate any adverse impact that the proposed facility may have on the affected region. Pursuant to this statute, the Board has reviewed and considered all the measures that Brighton has proposed to mitigate the negative impact that the ECEP project may have on the Estill County region.

Pursuant to KRS 278.708(3)(a)3, Applicant must address access control issues. ECEP has represented to the Board that it will control access to its site with access control points at all points of entry, including railroad tracks. The Board understands that cross-examination of Mr. Mack resolved any disagreements ECEP had with Recommendation 4 on this issue. (Tr. 126-28). Once ECEP's plans are finalized to designate the needed number of access points, Applicant is in agreement with the conditions delineated in that recommendation. (Tr. 128). The Board believes that the implementation of the standard industry practices for security and access control that Brighton recommended will successfully mitigate the risk of security breach. Therefore, as amended by Mr. Mack's testimony, the Board makes compliance with this recommendation a condition on the certificate in this case.

KRS 278.708(3)(a)4 requires Applicant to consider facility buildings, transmission lines, and other structures. The only remaining issue with regard to this statutory provision is the location of two vacant houses on the proposed plant site. ECEP has agreed to comply with Recommendation 5 that these two houses may not be used as residences while the generating plant is in active use. The Board makes compliance with this recommendation a condition on the certificate in this case.

Recommendation 6 addresses the issue raised by KRS 278.708(3)(a)6. Jackson Energy Electric Cooperative ("Jackson") has an electric distribution line that currently serves residential customers. The proposed plant will not receive service from that line. Because of the location of proposed plant facilities, however, that Jackson line must be moved to an off-site location. Brighton recommended that the line be relocated to a position outside the secured area. ECEP indicated that, while it was still in negotiations

with Jackson, Jackson should have independent access to the property through a key, password, or both. (Tr. 129-31). The Board's primary concerns are for safety and reliability, and ECEP's representation that it will not prevent or impede Jackson's access to its electric line satisfies these concerns. Once ECEP has completed its negotiations with Jackson, it should include a copy of the signed agreement, which demonstrates that Jackson has independent access to the facility, in its annual report to the Board.

Periodic Reports

Finally, the Board is aware that many of ECEP's proposed plans and agreements have not been finalized. If ECEP fails to honor the commitments it has made to this Board, it would substantially affect the projected impact of the proposed plant on the region. For these reasons, the Board has a responsibility to make every effort to ensure that the project is constructed as ECEP has represented throughout this proceeding. To that end, the Board finds that the submission of an annual project impact report would successfully mitigate any adverse impacts caused by the inherent uncertainty of this project.

Each of the preceding final Board Orders has included as the initial section of their Appendix A a set of "Monitoring Program and Reporting Requirements." Applicant has likewise proposed those requirements in its Proposed Appendix A attached to its Post-Hearing Brief. These annual reports, the first of which is due 1 year from the date of this Order, keep the Board updated on the progress of the plant. Among other requirements are those included under the section of Part B, entitled "Public Comments and Responses," which require Applicant to report all comments and complaints to the Board. Further, under Part C, the Board will make a final site visit, when it will ensure

that the plant was built according to the conditions the Board requires. As a part of this final visit, the Board may inquire about any complaints Applicant has received since the plant began operations. Given these reporting requirements, the Board does not need to decide the issues raised by several of Brighton's recommendations regarding continuing jurisdiction by the Board after construction is complete.

CONCLUSIONS

After carefully considering the criteria outlined in KRS 278.700 through 278.716, the record in this case, and arguments of counsel for all parties, the Board finds that ECEP has presented sufficient evidence to obtain the requested certificate to construct the subject merchant generating plant, subject to all conditions and mitigation measures discussed in this Order. Accordingly, the Board conditions this approval upon the implementation of the measures described in this Order and its Appendix.

Initially, to demonstrate that Applicant has the right to build on the proposed location, Applicant shall make a filing with the Board to demonstrate a possessory right to the site. This filing shall include (1) deeds, a certified boundary survey, or other proof of ownership or right of possession, and, if the boundaries differ from those included in the application, (2) a supplement to the original site assessment report, indicating all changes necessitated by resolution of the property dispute. With regard to the first point, ECEP shall demonstrate either (1) that Applicant itself has property rights independent of Fox Trot Properties, or (2) that Fox Trot Properties has property rights and ECEP has an option, lease, or some other contract with Fox Trot Properties giving Applicant property rights sufficient to construct and operate the proposed plant.

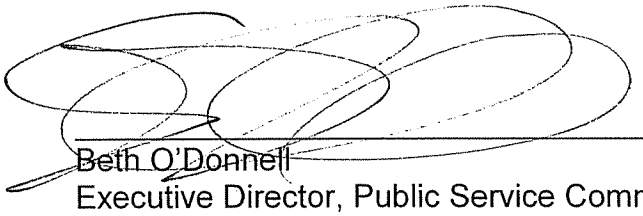
Before ultimately building the plant, ECEP will need to inform the Board of its acceptance of all other conditions required by this Order. Because the Board will be issuing another Order in this case after reviewing the supplemental site assessment report, ECEP may either accept those conditions now or after the subsequent Order. Therefore, within 10 days of the date of this Order, ECEP shall either file with the Board a written statement indicating whether it accepts each and every condition and commitment set forth in this Order and its Appendix, or file a statement indicating it will defer filing such a statement until after issuance of the Board's subsequent Order ruling on the supplemental site assessment report.

IT IS SO ORDERED.

Done at Frankfort, Kentucky, this 12 day of October, 2004.

By the Board

ATTEST:



Beth O'Donnell
Executive Director, Public Service Commission
On behalf of
The Kentucky State Board on Electric
Generation and Transmission Siting

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY STATE BOARD
ON ELECTRIC GENERATION AND TRANSMISSION SITING
IN CASE NO. 2002-00172 DATED OCTOBER 12, 2004.

MONITORING PROGRAM AND REPORTING REQUIREMENTS

The following monitoring program is to ensure that a proposed merchant plant is constructed as the application has represented throughout the siting process:

A. ECEP shall file an annual report throughout the duration of the construction of its facility. The initial report shall be filed within 1 year of the date of this Order. Subsequent reports shall be filed annually.

B. The report shall be filed in the form of a letter to the Chairman of the Kentucky State Board on Electric Generation and Transmission Siting. The report shall contain the following sections:

- Overview -- ECEP shall provide a short narrative summary of the project's progress or any changes that have occurred since the last report. ECEP shall also identify the primary contractor(s) responsible for the largest portion of the construction effort, if applicable.
- Implementation of Site Development Plan -- ECEP shall describe: (1) the implementation of access control to the site; (2) any substantive modifications to the proposed buildings, transmission lines and other structures; (3) any substantive modifications to the access ways, internal roads and railways serving the site; and (4) development of utilities to service the site. A map must accompany any change in the above four items.

- Local Hiring and Procurement -- ECEP shall describe its efforts to encourage the use of local workers and vendors. At a minimum, ECEP shall include a description of the efforts made by it and by its contractors and vendors to use local workers and local vendors to build and operate this project. ECEP shall also include, at a minimum, an informed estimate of the proportion of the construction and operational workforce that resided in the region (e.g., 50-mile radius) of the plant site prior to coming to work at the site.
- Public Comments and Responses -- ECEP shall provide a summary of any oral, telephone, e-mail, or other written complaints or comments received from the public during the intervening period since the last report. ECEP shall also summarize the topics of public comments, the number of comments received, and its response to each topic area. Original complaints and comments should be attached in their original form, including telephone transcriptions.
- Specific Mitigation Conditions -- ECEP shall provide a brief narrative response to indicate its progress, any obstacles encountered, and plans to fulfill each condition or mitigation requirement required by the Board.

C. Within 6 months after the conclusion of construction, ECEP shall schedule a final site visit from the Board, its staff and its consultants, to review and ascertain that the constructed facility followed the description provided by ECEP in its site assessment report and that the mitigation conditions imposed by the Board were successfully

implemented. ECEP shall also submit "as built" plans in the form of maps that illustrate the implementation of the Site Development Plan.

SPECIFIC CONDITIONS IMPOSED

D. ECEP shall provide access control and security that meets industry standards suitable to its particular operation. Listed below are industry standards that the Board considers appropriate. If ECEP subsequently determines that there is a preponderance of industry standards, which suggest an exception to these standards, it may request and substantiate such an exception in its periodic compliance reports.

1. Twenty-four-hour, seven-day-a-week security monitoring of the site and site entry will be performed by trained personnel or a third-party security provider. Only persons approved for work or visitors having legitimate business on the site will be allowed access. Access for site personnel will be via a security gate controlled by site security.

2. Approved parking areas for employees (inside or outside the secured area).

3. The secured area must be lighted along the fenced perimeter and directed away from off-site locations.

4. Storage buildings with hazardous or dangerous chemicals must be secured with a lock.

5. Access to waste disposal area must be locked.

6. Only personnel who have attended an induction course, including safety, are permitted to work on-site.

7. All employees and subcontractors must have a security pass that must be carried at all times.

8. All commercial vehicle drivers delivering or removing materials to or from the site must first register with ECEP security.

9. All drivers will be subject to examination and only those holding the necessary documents for type of vehicle or equipment they may operate will be allowed on the premises.

10. All vehicles entering or leaving the site shall be subject to search by ECEP security.

11. Post a vehicle speed limit of 15 mph throughout the proposed facility.

12. ECEP shall develop security procedures for the delivery of coal to the facility by rail.

E. ECEP shall ensure that the building contractors responsible for the facility's construction select neutral background colors for the stack and facility that will minimize contrast with existing surroundings, following industry standards.

F. ECEP shall instruct its contractors to design the relevant facilities to meet established noise criteria and minimize off-site noise impacts to the extent practicable, following industry standards.

G. To reduce noise impacts from steam blows, ECEP shall ensure that its contractors install silencers, following industry standards.

H. ECEP shall make reasonable efforts to hire workers, vendors, and contractors from the local area. A worker hired from the local area is one that can

commute daily to the plant site from his or her primary residence that existed prior to employment at the ECEP site.

I. ECEP shall instruct its contractors to design the lighting of the relevant facilities to minimize off-site glare, following industry standards.

J. Upon construction of the proposed industrial access road, truck traffic should be required to directly access KY 499 via the industrial access road, in lieu of Coal Wash Road.

K. ECEP shall utilize on-site waste coal as represented in its application.

L. A certified boundary survey shall be obtained and recorded in the Estill County Court Clerk's Office by ECEP, or an affiliate of ECEP as lessor to ECEP, for the real property upon which ECEP will construct the facility and upon which on-site waste coal will be mined as a fuel source for the facility.

M. The new facility access road and permanent roads within the site will be paved to minimize fugitive dust.