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September 13, 2004

Beth O'Donnell, Executive Director
Kentucky State Board on Electric Generation and Transmission Siting
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

RE: Estill County Energy Partners, LLC
Case No. 2002-00172
Post-Hearing Brief

Dear Ms. O'Donnell:

Estill County Energy Partners, LLC ("ECEP") is submitting the enclosed Post-Hearing Brief for the Siting Board.

ECEP is submitting with this letter an original and ten (10) paper copies of the Post-Hearing Brief. ECEP will also file the Post-Hearing Brief electronically on this date and provide a copy to all parties of record. A copy of the receipt for the electronic filing will be sent to your office via telecopy after the Post-Hearing Brief is filed electronically.

Sincerely,



Lisa E. Underwood
Attorney for Estill County Energy Partners, LLC

cc: Parties of Record

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)	

POST-HEARING BRIEF
OF
ESTILL COUNTY ENERGY PARTNERS, LLC

September 13, 2004

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Estill County Energy Partners, LLC ("ECEP") respectfully submits this Post-Hearing Brief to the Kentucky State Board on Electric Generation and Transmission Siting ("Board").

I. INTRODUCTION AND SUMMARY

A. The Project

ECEP proposes to construct an approximately 110 MW merchant power generation facility (the "Facility") on a 620 acre site located in Estill County, Kentucky, on Coal Wash Road¹ between the town of Irvine and a large bend of the Kentucky River (the "Site"). ECEP Response to No. 10 of Staff's First Data Request and revised Exhibit B (7/01/04). The Facility will be constructed on a 28-acre portion of the Site where a former coal washing plant is currently located ("Facility Site"). Tr. 121:4-15; Application at 6, and revised Exhibit G (7/01/04) in ECEP Response to No. 13 of Staff's First Data Request. The estimated cost to construct the Facility is \$150 million. Application, p.6. Tr. 51:3-4. The remainder of the Site contains piles of waste coal that were generated from the operation of the former coal processing plant. Application, p.6. ECEP proposes to reclaim this on-Site waste coal for use as the primary fuel source for the Facility.

¹ Coal Wash Road is accessed via Kentucky Highway 89 from Highway 499. Application, Tab A.

The Site is bounded on the west by the Kentucky River and is bisected from north to south by a main line of the CSX railroad. The Site has been extensively developed to support operation of a large-scale coal processing plant. *Id.* Existing development on the Site includes a coal preparation building, thermal dryers, coal storage yard, conveyors, conveyor tunnels, railcar dump facility, truck scales, river water intake structure, river water discharge structure, rail sidings, maintenance shops, warehouses, administration buildings and a former private airstrip, all of which are no longer in use. *Id.* Coal processing operations at the Site ceased in the late 1990's after which the owner, Kentucky Processing Company ("KPC"), was liquidated in connection with a bankruptcy proceeding.

ECEP will dismantle these rusty, abandoned heavy industrial structures as necessary to construct the Facility. Tr. 146:2-9; ECEP Response to No. 20 of Staff's First Data Request. ECEP has based the design of the Facility on conventional power technologies, including a circulation fluidized bed ("CFB") boiler designed to burn waste coal, a steam turbine generator, condenser, cooling towers, exhaust stack, coal and ash storage and handling equipment, electric transformer and switchgear, emissions control equipment and all necessary balance of plant equipment. The Facility will be designed and constructed to meet all relevant air, water, solid waste and other environmental permit requirements. Some existing structures, such as warehouses, maintenance shops, river water intake structure, railcar unloading facility, conveyor tunnels and administration buildings may be reconditioned for use in connection with the operation of the Facility. The private airstrip will not be used in the future and will be eliminated through recovery of waste coal upon which the airstrip was constructed.

The former coal processing operations generated more than 30 million tons of waste coal refuse, which will be recovered from the Site and used as the primary fuel source for the Facility.

ECEP estimates that the Site contains 25-30 years of waste coal reserves. Tr. 97:5-21. As the waste coal is burned by the Facility, portions of the Site will be reclaimed and permitted as a disposal area for ash from the Facility. Application at 8. Due to the expected variability of the waste coal quality, a small amount of additional regional coal, constituting 5-10% of total fuel consumed in the Facility, will be delivered, stockpiled and blended at times with the on-Site waste coal to assure a consistent boiler fuel for reliable operations. Application at 8; Tr. 97:22-98:5.

The proposed project will provide significant benefits to Estill County and the Commonwealth of Kentucky:

- First and foremost, it will provide an estimated 100 jobs in and around Estill County, of which 46 will be permanent, skilled jobs after construction is completed, as well as a major addition to the tax base in the County. The Kentucky Cabinet for Economic Development estimates that construction of the project will add \$118.4 million of total value to Kentucky and that operation of the project will add \$13.4 million of annual value. Application at 21 and Tab K.
- The project also will clean up the Site which has been severely impacted by the former coal processing operations that were conducted there. Indeed, the project will actually improve the Site by replacing rusted, abandoned coal processing facilities with a modern power generation facility, painted in neutral colors to reduce its visibility, and by consuming as fuel the massive piles of waste coal that now burden the Site and returning stable ash from the combustion process in accordance with modern mining reclamation standards. A blighted community eyesore will be converted to a community benefit that will help attract additional investment to the adjacent Estill County Industrial Park.

- Primarily for these reasons, the ECEP project enjoyed broad support from the local community at the local public hearing held in Irvine on August 5, where eight speakers, including the Mayor of Irvine and an Estill County Magistrate, spoke in favor of the project. Speakers supporting the project also included a representative of the Estill County Development Alliance, who stated that the Alliance, whose mission is to improve the quality of life in the County, had adopted a resolution supporting the project and a Mr. Tipton, who presented compelling testimony quantifying the massive waste of commuting time and expense incurred by residents of Estill County due to the lack of jobs in that community. Only two speakers opposed the project.

- Estill County will recover certain unpaid property taxes due and owing on the Site. Tr. 143:12-21.

- The project will promote the policy of the General Assembly to encourage the use of coal as a principal fuel for electricity generation as set forth in KRS 152.210.

- The project will provide an additional supply of electric power in the Kentucky wholesale power market.

In support of its Application, ECEP presented two witnesses at the evidentiary hearing, Gerard Mack, who is the Project Manager, and Dell Jagers, Vice-President of CBC Engineers and Affiliates, which has served as consultant to ECEP on permitting and real estate matters.

B. The Intervenors

Despite the clear economic and community benefits that will be provided by construction of the proposed Facility, ECEP's Application is opposed by certain intervenors, who are committed to blocking the project in order to serve their own interests.

A trust for members of the LaViers family ("LaViers Trust") that formerly owned or controlled South East Coal Company ("South East Coal"), a former owner of the Site, intervened to claim ownership of a small parcel of land at the far eastern edge of the Site, called the Calla Subdivision, and another parcel outside the Site, called the Sand Hill Property. Testifying as Trustee of the LaViers Trust was Harry LaViers, who was the owner of South East Coal. DLX, Inc. ("DLX"), which purchased the Site out of the bankruptcy of South East Coal, intervened to claim ownership of a parcel on the Kentucky River on which a waste coal pile is located (the "Refuse Pile Tract") and an associated right-of-way. DLX's claim has been asserted in pending litigation before the U. S. Bankruptcy Court for the Eastern District of Kentucky ("Bankruptcy Court"). DLX also asserted that the Bankruptcy Court proceeding includes a DLX claim to ownership of the Facility Site. DLX's own evidence shows that this claim is not covered by the Bankruptcy Court proceeding. Testifying for DLX was Donald LaViers, son of Harry LaViers, who owns DLX. DLX and the LaViers Trust have no interest other than using this proceeding to seek advantage for their real estate claims.

The other intervenor, Will Herrick, resides on property located in Lee and Wolfe Counties. Tr. 9-18. He intervened out of concerns about the environmental impacts of the proposed Facility, based on his use of a pond on his land and on his potential interest in visiting the Great Smoky Mountains. Mr. Herrick requests the Board to consider the "potential environmental disbenefits" of the proposed Facility when considering the economic impact of the proposed project. At the evidentiary hearing, Mr. Herrick went further to oppose the project on a number of other grounds.

C. Real Estate Matters

Perhaps the most contentious, and time-consuming, issue at the evidentiary hearing addressed the proper treatment of the claims in this proceeding of DLX and LaViers Trust. This

was unfortunate, because it may actually have detracted from the Board's understanding of the actual nature of these claims. As will be shown below, the extent of the DLX claims in the Bankruptcy Court proceeding can be readily understood by a brief review of the ownership history of the Site and only one document -- the Lis Pendens filed by DLX in the Bankruptcy Court.

Coal processing operations were begun on the Site by South East Coal, which owned the Site. In or around 1993, South East Coal was bankrupted, and the Site was acquired by DLX, which was owned by Donald LaViers, son of the majority owner of South East Coal, Harry LaViers. In 1994, DLX sold the Site to KPC, which was owned by Charles E. Yates. KPC conducted coal processing operations on the Site until 1998, when it encountered business hardships and filed a Chapter 11 bankruptcy case. In 2001, a plan for liquidation of KPC and distribution of its assets was confirmed by the Bankruptcy Court. *See* ECEP Response to No. 10 of Staff's First Data Request, *In the Matter of Kentucky Processing Company, et al*, United States Bankruptcy Court for N. Eastern District of Kentucky, Case No. 98-522637, Corrected Amended Disclosure Statement to Accompany Debtor's Amended Plan of Orderly Liquidation and Distribution ("KPC Liquidation Plan Disclosure Statement") dated February 19, 2001. The KPC Liquidation Plan Disclosure Statement accompanying that plan stated, on page 18, that "the Debtor [KPC] is now closed, does not anticipate reactivation and will have no future operations" and that "the debtor will never conduct any future operations, but will be construed to be defunct."

In connection with implementation of the Plan, the Bankruptcy Trustee sold the Site at auction to Fox Trot Properties, LLC ("Fox Trot Properties") under a contract dated July 20, 2001. Fox Trot Properties is owned and controlled by Fox Trot Corporation, which is owned by

Jacquelyn Yates, wife of Charles E. Yates.² Mrs. Yates also is the owner of Calla Energy Holding, LLC, ("CEH"), which owns ECEP. Thus, Mrs. Yates controls both the contract buyer of the Site, Fox Trot Properties, and ECEP, which will lease the Site from Fox Trot Properties.

Before the auction sale of the Site, DLX had filed an adversary proceeding in the Bankruptcy Court seeking reformation of the deed conveying the Site to KPC in an effort to exclude the Refuse Pile and a right-of-way thereto and filed a Lis Pendens on the property affected by its claims. A copy of that Lis Pendens, which is contained in Exhibit J to the Direct Testimony of Donald LaViers, is attached to this Post-Hearing Brief for reference. On page 2, the DLX Lis Pendens states that "[T]he property that is affected by DLX's claims in the [Bankruptcy proceeding] to reform part of a description in the deeds is more fully described in Exhibit 1 (taken from the proposed deed of correction) which is attached hereto and is incorporated herein by reference." Exhibit 1 to the DLX Lis Pendens is a written metes and bounds description of the Refuse Pile Tract claimed by DLX, and the survey shown on Exhibit A to Exhibit 1 is the "Hall Survey" prepared by DLX's own surveyor, Richard W. Hall. The Hall Survey graphically depicts the written metes and bounds description of the Refuse Pile Tract as the lines marked with courses and distances corresponding to the written description. The Hall Survey shows as not included in the Refuse Pile a trapezoidal parcel that adjoins the Refuse Pile Tract to the east and is not delineated by courses and distances ("Adjoining Trapezoidal Parcel"). This Adjoining Trapezoidal Parcel is the property on which the abandoned coal processing plant is now located and on which the proposed Facility will be built, the Facility Site.

At the hearing in this proceeding, DLX asserted that its claim in the Bankruptcy Court included not only the Refuse Pile Tract and right-of-way, but also the Facility Site and was

² There is nothing unusual about this transaction, which is quite similar to the earlier acquisition of the Site by DLX, owned by Donald LaViers, out of the bankruptcy of South East Coal, owned by his father, Harry LaViers.

allowed to introduce Exhibits DLX-1 and DLX-2³ to support that claim. Specifically, Donald LaViers testified at the hearing that the yellow line on Exhibit DLX-1 tracked the Hall Survey used by DLX to delineate the property claimed by DLX in that case and that the claimed area included the Facility Site. Mr. Mack and Mr. Jagers, both of whom previously had reviewed the Hall Survey, testified strongly to the contrary.

Even a cursory comparison between the Hall Survey attached to the DLX Lis Pendens and Exhibit DLX-1 shows a major discrepancy between the two maps. The Hall Survey shows the property claimed by DLX in the Bankruptcy Proceeding -- the property bounded within the lines with courses and distances -- **does not include** the Adjoining Trapezoidal Parcel where the Facility will be built.⁴ The yellow line superimposed by DLX on Exhibit DLX-1, which Donald LaViers represented to the Board as depicting the property claimed by DLX in the Bankruptcy Court, **does include** this Adjoining Trapezoidal Parcel. The yellow line superimposed by DLX on Exhibit DLX-1 is not the Hall Survey line. This is the obvious and fundamental discrepancy to which Mr. Jagers referred during his redirect testimony at the hearing:

- Q. Okay. Now, I understood Mr. Donnie LaViers to testify that the yellow lines - well, to testify that the yellow lines shown in the portion of the property - I'm on DLX-Exhibit 1 - represent property that they have claimed an ownership in the bankruptcy court, Did you understand that?
- A. Say that again for me, please.
- Q. Sure. I'm referring not to the Calla Subdivision but to the yellow lines in the bend of the Kentucky River.
- A. Yes.
- Q. Do you see that?
- A. Yes.

³ DLX-1 appears to have been developed by superimposing lines and other revisions made by DLX onto the originally filed version of ECEP's Site Boundaries Map Exhibit B, dated May 4, 2004, prepared by CBC. Tr. 282:18-288:24, 291:16-293:23-294:1, 295:1-8. DLX-2 appears to superimpose the same DLX lines and other revisions on the originally filed version of ECEP's Exhibit G Facility Site Layout Map, also dated May 4, 2004 and prepared by CBC. For the purposes of this discussion, DLX-2 amounts to a close-up of DLX-1, showing the same information in more detail. Mr. Jagers stated for the record his objection to the continued presence of CBC's name on DLX-1 and DLX-2.

⁴ Counsel for DLX made it clear at the hearing that a recordable survey covers the property bounded within lines marked by courses and distances. Tr. 14:20-165:17.

- Q. Now, I understood Mr. Donnie LaViers to testify that those yellow lines refer to property that DLX claims in the bankruptcy proceeding is owned by DLX. Do you understand that?
- A. That's what I heard him say.
- Q. Is that correct?
- * * *
- A. And the problem I had earlier with the questioning when these maps were first presented to me was that the property boundary that I have always seen and has been explained to me as being in dispute is not at all represented by what's on this map.
- Q. By "under dispute," do you mean in the bankruptcy proceeding?
- A. Yes.
- Q. All right, can you explain what you mean?
- A. I mean that the boundary expands out further in an easterly direction than what was under dispute. What was under dispute has always been referred to as the river refuse pile, and this goes way out beyond the river refuse pile.
- Q. And what's the effect of going to the east of the line you understand to be the right line?
- * * *
- A. And your question again?
- Q. The question was, you testified just a moment ago that the boundary goes substantially to the east of where you understood the boundary to be. By "boundary," I mean the disputed boundary, the boundary that's in dispute in the bankruptcy case.
- A. It goes beyond that on two things. Any of the maps that I have previously seen and also the map that they represent as the Richard Hall boundary, survey boundary, are not the same as this one that's plotted on this map at all.
- Q. And does the effect of that include on – or how does the difference between the yellow line, this boundary on this map, and the Hall boundary, how does that relate to the location of where the proposed power generation facility would be?
- A. The one that's on the disputed boundary or the Hall survey tract follows the refuse pile. This one extends all the way out into where Kentucky Processing operated their coal preparation facility for years and where the proposed power plant is actually purported or planned to be constructed.
- Q. And if it, in fact, followed the Hall Survey, would the area include the proposed site for the power generation facility?
- A. No.
- Q. I'm sorry?
- A. No, it would not.

Tr. 296:24-300:16. The DLX Lis Pendens clearly confirms Mr. Jagers' testimony. The DLX yellow line on Exhibit DLX-1 **does not follow the Hall Survey**, as DLX represented to the Board. Tr.253:2-5. Instead, the yellow line placed by DLX on Exhibit DLX-1 **follows the**

eastern boundary of the Adjoining Trapezoidal Parcel, which is outside the Refuse Pile Tract. The Refuse Pile Tract claimed by DLX in the Bankruptcy Court adversary proceeding **does not include the land on which the Facility will be built**. Exhibit 2 to the DLX Lis Pendens further affirms that DLX's claims in the Bankruptcy Court **do not include** the parcels north and east of the Refuse Pile Tract, including the Facility Site.

Several things are now clear. First, DLX's own Lis Pendens shows that DLX's claim in the Bankruptcy Court does not include the Facility Site, and the testimony of Mr. Donald LaViers, his Exhibits DLX-1 and DLX-2, and the statements of his counsel to the contrary were all false. Tr. 25:24-26:21, 265:3-19, 253:2-5. Second, DLX's claim in the Bankruptcy Court is limited to the Refuse Pile Tract which Mr. Mack testified is not required to construct the project. Third, as Mr. Harry LaViers testified, there is no pending litigation asserting any claim by the LaViers Trust to the Calla Subdivision, which Mr. Mack testified contained no waste coal to be reclaimed. Fourth, the Sand Hill property is outside the Site and is irrelevant to any real estate claims with respect to the Site.⁵ Finally, DLX's repeated statements that it is the "record owner" of the Site are also false. DLX is merely litigating a claim to the Refuse Pile Tract in the Bankruptcy Court. In fact, the Estill County Property Valuation Maps show KPC as the owner of the Site. Tr. 296:16-23.

The only real estate claim to any part of the Site that has been formally asserted by either DLX or LaViers Trust is the DLX claim to the Refuse Pile Tract, which represents only 80 acres of the 620 acre Site. Mr. Mack made it clear that a Bankruptcy Court decision in favor of DLX would not prevent construction of the Facility, his estimate of 25-30 years of Btu reserves from

⁵ On page 5 of their Motions To Intervene, filed July 14, 2004, DLX and LaViers Trust claimed to own the Sand Hill property by virtue of a 1995 deed. In its July 20, 2004 Response opposing those Motions, ECEP advised the Board that the Estill County Property Valuation Assessment Maps show Joyce Marcum as owner of the Sand Hill property; see also ECEP Response to No. 1 of Staff's First Data Request. On page 3 of his Direct Testimony, Harry LaViers admitted he had deeded the Sand Hill property to Ms. Marcum but claimed it was still owned by the Trust.

the on-Site waste coal or change his estimate that 5-10% of total fuel that would come from off-Site coal. Tr. 123:4, 124:5; 155:22-156:9. It also would have no impact on the anticipated truck traffic impacts. Tr. 124:16-25. Given the pendency of the Bankruptcy Court proceeding, the only fair resolution of this issue is to adopt the survey condition proposed in Applicant's Exhibit 2, which preserves DLX's position as to the Refuse Pile Tract but which allows the Facility to be built once financing is in place.

II. THE BOARD MUST CONSIDER ECEP'S APPLICATION BY APPLYING THE STATUTORY CRITERIA PRESCRIBED BY KRS 278.710

The proposed Facility will be a "merchant generating facility" as defined in KRS 278.700(2).⁶ Under KRS 278.704, no person may commence to construct a merchant electric generating facility until that person has applied for and obtained a construction certificate "for the facility from this Board." KRS 278.706 states that any person seeking to obtain a "construction certificate" from the Board "to construct a merchant electric generating facility" must file an application therefore at the Public Service Commission and further prescribes the contents of a completed application. KRS 278.700(1) states that the Board is created in KRS 278.702, which statute establishes the Board, and addresses a number of organizational and procedural matters but does not assign specific duties to the Board. The Board's duties are prescribed by KRS 278.710(1), which provides that, within a specified time period after receipt of an "administratively complete application" the Board "shall, by majority vote, grant or deny a construction certificate based upon the following criteria, "which are listed in subsections (a) through (i). Subsection (2) provides further that the Board, when considering such an

⁶ KRS 278.700(2) provides, in pertinent part, that "merchant electric generating facility" means "an electric generating plant, together with associated facilities, that:

(a) is capable of operating at a capacity of 10 megawatts (MW) or more; and

(b) sells the electricity it produces in the wholesale market, at rates and charges not regulated by the [Kentucky] Public Service Commission."

application, "may consider the policy of the General Assembly to encourage the use of coal as a principal fuel for electricity generation as set forth in KRS 152.210," subject to the facility's compliance with certain other statutory requirements.

The Board is limited by Kentucky law to applying only the criteria specifically prescribed by its authorizing statutes and regulations, and cannot expand its approval process beyond these limits: "Administrative agencies are creatures of statutes and must find within the statute warrant for the exercise of any authority which they claim." *Dept. for Nat. Resources and Env. Protection v. Stearns Coal and Lumber Co.*, 563 S.W.2d. 471, 473 (Ky. 1978). "Powers not conferred upon an agency are just as plainly prohibited as those which are expressly forbidden. When powers are given to be performed in a specific manner, there is an implied restriction upon the exercise of those powers in excess of the grant." *Johnson v. Correll*, 332 S.W.2d. 843, 845 (Ky. Ct. App. 1960).

The Board itself has recognized that it must grant or deny a certificate only on the basis of the criteria contained in KRS 278.710(1). In *Application of Thoroughbred Generating Co., LLC ("Thoroughbred")* Case No. 2002-00150, an intervenor wanted the Board to address air pollutions and emissions. The Board refused, stating that the Natural Resources and Environmental Protection Cabinet has jurisdiction over these issues and that the Board has no jurisdiction over emissions or discharges. In its July 23, 2004 Order in this proceeding, the Board stated that "the issues to be litigated in the case are limited to those delegated by the General Assembly" in KRS 278 and the Board "will not adjudicate" real estate claims "or any other issues beyond those delegated to it" by KRS 278.

ECEP filed its application to the Board for a construction certificate on June 14, 2004, in accordance with the requirements of KRS 278.706(2), which sets out what constitutes a

"completed application," and 807 KAR 5:110, Section 2, governing the filing of such applications. Subsection (3) of 807 KAR 5:110, Section 2 states that "Administrative staff for the board will determine whether the application is administratively complete and shall inform the applicant of its determination by letter." This determination of administrative completeness triggers the statutory requirements in KRS 278.710 that the Board grant or deny, within the prescribed time period, a construction certificate based on the criteria listed in KRS 278.710(1)(a)-(i). On June 17, 2004, the Board's Executive Director issued a letter to ECEP stating that ECEP's Application meets the Board's filing requirements, that the Application had been docketed as Case No. 2002-00172 and would be processed as expeditiously as possible ("Notice of Completeness Letter"). Accordingly, the Board must consider ECEP's application based solely on the specific criteria listed in KRS 278.710(1)(a)-(i).

III. ECEP HAS COMPLIED WITH THE REQUIREMENTS FOR A COMPLETED APPLICATION

The opponents of the proposed Facility argued at the evidentiary hearing that ECEP's Application was incomplete for not including a recordable metes and bounds survey of the Site. The Board must reject this claim, which is contrary to Kentucky law and the facts.

KRS 278.708(2)(a) provides that a completed application include "a full description of the proposed site, including a map showing the distance of the proposed site from residential neighborhoods, the nearest residential structures, schools and public and private parks that are located within a two (2) mile radius of the proposed facility." KRS 278.710(1) and KRS 278.708(3)(a)2 combine to provide that a completed application include within the Site Assessment Report "a description of the proposed facility that shall include a proposed site development plan that describes . . . the legal boundaries of the proposed site." To meet these

requirements, ECEP's Application filed June 14, 2004 included two separate descriptions of the Site, together with a Two Mile Vicinity Map and a Site Boundaries Map.⁷ Application at 6-10, 23-25, and Tab A and Tab B. Brighton A&E Inc. ("Brighton"), the Board's consultant, was able to determine the legal boundaries of the Site from the information filed in the Application and verified the accuracy of the maps provided in the Application by comparison to the Estill County tax maps. Brighton Report at C-7--C-8.

On July 27, 2004, the Board's Staff, through the Executive Director, issued to ECEP the Notice of Completeness Letter stating the Staff's determination that the Board's minimum filing requirements had been met. Authority to make this determination, which 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) had been delegated to the Staff by 807 KAR 5:110, Section 2(3). Based on that determination, the Board commenced its consideration of ECEP's Application, which must be completed within 120 days after the date of the Notice of Completeness Letter.

Accordingly, the Board, through the Staff as its delegee, already made on July 17, 2004 the determination, as required by statutory law and the Board's regulations, that ECEP's Application met the requirements of a completed application. The Board may not now ignore or violate its own regulations by countermanding its own determination duly made in accordance with those regulations. *Phelps v. Sallee*, 529 S.W.2d. 361 (Ky. Ct. App. 1975) (unless the statute creating the agency specifically confers the power to change a ruling regarding notice and the need for an evidentiary hearing, it has no power to do so).

In any event, the referenced portions of the Application and the referenced maps comply fully with the requirement of KRS 278.710(l) and KRS 278.703(3)(a)2, which, taken together,

⁷ ECEP's July 28, 2004 response to Staff's First Data Request Nos. 10 and 11 provided an Amended Site Boundaries Map and provided supporting deeds. ECEP's July 28, 2004 response to the Staff's First Data Request No. 1 also provided an Adjacent Property Owners Map showing property lines of the Site and of adjacent landowners.

call for a "description" that includes a "development plan" that "describes" the legal boundaries⁸ and do not require a formal, recordable metes and bounds survey. The term "survey" connotes a metes and bounds property description. Opinion of the Attorney General, OAG 66-575. If the General Assembly had intended to require a survey, it could have specified that applications under KRS 278.700, *et seq.* include a survey. It did not do so, however, and the Board may not usurp the function of the General Assembly by requiring one.

IV. ECEP HAS SATISFIED THE STATUTORY CRITERIA, AND THE BOARD SHOULD ISSUE A CONSTRUCTION CERTIFICATE TO ECEP SUBJECT TO APPROPRIATE CONDITIONS

In addition to the many benefits the project will provide, ECEP has satisfied all applicable statutory criteria for approval of its Application. The Board has developed an Appendix A to its prior orders containing a standardized Monitoring Program and Reporting Requirements, to insure that a proposed merchant plant is constructed as an application has represented throughout the siting process, and Specific Conditions Imposed on each certificate. ECEP has developed for the Board's consideration a Proposed Appendix A to its order in this proceeding, which contains (1) the Monitoring Program and Reporting Requirements used in prior cases; (2) certain Specific Conditions Imposed that have been used in prior orders to address issues presented in this case; (3) conditions that have been proposed by ECEP and others in this case; and (4) a few new conditions that address issues unique to this case. ECEP urges the Board to adopt the Proposed Appendix A for use as the Appendix A to an order issuing a construction certificate to ECEP.

The following describes how ECEP has satisfied each requirement of KRS 278.710.

⁸ The term "legal boundary" has been used in Kentucky case law only to refer to the boundaries of a municipality or state. See *City of Matthews v. City of Beachwood*, 373 S.W. 2d 427, 1963 Ky. LEXIS 161; *Belknap v. City of Louisville*, 93 Ky. 444, 20 S.W. 309, 1892 Ky. LEXIS 107; *Bruce v. Morgan*, 40 Ky. 26, 1840 Ky. LEXIS 65; *Camp v. Prather*, 46 Ky. 599, 1847 Ky. LEXIS 84.

A. Impact of the facility on scenic surroundings, property values, the pattern and type of development of adjacent property, and surrounding roads. KRS 278.710(1)(a).

1. *Compatibility with scenic surroundings.*

ECEP proposes to construct the Facility on the site of a former coal washing plant. The Site has been extensively developed during the past 47 years to support operation of a large-scale coal processing plant and its associated refuse disposal area. Local residents and property owners are accustomed to existing industrial facilities and have made property decisions and investments with knowledge of the history of large scale industrial facilities and industrial operations on the Site.

The Facility will be compatible with, and will generally improve, the Site appearance with regard to the scenic surroundings. Appearance of the Site will be maintained or improved in the following areas:

- a. As on-Site waste coal is reclaimed to fuel the Facility, the Site will be reclaimed to the standards of the Kentucky Department for Surface Mining, Reclamation and Enforcement;
- b. Replacement of an assortment of large deteriorating structures with a well-organized and modern industrial facility will enhance appearance of the Site;
- c. The Facility will be located on the Site to minimize its impact on the viewshed from surrounding communities and areas;
- d. To minimize impact on the surrounding land owners, ECEP has requested Kentucky Utilities ("KU") to allow the replacement 161-kV line to be installed within the rights of way currently containing the 69-kV line;
- e. Direct access to the Site will be provided from the Highway 499 bypass which was constructed to alleviate any traffic congestion issues for the industrial development sites;
- f. The Facility will withdraw and discharge water to the Kentucky River adjacent to the Site to avoid construction of water lines across new off-site rights;

- g.** The Facility will primarily be fueled with waste coal recovered from the Site, minimizing rail or truck traffic associated with delivering fuel from off-site sources; and
- h.** Ash generated by operation of the Facility will be placed for disposal on-Site, eliminating truck transportation for off-site disposal except where such ash may be useful as stable fill to support off-site economic development.

The Viewshed Cross-Sections submitted by ECEP indicate that the Facility exhaust stack may be visible from several immediately adjacent areas, but will not be visible from the majority of the nearest communities because of topography between the Site and the communities.

Application, Tab E.

The Board's consultant for this proceeding, Brighton, conducted a comprehensive review of the Facility's compatibility with scenic surroundings. Brighton Report at C-19--C-24. Brighton confirmed that "removal of the existing [coal processing plant] facilities will improve the appearance of the site." The scenic viewshed analysis demonstrates that "the proposed facility is not observable to most of the community observation points" and that the proposed Facility will not severely impact the scenic viewshed of the area if ECEP utilizes neutral colors to minimize the impact on the scenic surroundings and if off-site glare from lighting is minimized to industry standards. See Brighton recommendation Nos. 7 and 8, Brighton Report at D-3.

ECEP does not object to implementing Brighton's recommendations, Application at C-24, and has included them as Specific Conditions E and H in its Proposed Appendix A.

2. *Potential changes in adjacent property values.*

Siting, construction and operation of the ECEP Facility is expected to have no detrimental effect on adjacent property owners. Application at 32. ECEP submitted an in-depth Real Property Value Impact Study prepared by Commonwealth Guaranty, Inc., of Berea,

Kentucky, based on nine years of experience in appraising properties (including more than 1,700 appraisal assignments) in Estill County. Application, Tab I. This report concluded that the project will have no detrimental effect for adjacent property owners and may actually increase adjacent property values due to employment opportunities directly and indirectly resulting from the project. Application at 28-29.

Brighton reviewed the Real Property Value Impact Study. Brighton Report at C-25--C-27. Brighton found that this appraisal report considered and applied all relevant approaches to value and its value impact conclusion to be realistic and adequately supported. Brighton Report at C-27.

3. *The pattern and type of development of adjacent property.*

Accordingly, the Facility will be located on the site of a former coal processing plant and associated waste coal disposal. These heavy industrial operations were conducted on the Site for some 45 years, in proximity to property used for residential, commercial, agricultural and recreational purposes, as shown on the Land Use Map filed by ECEP. Application, Tab C. The proposed Facility, which will not be visible from most developed locations in and around the City of Irvine, is projected to have no more impacts on the pattern and type of development of adjacent property than the former coal processing operations.

Based on its review of the surrounding uses, Brighton found that ECEP's Land Use Map's presentation of residential, commercial and industrial uses to be reasonable (although no formal land use classifications are applicable in Estill County, which does not have zoning regulations); that the closest residence is 2,170 feet, and the nearest residential neighborhood,⁹ is 3,100 feet, from the proposed location of the Facility's exhaust stack; that the Site offers "a natural isolation from the adjacent areas by means of terrain," and the Kentucky River and that the residential

⁹ KRS 278.700(6).

properties along Coal Wash Road are visually buffered from the Site due to the hilly, forested terrain. Brighton Report at C-5--C-6.

4. *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.*

Road and rail traffic expected to be caused by operation of the Facility will be less than road and rail traffic caused by operation of the former coal washing plant. Road and rail traffic expected to be caused by operation of the Facility will not significantly impact traffic levels on the railroad or on nearby roads. Fugitive dust emissions will be controlled by paving Site access roads and treating other roads within the Site with water or dust palliatives as necessary.

Operation of the Facility is not anticipated to degrade roads and lands in the vicinity of the Facility. Further access to the Site will be provided by a new paved Industrial Access Road to be constructed by Kentucky Department of Transportation, which will connect from Highway 499 to Coal Wash Road at the Estill County Industrial Development Authority. Application at 25 and Tab D.

ECEP filed with its Application a Traffic Study prepared by CBC, based on ECEP's proposed project. Application, Tab J. ECEP will reclaim power plant fuel from existing on-Site waste coal storage areas, at an estimated rate of 700,000-1,200,000 tons per year. Trucks will travel from active mining operations on the Site to the Facility, where some trucks will pick up and haul back ash product. This transportation of fuel and ash will be on internal haul roads, the locations of which will change periodically as the fuel is recovered and burned. Temporary haul roads will not be paved but instead will be lined with durable material and watered and/or treated with dust palliatives, in accordance with standards promulgated by the Kentucky Department of

Surface Mining Reclamation and Enforcement ("DSMRE"). Permanent on-site roads will be paved.

In order to assure a consistent, reliable fuel blend for the Facility, ECEP may purchase and deliver to the Site as much as 120,000 tons of coal per year from off-Site sources, which will constitute 5-10% of the fuel consumed. This blend coal may be delivered to the Site by truck but most likely would be delivered by rail. In the unlikely event all of this coal is delivered by truck, an estimated 15 truck deliveries per day, five days per week, would be required. These would be spread throughout the day, reducing any problems with excess traffic.

ECEP also will require an estimated 100,000 tons of limestone, and approximately 20,000 tons of lime, per year, which can be delivered by rail or truck. Less than 20 truck deliveries per day, five days per week, would be required if all of this limestone and lime were delivered by truck.

The ECEP project will employ as many as 400 people at any point during construction and approximately 46 during post-construction operation. Construction employees would not all be working at the same time, with as many as three shifts per day. No more than 150 construction workers are expected on the Site during any shift.

The Traffic Study found that the on-Site traffic will not impede or disrupt normal highway traffic outside the mining area. It also analyzed the impacts of off-Site traffic on Highways 89 and 499, which serve the Site, finding that the highway system has already been expanded (by the addition of Highway 499) to alleviate congestion and that ample capacity for anticipated traffic exists on both roads.

The Traffic Study also found that rail traffic to and from the Site will not experience congestion due to deliveries of coal, limestone and lime by rail, which will be significantly less than the rail traffic to the Site which it had used for coal processing.

Brighton's traffic analysis is found on pages C-33--C-40 of the Brighton Report. Brighton agreed in concept with CBC's conclusion that there would be no significant increase in the traffic volume numbers as compared to existing numbers but expressed the view that to reach a definitive conclusion certain additional information should be gathered and a capacity analysis performed. *Id.* at C-35. The information was provided, and Brighton performed the capacity analysis for existing conditions during construction and during operation of the Facility over the three most potentially impacted road segments. *Id.* at C-35--C-39. Results of the study indicated that the project's traffic impacts on the existing road network are "insignificant." *Id.* at C-38. Brighton also believes the proposed project "will have a minimal effect on intersections in the area." *Id.* at C-39. Despite these findings, the Brighton Report recommends six traffic-related conditions that far exceed any conditions previously imposed by the Board. *Id.* at D-1 and D-4--5. Of these, only two should be made a certificate condition.

Brighton's recommendation No. 2 provides that, upon the construction of the proposed Industrial Access Road, truck traffic should be required to directly access KY 499 via Industrial Access Road, in lieu of Coal Wash Road. The new road will provide further access and will avoid traffic through the town of Irvine. Application, Tab D. This is an appropriate condition and has been included as Condition I in ECEP's Proposed Appendix A.

The first recommendation No. 13 is a condition to restrict truck deliveries to non-peak hours (a.m. and p.m.). This condition is not supported by any analysis in the Brighton Report, would discriminate against ECEP compared to other trucking activities and has not been required

in the Board's prior orders. No basis has been given for imposing it on ECEP as opposed to other applicants and it should be rejected.

Second recommendation No. 13 is a condition that if ash is disposed of off-site, two-lane capacity analyses should be performed of Coal Wash Road, and KY 89 and intersection analyses should be performed of Coal Wash Road and KY 89. ECEP has merely indicated that Estill County may wish to obtain some ash for road maintenance purposes, in which case ECEP would cooperate with the County. Any traffic restrictions on such deliveries, which would be occasional only, should be left to the County. This condition is excessive and unreasonable, has not been required in prior Board orders and no basis has been provided for imposing it on ECEP. Jagers Direct Testimony at 4-5.

Recommendation No. 14 is a condition that a new entrance road from Coal Wash Road to secured perimeter of the Facility be paved to reduce fugitive dust. This condition is consistent with a corresponding condition proposed by ECEP in its Application (Application at 24), which has been included as Condition M in ECEP's Proposed Appendix A.

The first recommendation No. 15 is a condition that fugitive dust should be minimized with use of gravel roads, water and dust palliatives as coal is reclaimed from the site. The Brighton Report admits that regulation of temporary coal haul roads is regulated by the DSMRE and beyond the scope of the Board's review. This condition has not been required in prior Board orders and no basis has been provided for imposing it on ECEP.

The second recommendation No. 15 is a condition that, to the extent financially feasible, ECEP use rail delivery of coal, lime and limestone. The Brighton Report, which found that truck deliveries of limestone and lime would not have a significant impact on affected roads, provides

no basis for this condition, which would harm local suppliers of limestone and lime and should be rejected.

There is no basis to claim that the Commission can actively regulate actual traffic impacts or actual noise impacts, once construction is completed and in operation. The Board only has jurisdiction to issue a "construction certificate." KRS 278.700, *et seq.* contains numerous references to "construction certificate" and none to a certificate to "construct and operate" a merchant generating facility. KRS 278.708(3)(a) requires the site assessment report to include evaluation of the noise levels "expected to be produced" by the facility. KRS 278.708(3)9d) requires the report to include impacts of "anticipated levels" of fugitive dust created by traffic and "anticipated degradation" of roads and lands associated with road and rail traffic. It is also clear that the Board is only able to prescribe fees to pay "expenses associated with its review of applications filed with it pursuant to KRS 278.700 to 278.716" for a construction certificate and that a supplemental application fee may be assessed if the Board's expenses "associated with the application," including legal review of the application, are insufficient. The Board does review construction monitoring reports during the construction period to assure consistency of construction with the application for a construction permit, but the fees are not to cover regulation of a facility's operation post-construction.

B. Anticipated noise levels expected as result of construction and operation of the proposed facility. KRS 278.710(1)(b).

ECEP has submitted a Noise Level Study performed by CBC demonstrating that noise levels expected to be produced by the Facility will be equal to, or no less than, noise levels produced by operation of the former coal washing plant and that projected noise levels will not interfere with normal activities and will be compatible with the surrounding community and neighboring properties. Application at 33 and Tab H. In order to further mitigate anticipated

noise impacts, ECEP has agreed to install silencers to mitigate the sound of steam blows.

Response to Board Staff's First Data Request, DR No. 34.

The Brighton Report found that ECEP's Noise Level Study meets applicable statutory criteria and sufficiently documents that anticipated noise from construction and operation will be at acceptable levels at the property boundaries and at the nearest residences. Brighton Report at C-28--C-32. Despite these findings, Brighton has recommended conditions that exceed what the Board has required in its prior orders and, indeed, that exceed the Board's jurisdiction.

In its orders granting construction certificates in *Application of Kentucky Pioneer Energy, LLC*, Case No. 2002-00312 ("*Kentucky Pioneer*") and *Thoroughbred*, the Board has required applicants to require their contractors to design relevant facilities to meet established noise criteria and minimize off-site noise impacts to the extent practicable, following industry standards. ECEP requests the Board to adopt this standard, which is included as Condition F in ECEP's Proposed Appendix A.

In its order granting a construction certificate in *Application of Kentucky Mountain Power, LLC/Enviropower, LLC*, Case No. 2002-00149 ("*Kentucky Mountain*"), the Board also has imposed a condition requiring applicants to require their contractors to install silencers during the planned startup period or to adjust the timing of steam blows to occur between 7:00 a.m. and 9:00 p.m. As noted above, ECEP has agreed to install silencers to mitigate the sound of steam blows, so timing of steam blows is unnecessary. Without providing any supporting rationale, Brighton's recommendation No. 9 would require silencers to reduce noise levels, and No. 10 would require, in addition to silencers, that steam blows occur between 7:00 a.m. and 9:00 p.m. excepting emergency conditions. Brighton Report at D-4. The Board should adopt

ECEP's proposal to install silencers, which has been included in ECEP's Proposed Appendix A as Condition G.

Brighton's recommendation Nos. 11, under which the Board would retain jurisdiction to review annual reports and further restrict steam blows after completion of construction, and 12, under which the Board would adopt a new noise standard of 65dBA and retain jurisdiction after completion of construction to require noise maintaining and further restrict noise levels, would far exceed any conditions the Board has adopted before. Brighton provides no rationale for imposing, for the first time, these new restrictions on ECEP or justifying the extension of the Board's regulation of noise past the construction period. Indeed, Brighton would have the Board actively regulate noise for an unlimited period of time into the future, even though Kentucky's statutory law confers no such jurisdiction on the Board or any other state agency. The Board should reject these conditions, which clearly exceed its jurisdiction. Jagers Direct Testimony at 2-4.

C. Economic impact of the facility upon the affected region and state. KRS 278.710(1)(c).

The Kentucky Cabinet for Economic Development, Division of Research, has prepared an Economic Impact Assessment for the construction and operation of the Facility by ECEP. This assessment estimates ECEP's construction to add \$118,413,000 of total value to Kentucky and ECEP's operation to add \$13,442,000 of total annual value to Kentucky. Application at 21 and Tab K. The project will have a significant positive impact on Estill County and Kentucky.

Mr. Herrick requests the Board to take into consideration the "potential environmental disbenefits" of the Facility that he claims "may result in negative impacts elsewhere in the economy." Herrick Direct Testimony at 2: According to his counsel, this request is based on the Board's treatment of a similar request made in *Thoroughbred*. Tr. 112:7-113-11. KRS

278.704(1) expressly provides that a construction certificate "shall be conditional upon the applicant obtaining necessary, air, water, and waste permits." Accordingly, the Board found in *Thoroughbred*, as noted above, that it had no jurisdiction over such matters. Big Rivers Electric Cooperative ("Big-Rivers") argued, however, that it, and its retail ratepayers, would suffer economic detriment because the proposed generating facility would consume virtually all of the available air resources in the region, which was in a Class I non-attainment area, based on specific data regarding the potential economic impact of the proposed Facility on Big Rivers' existing Wilson I and planned Wilson II generating units.

In its Order granting a construction certificate, the Board found that the evidence presented by Big Rivers should be considered because it raised what the Board considered to be a possibility of potentially severe economic impacts to the region. The Board concluded, however, that the proposed facility in that case was more likely to aid the region than to harm it, because the evidence presented was "contingent and speculative," "no concrete evidence that new sources planned to locate in the affected region in the near future" had been presented and Big Rivers' plans for Wilson II were "tentative at best." As a result the Board could not conclude that "the potential for economic harm in the area as a result of *Thoroughbred's* consumption of Class I increment is a certainty."

In the instant case, not only is there no "concrete" evidence that the potential for economic harm is "a certainty" -- the standard applied by the Board in *Thoroughbred* -- but it does not even rise to the level of evidence that is "contingent and speculative" or "tentative." It is non-existent. Moreover, no utility intervened in this case, and the Facility will not be in a non-attainment area. There is no evidence of any kind that new air emissions sources are

planned for the region that could be affected in any way by the Facility. Mr. Herrick's wholly unsupported theory must be rejected.

- D. Whether the facility is proposed for a site upon which existing generation facilities, capable of generating ten megawatts (10MW) or more of electricity, are currently located. KRS 278.710(1)(d) and KRS 278.706(2)(g).

ECEP has proposed to locate the Facility on the Site because the benefits provided by the Site would not be available at alternative locations. Application at 15. The Site has been extensively developed for industrial purposes and, although there are no existing electric generating facilities on the Site, construction and operation of the Facility on the Site will improve the use of the Site and will provide net benefits to the surrounding communities.

The existing electric generating facility nearest to the Site is the East Kentucky Cooperative plant in Clark County. ECEP considered locating the Facility at that site, but the on-Site waste coal cannot be economically transported to these nearest existing electric generating facilities. Tr. 86:20-87:88:14-17. Construction of the Facility on the Site will replace an assortment of deteriorating structures with a well-organized and modern industrial facility. Operation of the Facility on the Site will allow the Site to be reclaimed for beneficial uses using stable ash generated by the Facility.

In *Thoroughbred*, the Board addressed a quite similar situation, where the Board found as follows:

KRS 78.710(1)(d) requires the Board to consider whether a merchant power plant is proposed for a site upon which facilities capable of generating 10 MW or more of electricity are located. *Thoroughbred* provided little detail of its efforts to locate the Facility on a site with existing generation when it initially filed its application. . . . *Thoroughbred* selected the Muhlenberg County site for its proximity to coal reserves, its proximity to the Green River for cooling water and barge access, and its proximity to rail transportation to assist in the delivery of construction and operation materials. It is *Thoroughbred's* opinion, and we concur in this instance, that the installation of the plant on this former

mine site will have little detrimental impact on it and will have a positive impact on the land use of the unreclaimed site.

The legislature's intent in requiring the applicant to disclose its efforts to locate a proposed plant on the site of an existing generation plant was to limit the proliferation of such facilities around the Commonwealth. The lack of local objection, the rural location for the plant, and the fact that Thoroughbred will actually improve the land from its present state further the legislative objectives.

[cite?] ECEP's selection of the site of a former coal processing plant, with 25-30 years of on-site waste coal reserves for its proposed Facility is closely analogous to the *Thoroughbred* facts.

ECEP should not be penalized for the selection of its Site, which will be significantly improved by construction of the proposed Facility and will produce other benefits unique to the Site. Tr. 139:8-22.

E. Whether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed. KRS 278.710(1)(e).

There are no local ordinances or regulations concerning noise control, no local planning and zoning ordinances and no setback requirements established by local planning commissions applicable to the Facility or the Site. Application at 12 and 4/5/04 letter from Estill County Judge Executive under Tab Q.

F. Whether the additional load imposed upon the electricity transmission system by use of the merchant electric generating facility will adversely affect the reliability of service for retail customers of electric utilities regulated by the Public Service Commission.

The Facility will be constructed, interconnected and operated without adverse impact on the electricity transmission system in Kentucky.

The Site is now connected to the electric transmission system through an existing dedicated 69-kV line running approximately 1.8 miles from the Kentucky Utilities Company ("KU") West Irvine Substation. At the West Irvine Substation, 161-kV transmission system

voltage is stepped down to 69-kV for regional distribution including the former coal processing plant. Although the former coal processing plant on the Site is not currently processing coal, electrical service is obtained through this line to power essential lights, pumps and motors.

The Facility will connect to the electric transmission system by replacing the 69-kV line with a 161-kV line connecting to the West Irvine Substation. To minimize impact on the surrounding land owners, ECEP has requested that KU allow the replacement 161-kV line to be installed entirely within the existing rights of way currently containing the 69-kV line. Application, Tab U. Current plans are for ECEP to file an application for a certificate to construct a nonregulated electric transmission line under KRS 278.714 prior to construction of the line.

ECEP submitted an Interconnection Request to the Midwest Independent Transmission System Operator, Inc. ("MISO") in August, 2002. Since then, all impacts of the Facility's interconnection have been evaluated through all required MISO processes. Required facilities and required system upgrades for interconnection have been identified and cost estimates have been agreed on. Provisions for their design, construction and funding are established and retail ratepayers will not bear any of the cost associated with the Facility's interconnection facilities or network upgrades. Transmission service related upgrades will be determined through the MISO process and will be the responsibility of ECEP or its wholesale power customers. Through this process, the Facility is assured to be constructed, interconnected and operated without adverse impact on the electric transmission system or the retail electric customers in Kentucky. A more complete description of these arrangements and assurances is provided in the Application at

pages 17-20. Copies of relevant interconnection agreements and studies are provided in Tabs M, N and O to the Application.¹⁰

G. Compliance with statutory setback requirements. KRS 278.710(1)(g).

This criterion addresses compliance with the setback requirements of KRS 278.704. Subsection (2) of that statute provides that, except as provided in subsection (5), the exhaust stack of a proposed merchant generating facility be at least 1,000 feet from the property boundary of any adjoining property owner and 2,000 feet from any residential neighborhood school, hospital, or nursing home facility; Subsection (5) states that, if a merchant generating facility is proposed to be located on "a site of a former coal processing plant in Kentucky where the electric generating facility will utilize on-site waste coal or a fuel source," the 1,000 foot property boundary set back does not apply.

The record shows that a coal processing plant was constructed on the site by South East Coal and was operated by South East Coal until it failed and was bankrupted in or around 1993, at which time it was sold to DLX. Tr. 269:20-270:9; D. LaViers Direct Testimony at 2:14-22. The coal washing plant was then sold by DLX to KPC in 1994, which operated it until 1998, when it fell into economic difficulty and filed for bankruptcy in September of 1998. D. LaViers Direct Testimony at 4:18. After KPC filed for bankruptcy protection, a plan was developed for the liquidation and distribution of KPC's assets, including the coal processing plant. The KPC Liquidation Plan Disclosure Statement states on page 10-11 that the plant went into "idle status" in 1998, laying off its employees but retaining a staff of employees to continue maintenance, reclamation and security services. The KPC Liquidation Plan Disclosure Statement, which is

¹⁰ Although the Tennessee Valley Authority ("TVA") is not a public utility regulated by the Kentucky Public Service Commission, TVA was contacted by the Board regarding the impacts of the Facility on TVA's transmission system. At the evidentiary hearing ECEP filed Applicant Exhibit 1 demonstrating that TVA had been given all relevant information regarding the transmission impacts of the Facility and had full opportunity to participate in the interconnection process. Tr. 38:19-44:4, 44:15-25.

dated February 19, 2001, also states on page 18, under the heading, "Future Operations" that "The Debtor [KPC] is now closed, does not anticipate reactivation and will never conduct any future operations, but will be construed to be defunct." Tr. 275:20-277:2. The liquidation plan was confirmed by the Bankruptcy Court's Order of Confirmation dated May 31, 2001. See Response to No. 10 of Staff's First Data Request to ECEP. The Site was sold to Fox Trot Properties under this plan.

The KPC coal processing plant was idle beginning at least in 1998. Mr. Mack and Mr. Jagers testified that the Site was last used for coal processing in 1998 and 1999. Direct Testimony of Gerard B. Mack at 3:18-4:20; Tr. 219:17-24.¹¹ The KPC liquidation plan states that, as of February 2001, KPC was "closed," "will have no future operations," and was "defunct." Mr. Jagers testified that the coal processing plant is "not operational," could not be operated today to crush and load coal, and would require retrofitting, and a new water withdrawal permit in order to be reactivated. Tr. 216:18-217:4, 218:8-22, 239:13-19.

ECEP will dismantle the central coal processing plant and build the Facility in its place. ECEP will reclaim all of the on-site waste coal as a fuel source for the Facility and will obtain the necessary DSMRE permits to do so, either by obtaining new permits or by succeeding to any KPC permits that have not lapsed. The Site contains an estimated 25-30 years of coal waste reserves to utilize as fuel. The fuel burned in the Facility will be approximately 5-10% off-Site blend coal to maintain a consistent and reliable fuel.¹² There will be no processing of either the on-Site waste coal or the off-Site blend coal.

¹¹ Mr. Mack's testimony was provided to correct a statement in the Brighton Report that the coal processing plant had not been operated since the early 1990's.

¹² KRS 278.704(2) and (5) specify that the on-site waste coal must be utilized "as a fuel source," without specifying that any specific portion of total fuel burned must be on-site waste coal.

The Facility will be located on the site of a former coal processing plant and will use on-site coal waste as a fuel source. Under KRS 278.704(2) and (5) the 1,000 foot adjoining property boundary setback does not apply. The exhaust stack will be at least 2,000 feet from any residential neighborhood, school,¹³ hospital or nursing home facility. The applicable setback requirements of KRS 278.704(5) and (2) will be met.¹⁴ Application at 13.

The Brighton Report confirms that all applicable setbacks in KRS 278.704(5) and (2) will be complied with. Brighton Report at C.

Mr. Herrick claims that the Facility is a "current" coal processing facility because it would not need a new DSMRE permit to restart operations on the majority of the Site. Herrick Direct Testimony at 3:22-4:2. The record shows that the coal washing plant ceased operations over five years ago and is not operable now,¹⁵ that the holder of the DSMRE permit -- KPC -- has been completely out of business since 2001 and that ECEP will tear down the core structures of the abandoned processing plant, leaving only some outbuildings. It is both plain and obvious that the Facility will be located on the site of a "former coal washing plant" within the contemplation of KRS 278.704(5).

H. KRS 278.710(1)(h) and KRS 278.708(6).

As noted above, ECEP has developed a Proposed Appendix A for the Board's consideration. Proposed Appendix A contains the standardized Monitoring Program and Reporting Requirements used by the Board in its prior final orders in *Kentucky Mountain*,

¹³ KRS 278.700(6) defines "residential neighborhood" to mean "a populated area of five (5) or more acres containing at least one (1) residential structure per acre.

¹⁴ ECEP's Exhibit B Site Boundary Maps, which were prepared based on a review of relevant filed deeds, fully support these findings that the setbacks will be complied with. In any event, the 1,000 foot property boundary setback of KRS 278.704(2) does not apply due to KRS 278.704(5) as discussed above. The 2,000 foot setback from residential neighborhoods, etc. of KRS 278.804(2) is based not on property boundaries but the location of the Facility's exhaust stack.

¹⁵ A significant renovation and applicable permits, including a water withdrawal permit, would be required before it could be restarted.

Kentucky Pioneer and *Thoroughbred* to insure that a proposed merchant plant is constructed as represented by the application. These provisions will address Brighton's recommendation No. 1 addressing annual reports to the Board.

ECEP's Proposed Appendix A also contains a proposed set of Specific Conditions Imposed to which the Board's order granting the requested construction certificate would be subject. These include:

- Conditions used by the Board in prior orders to address the following issues raised in this proceeding: impact on scenic surroundings (Condition E)¹⁶, anticipated noise levels (Condition F)¹⁷ and dust control (Condition J).¹⁸
- Conditions proposed by ECEP in this proceeding to address: steam blows (Condition G); utilization of on-site waste coal as represented in the Application (Condition K); the disputed real estate claims, consistent with Brighton's recommendation No. 14 (Condition L); and paving of permanent on-Site roads to minimize fugitive dust (Condition M).¹⁹
- Conditions proposed by Brighton to address access control and security (Condition D), impact on scenic surroundings (Condition H) and utilization of the proposed new Industrial Access Road off Highway 499 (Condition I), to which ECEP has agreed.²⁰

¹⁶ This proposed condition is derived from Condition 2 in the *Kentucky Mountain* order, Condition F in the *Kentucky Pioneer* order and Condition E in the *Thoroughbred* order.

¹⁷ This proposed condition is derived from Condition G in the *Kentucky Pioneer* order and Condition F in the *Thoroughbred* order.

¹⁸ This proposed condition is derived from Condition K in the *Kentucky Pioneer* order and Condition J in the *Thoroughbred* order.

¹⁹ Proposed Conditions G, K and M are derived from P. 34 of ECEP's Application. Proposed Condition L is derived from Applicant Exhibit 2.

²⁰ Proposed Condition D is derived from Brighton's recommendation No. 4, to which ECEP is agreeable, with J (prescribing only 2 controlled access points for traffic) deleted. Tr. 126:7-128:22. ECEP also objected to Brighton's recommendation No. 6 that the Jackson Electric Cooperative ("JEC") electric line, which will need to be relocated to the extent it crosses the Site, should be located outside the secured area of the Facility. Mr. Mack explained that this line cannot, as a practical matter, avoid being located in the secured area, but that the Facility will be manned at all times and that JEC's new personnel could be screened or have a separate lock for the gate and that such arrangements are common in the utility industry. Mack Direct Testimony at 5:9-6:4; Tr. 128:23-130:21. Proposed

I. Whether the applicant has a good environmental compliance history. KRS 278.710(1)(i).

Neither ECEP, nor any person with an ownership interest, has violated any federal or state environmental laws, rules or administrative regulations, whether judicial or administrative. There are no judicial or administrative actions pending against ECEP or any person with an ownership interest. Application at 22: At the request of the Board's Chairman, ECEP confirmed in Post-Hearing Data Response No. 1 that the foregoing statement is true for both CEH, which is the sole member of ECEP, and for Jacqueline Yates, who is the sole Member of CEH.

J. When considering an application for a construction certificate for a merchant electric generating facility, the board may consider the policy of the General Assembly to encourage the use of coal as a principal fuel for electricity generation as set forth in KRS 152.210, provided that any facility, regardless of fuel choice, shall comply fully with KRS 224.10-280, 278.212, 278.216 and 278.700 to 278.16. KRS 278.710(2).

As noted earlier, construction of the proposed Facility will promote the General Assembly's policy to encourage the use of coal as a principal fuel for electricity generation. Indeed, the project will reclaim and use as fuel for power generation waste coal that would otherwise never be consumed.

V. **THE MOTION TO DISMISS MUST BE DENIED**

On the day of the evidentiary hearing, DLX and the LaViers Trust filed a Motion To Dismiss the Application to the extent the Application pertains to property and property rights claimed by DLX and the LaViers Trust or in its entirety because the Application is "meritless" due to the DLX and LaViers Trust claims.

The Motion To Dismiss argues that the Board can only issue a construction certificate concerning specific property "if the applicant actually has the property rights necessary to

Condition D is derived from Brighton's recommendation No. 8 and page 34 of ECEP's Application. Proposed Condition I is derived from Brighton recommendation No. 2.

undertake the acts authorized by the construction certificate" because "[I]t seems that it ought to be axiomatic that someone who seeks a construction or building permit ought to demonstrate that they have the right to build the structure if they obtain the permit." Motion To Dismiss at 5.²¹ At the evidentiary hearing, this argument was modified to claim that ECEP must make a prima facie showing that it is entitled to relief that the Board can grant. Tr. 20:4-30:9, 21:25-22:23, 23:2-6. The Motion To Dismiss goes on to claim that certain specific statutes make references to property owners and ownership supportive of its argument but that, if KRS 278.700 *et seq.* do not "explicitly require an applicant to have the property rights necessary to undertake the rights authorized by the construction certificate, then they are implied by law."

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. But whether or not ECEP has chosen to obtain such contractual assurance is not a relevant criterion for the Board's consideration of ECEP's Application.

The arguments of the Motion To Dismiss are refuted by the most fundamental concepts of Kentucky administrative law, as discussed in Section II above. "It is fundamental that

²¹ ECEP will not respond in detail to the other arguments made in the Motion To Dismiss, except to say that (a) ECEP agrees completely that the Board cannot lawfully decide the real estate claims of DLX and the LaViers Trust and understands the Board to have so ruled in its July 23 Order, (b) the arguments that constitutional rights of DLX and the LaViers Trust may be violated are entirely unsupported; and (c) threats by DLX and LaViers Trust to hold the Board members personally for champerty and/or tortious interference are equally unsupported and appear to be intended to intimidate the Board.

administrative agencies are creatures of statute and must find within the statute warrant for the exercise of any authority which they claim." *Brown v. Jefferson County Police Merit Board*, 751 S.W. 2d. 23 (Ky. 1988) (hereafter "*Brown v. Jefferson County*"). The Kentucky court in *Brown v. Jefferson County* relied on the decision of *Dept. for Nat. Resources v. Stearns Coal, supra*, in which the court held that where the statutory criteria for granting or denial of a permit have been clearly spelled out, the agency "cannot add to the requirements established by the legislature for the issuance of a permit nor can it exercise authority not vested in it." *See also Bloemer v. Turner*, 281 Ky. 832, 137 S.W. 2d. 387,388, 1939 Ky. LEXIS 43 (where the statute spelled out what is to go on a food label the agency's requirement to list an additional fact was outside its authority) and *Johnson v. Correll*, 332 S.W. 2d. 843 (Ky. 1960) (State Board of Embalmers and Funeral Directors was not empowered to expand the statutory law regarding revocation of funeral director licenses).

In each case, the statutes creating the agency and prescribing its duties and criteria for performing those duties must be examined. In the case of this Board, the criteria prescribed for granting or denying construction certificates are devoid of any requirement to show an interest in the property on which the merchant generating facility is proposed to be built. None of the statutes referenced in the Motion To Dismiss furnish such a requirement, and counsel for DLX and LaViers Trust had to admit at the evidentiary hearing that none can be found. Tr. 23:8-14. It also is clear from the authorities discussed above that Kentucky law does not permit the Board to imply a criterion not explicitly set out in the enabling statute. The Board "cannot add to the requirements established by the legislature for the issuance of a permit." *Dept. of Nat. Resources v. Stearns Coal, supra*. Accordingly, this Board is no more authorized to imply a criterion requiring a showing of sufficient interest in real estate than it is to imply a requirement to

demonstrate that financing has been secured or that the applicant has a contract to sell the power to be generated.

At hearing, counsel for DLX and LaViers Trust and for Mr. Herrick became allies in arguing it is "implicit" in the law that ECEP does not have standing to invoke the Board's jurisdiction, because of a claimed failure to demonstrate what they consider to be a sufficient interest in the Site. Tr. 20:4-30:9, 30:6-9, 21:25-22:3, 32:8-33:6. In fact, however, under KRS 228.700 *et seq.* any "person" proposing to construct a merchant generating facility may invoke the Board's jurisdiction by filing a completed application under KRS 278.706. Nothing more is required. Under KRS 278.710, the Board then grants or denies based on the specific criteria contained in 278.710(1)(a)-(i). Those criteria do not include a showing of a particular interest in the property on which the facility is proposed to be built. If the application is granted, KRS 278.704 gives the applicant a period of two years to obtain all necessary permits and construct the facility. Obviously, this period also would be used to obtain the financing needed to build the facility, which will require resolving any issues as to real estate rights in the Site. ECEP's Applicant Exhibit 2, which conditions construction on filing a formal survey of the Site, after resolution of real estate claims, is entirely consistent with the process created by the General Assembly.

The only cases offered by the Motion To Dismiss that were decided under Kentucky law have no bearing on the question presented. *Hatch v. Fiscal Court of Fayette County*, 242 S.W.2d. 1018, 1951 Ky. LEXIS 1106, arises under principles of land use and zoning law implemented under local municipal ordinances, which do not address the powers of administrative agencies created by statute, and merely offers, without any analysis, the general statement that courts have recognized that an option holder can apply to a municipality for a

zoning change. *Home Depot V, USA., Inc. v. Saul Subsidiary Ltd. P'ship* -- S.W.2d. ____, 2004 WL 1699614, 2004 Ky. App LEXIS 223 (Ky. Ct. App. July 30, 2004), which is not a final decision, does not involve administrative agency law, or even municipal zoning law, but rather claims under mutually restrictive deed covenants agreed to by predecessors in title. *Hammer v. Best*, 656 S.W.2d. 253 (Ky. Ct. App. 1938), another zoning case, is offered for the principle that municipal zoning laws must be strictly construed because they are in derogation of the common law. This principle, if applied to KRS 278.700 *et seq.*, supports ECEP's position that the Board may not expand its enabling legislation -- which creates the requirements, in derogation of the common law, to obtain a construction certificate from the Board to construct a merchant generating facility -- by adding new criteria for a construction certificate.

Kentucky law clearly requires that the Motion To Dismiss be denied.

VI. CONCLUSION

The proposed Facility will provide significant benefits to Estill County and Kentucky and is strongly supported by the local community. ECEP urges the Board to grant the requested construction certificate, subject to Proposed Appendix A.

Respectfully submitted,

ESTILL COUNTY ENERGY PARTNERS, LLC

By: Lisa E. Underwood

September 13, 2004

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Counsel for Estill County Energy Partners, LLC

PROPOSED APPENDIX A

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 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 requirements 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 secure the Facility premises with the following security measures:

1. Twenty four hour, seven day a week security monitoring of the site to be performed by trained personnel or a third party security provider;
2. Approved parking areas for employees (inside or outside the secured area);
3. The secured area should be lighted along the perimeter and directed away from offsite locations;
4. Storage buildings with hazardous chemicals should be secured with a lock;
5. All workers on site should attend a mandatory safety course;
6. All employees and subcontractors should be required to carry security passes at all times;
7. All commercial drivers should register with security personnel;
8. All drivers shall be subject to examination (for type of vehicle or equipment they may operate on premises);
9. Post a vehicle speed limit of 15 mph throughout the proposed facility;
10. 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 offsite noise impacts to the extent practicable, following industry standards.

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

H. ECEP shall instruct its contractors to design the lighting of the relevant facilities to minimize offsite glare, following industry standards.

I. Upon construction of the proposed Industrial Access Road, truck traffic should be required to directly access KY 499 via Industrial Access Road, in lieu of Coal Wash Road.

J. During the construction phase of the proposed project, ECEP shall implement dust control measures consistent with industry standards.

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

L. A boundary survey shall be obtained and recorded in the Estill County 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.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

IN THE MATTER OF:

CHAPTER 11

KENTUCKY PROCESSING COMPANY,)
fdba FOX MINING CORPORATION,)
FOX PROCESSING CORPORATION,)
FOX TRUCKING CORPORATION,)
FOX LEASING CORPORATION,)
G & Y COAL CO., INC.,)
ADENA FUELS, INC.,)
ADENA PROCESSING, INC.,)
CLEMONS COAL COMPANY, and)
KENTUCKY MINERAL PROCESSING, INC.,)
DEBTOR.)

CASE NO. 98-52437

DLX, INC.,)
PLAINTIFF,)
v.)
KENTUCKY PROCESSING COMPANY,)
DEFENDANT.)

ADVERSARY PROCEEDING

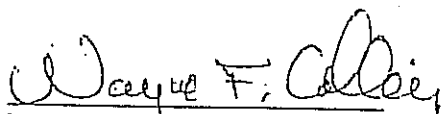
NO. 01-5199

NOTICE OF LIS PENDENS

* * * * *

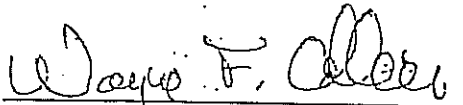
Comes the Plaintiff, DLX, Inc., by counsel, and hereby gives notice that it has filed the captioned action against a part of the property that was conveyed in two deeds of record in the Estill County Clerk's Office, one deed being dated August 4, 1994, from DLX, Inc., to Kentucky Processing Company, a Kentucky corporation, which is of record in Deed Book 209, Page 143, and the other being a deed of correction dated October 18, 1994, from DLX, Inc., to Kentucky Processing

Company, a Kentucky general partnership, which is of record in Deed Book 210, Page 291 (collectively the "Deeds"). Kentucky Processing Company, a Kentucky corporation, is the successor in interest to Kentucky Processing Company, a Kentucky general partnership, under the Deeds. The property that is affected by DLX, Inc.'s claims in the captioned action to reform part of the description in the Deeds is more fully described on Exhibit 1 (taken from the proposed deed of correction), which is attached hereto and is incorporated herein by reference.



Robert C. Stilz, Jr.
Wayne F. Collier
Kinkead & Stilz, PLLC
3120 Wall Street, Suite 350
Lexington, Kentucky 40513
(859) 296-2300
Counsel for DLX, Inc.

This instrument prepared by:



KINKEAD & STILZ, PLLC
3120 Wall Street, Suite 350
Lexington, Kentucky 40513
(859) 296-2300

RETURN TO PREPARER

EXHIBIT 1

1. CORRECTED DESCRIPTION TO THE
REFUSE PILE TRACT AND TO THE
EASEMENT APPURTENANT THERETO

NOW, THEREFORE, in consideration of a valuable consideration heretofore paid, the receipt and sufficiency of which is hereby acknowledged, and in order to conform to the intention of the parties thereto, and to correct said description, DLX has bargained and sold and does hereby grant and convey unto KPC, its heirs, successors and assigns, forever, all of the following real property and improvements thereon described in the Deeds, with the addition of the following exception and reservation in favor of DLX, Inc., which should have been included in the Deeds regarding the following real property and improvements thereon situated in the Commonwealth of Kentucky, County of Estill, near the City of Irvine, on the right descending bank of the Kentucky River, and more particularly described, and all bearings stated herein are referenced to the Magnetic Meridian taken on June 23, 2001:

BEGINNING at an iron pin with cap stamped LS #3144 set near the back of a man made bench, by the Refuse at a wooden stake (found), with Metal plate, also being the toe of the slope of the Refuse Pile in the land excepted out of a deed to Kentucky Processing Company in Deed Book 210, Page 297, having approximate 1983 State Plane Coordinates North 2633701.46 and East 1183615.66 (Zone: Alabama East);

Thence S 01 00 10 W 126.10 Feet to an iron pin with cap stamped LS #3144 on the edge of a man made bench by the Refuse near a wooden stake (found) with metal plate found on the edge of the bench;

Thence down the hill S 01 00 10 W 170.08 Feet to the edge of the Kentucky River passing over an iron pin with cap set stamped LS # 3144 at 124.95 Feet;

Thence continuing with the edge of the Kentucky River down stream in a Northern direction N 75 21 48 W 242.05 Feet;

Thence N 71 57 27 W 81.78 Feet;

Thence N 59 18 43 W 52.12 Feet;

Thence N 61 16 42 W 141.79 Feet;

Thence N 66 52 01 W 116.16 Feet;

Thence N 56 01 34 W 150.09 Feet;

Thence N 38 06 51 W 198.75 Feet;

Thence N 20 13 15 W 150.00 Feet;

Thence N 02 57 42 E 120.43 Feet;

Thence N 20 27 16 E 178.94 Feet;

Thence N 34 55 40 E 409.76 Feet;

Thence N 49 58 32 E 769.89 Feet;

Thence N 52.04 08 E 487.56 Feet;

Thence N 53 47 47 E 532.18 Feet;

Thence N 58 21 19 E 534.61 Feet;

Thence N 61 37 27 E 378.46 Feet to a point on the edge of the Kentucky River a common corner to Kentucky Processing Company in Deed Book 210, Page 291;

Thence leaving the Kentucky River and continuing with line of Kentucky Processing Company line S 41 19 50 E 153.78 to an iron pin set with cap stamped LS #3144 on a man made dike, passing over an iron pin with cap stamped LS #3144 Set at 46.22 Feet;

Thence S 41 21 20 E 229.05 Feet to an iron pin set with cap stamped LS #3144 at the toe of the Refuse;

Thence S 82 54 39 E 143.81 Feet to an iron pin set with cap stamped LS #3144 on top of, and on the outer edge of a man made hump of Refuse, this being the Northeast side of the hump of Refuse;

Thence continuing around the outer edge of the hump of Refuse S 61 49 45 E 29.67 Feet to a large nail;

Thence S 33 08 45 E 35.98 Feet to an iron pin set with a cap stamped LS #3144;

Thence S 06 00 46 W 53.66 Feet to a large nail;

Thence S 07 17 37 W 210.31 Feet to an iron pin set with cap stamped LS #3144 in the edge of an old road;

Thence continuing with the edge of the road S 39 11 32 W 80.33 Feet to an iron pin set with cap stamped LS #3144;

Thence S 44 24 15 W 370.24 Feet to an iron pin set with cap stamped LS #3144;

Thence S 49 09 11 W 176.58 Feet to an iron pin set with cap stamped LS #3144;

Thence S 54 50 06 W 348.33 Feet to an iron pin set with cap stamped LS #3144;

Thence leaving the edge of the road S 34 11 34 E 135.42 Feet to an iron pin set 44.63 Feet from lamp pole;

Thence S 47 57 43 W 584.36 Feet to an iron pin set with cap stamped LS #3144 in the land excepted out to South-East Coal Company in a deed to DLX, Inc., in Deed Book 202, Page 426;

Thence with South-East Coal Company's line S 26 40 53 W 365.70 to an iron pin set with cap stamped LS #3144, at a wooden stake (found);

Thence S 51 13 19 W 171.77 to an iron pin set with cap stamped LS #3144 near the toe of a small bank near the edge of the road;

Thence S 63 26 05 W 379.10 to an iron pin set with cap stamped LS #3144 at the toe of the Refuse Pile on the West side of the ditchline;

Thence running with the toe of the Refuse Pile on the West side of the ditchline S 58 48 19 W 209.79 Feet;

Thence continuing with the toe S 72 10 24 W 114.82 Feet to the BEGINNING, containing 80.26 acres according to a survey by Richard Hall, LS #3144 on 06-28-2001 (hereinafter the "Refuse Pile Tract");

Together with an easement or right of way for ingress and egress across Kentucky Processing Company's property, including that which is described in Deed Book 209, Page 143, and in Deed Book 210, Page 291, in the Estill County Clerk's Office, which connects the foregoing property with the right of way to the Industrial Park and to Kentucky Highway 1840 as shown on the map attached hereto and marked as Exhibit A; and

BEING A PART of the same property conveyed to South-East Coal Company by several deeds, including those of record in Deed Book 101, Page 488, and in Deed Book 101, Page 493, and is a part of the same property conveyed by South-East Coal Company to DLX, Inc., by deed of record in Deed Book 202, Page 426, and which should have been listed as an exception and/or reservation in favor of DLX, Inc., in the two deeds from DLX, Inc., to Kentucky Processing Company of record in Deed Book 209, Page 143, and in Deed Book 210, Page 291, all in the Estill County Clerk's Office.

2. CORRECTED DESCRIPTION TO THREE
TRACTS EAST OF AND DIRECTLY
ADJACENT TO THE REFUSE PILE TRACT

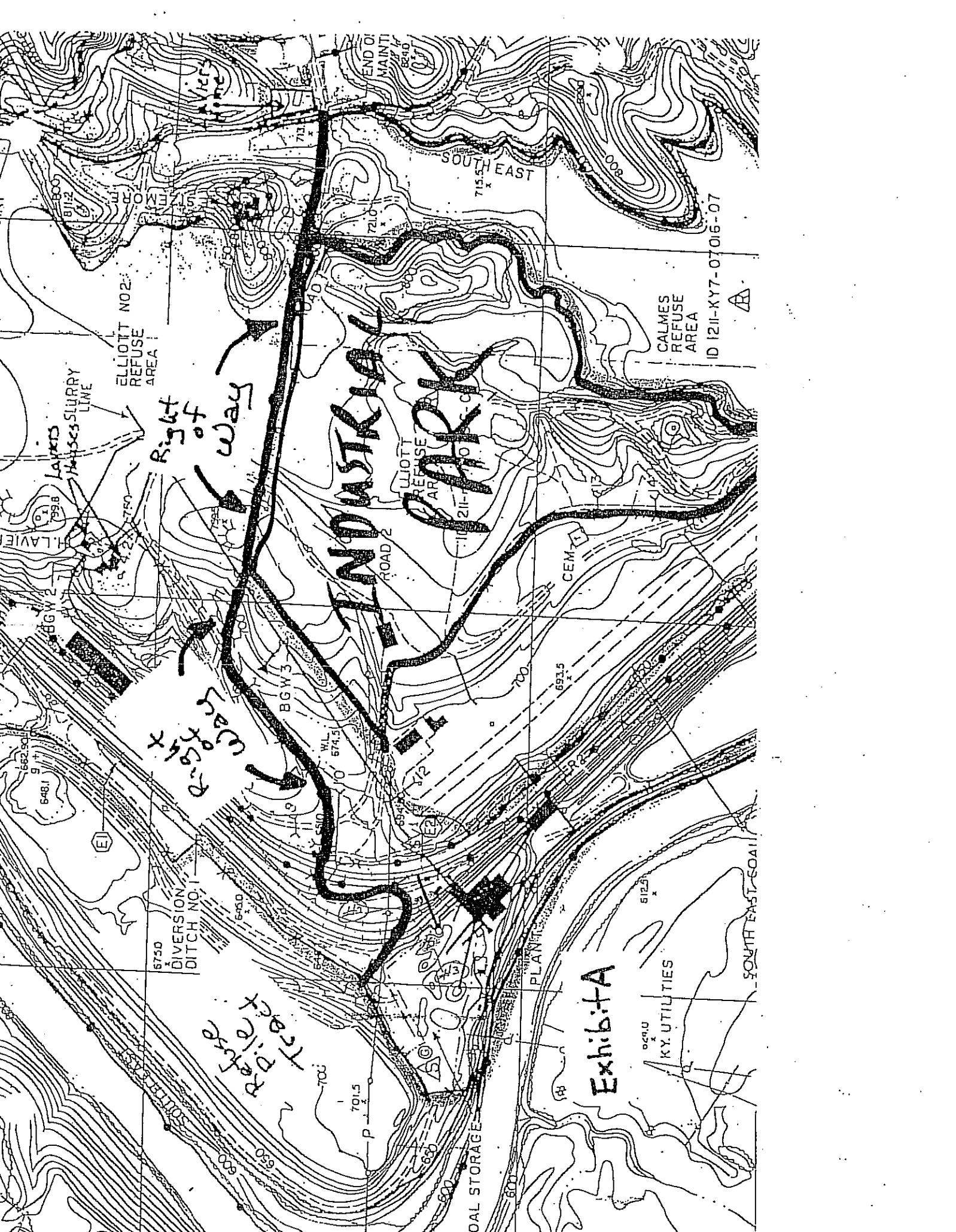
NOW, THEREFORE, in consideration of a valuable consideration heretofore paid, the receipt and sufficiency of which is hereby acknowledged, and in order to conform to the intention of the parties thereto, and to correct said description, DLX does hereby quitclaim unto KPC, its heirs, successors and assigns, forever, all of the following real property and improvements thereon located adjacent to the North and to the East of the eastern boundary line of the Refuse Pile Tract within the following three parcels described in Exhibit B, Schedule 1, of the deeds of record in Deed Book 209, Page 143, and in Deed Book 210, Page 291, in the Estill County Clerk's Office:

- a. Parcel II (Nellie Osborne Tract);
- b. Parcel III, Tract No. 2 (Spicer Tracts); and
- c. Parcel V (Powell I Tract); and, in addition,

Excepting and reserving unto DLX, Inc., the Refuse Pile Tract and the easement appurtenant thereto and all other rights and interests that were reserved and excepted to DLX, Inc., in Deed Book 209, Page 143, and in Deed Book 210, Page 291, all of which are of record in the Estill County Clerk's Office; and

BEING A PART of the same property conveyed to South-East Coal Company by several deeds, including those of record in Deed Book 101, Page 488, and in Deed Book 101, Page 493, and is a part of the same property conveyed by South-East Coal Company to DLX, Inc., by deed of record in Deed Book 202, Page 426, and which should have been listed as a modification to the descriptions to these three tracts in two deeds from DLX, Inc., to Kentucky Processing Company of record in Deed Book 209, Page 143, and in Deed Book 210, Page 291, all in the Estill County Clerk's Office.

JA_WfDLXLisPendens.wpd



INDUSTRIAL PARK

Right of Way

Calle 5th

Refuse Ditch Tract

Exhibit A

CALMES REFUSE AREA

ELLIOTT NO. 2 REFUSE AREA

LAVIERS HOUSE SLURRY LINE

DIVERSION DITCH NO. 1

COAL STORAGE

KY. UTILITIES

ELLIOTT REFUSE AREA

CEM. 1

ID 1211-KY7-07016-07

SOUTH EAST

SOUTH EAST-SOIL

715.5 EAST

612.5

701.5

612.5

611.2

721.0

629.0

650.0

693.5

648.1

675.0

640.0

679.8

674.5

693.5

693.5

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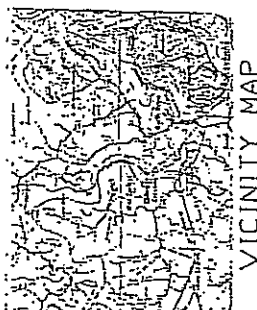
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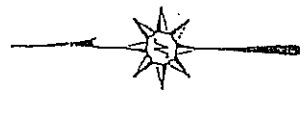
693.5

Exhibit A



VICINITY MAP

3496130 SF.
80.26 AC.

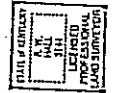


MAGNETIC NORTH
DECLINATION 10° 31'

LEGEND

1/7 X 10" L.P. WITH CAP SET
STAMPED FILE 3144

- STAKE ○
- GPS FLIGHT TARGET POINTS Y
- LOT LINES —
- POWER POLES X
- LAMP POLES ●
- LARGE HAIL ●



I HEREBY CERTIFY THAT THE FOREGOING SURVEY WAS MADE BY ME OR BY PERSONS UNDER MY SUPERVISION, IN ACCORDANCE WITH THE PROVISIONS OF THE MISSOURI CONSTITUTION AND THE STATUTES OF THE STATE OF MISSOURI, AND THAT THE SAME IS A TRUE AND ACCURATE REPRESENTATION OF THE SURVEY AS MADE BY ME OR BY PERSONS UNDER MY SUPERVISION.

Richard F. Hill
11/11/11
11/11/11



PLAT OF SURVEY
SUPPORT OF PICTURE FILE
FOR
DLX INC.
AND
DONALD G. LAVIERS
P O BOX 447
STRAWBERRY PLAINS TN, 37871
FROM
DEED BOOK 210, PAGE 591
DEED BOOK 101, PAGE 493

DLX INC. LAVIERS	DATE OF SURV
SCALE 1" = 200' FEET	DATE 01-18-2014

THE TRACT SHOWN HEREON IS SITUATED ON THE WESTERN END OF THE HIGHWAY IN THE COUNTY OF...
THIS TRACT OF LAND WAS SURVEYED WITHOUT A TITLE SEARCH...
THE WORD "CERTIFY" IN "STATEMENT" AS SHOWN HEREON MEANS...
THE SURVEY IS VALID ONLY IF THE ORIGINAL SURVEYOR...
THE ORIGINAL CLIENT AND NOT TRANSMITTAL TO SUBSEQUENT PARTIES...
THE BOUNDARIES SHOWN HEREON ARE BASED ON THE SURVEY RECORDS...
THE TECHNICAL AND DISTANCE UNITS SHOWN ARE IN A...
CLOCKWISE DIRECTION.

RICHARD F. HILL
LICENSED LAND SURVEYOR
P.O. BOX 447, STRAWBERRY PLAINS, TN 37871
666-231-3555

REUSE FILE IN PIONEER RECORDS BY THE OLD SOUTH-EAST...
DEED BOOK 210, PAGE 591
DEED BOOK 101, PAGE 493
WHICH IS OF RECORD IN THE DEED COUNTY CLERK'S OFFICE

DOCUMENT NO: 186377
RECORDED ON: JULY 20, 2001 09:46:00AM
FEE: \$19.00
CLERK: SHERRY L FOX
COUNTY: ESTILL COUNTY
DEPUTY CLERK: AMANDA BECKLER

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was sent on September 13, 2004 by United States First Class Mail, sufficient postage prepaid, to the following:

Darrell D. Brock, Jr.
Commissioner/Assistant to Governor
Office of Local Government
1024 Capital Center Drive
Suite 340
Frankfort, KY 40601

Danny P. Woods
Brighton A&E
201 Brighton Park Boulevard
Frankfort, KY 40601

John St. Claire
Citizens Guaranty Bank
Riverdrive
Irvine, KY 40336

Judge Wallace Taylor
Estill County Judge Executive
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