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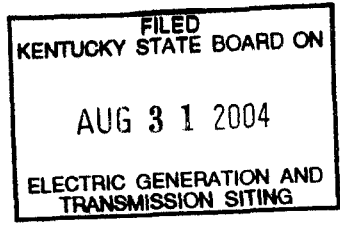
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COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

IN THE MATTER OF:

THE APPLICATION OF ESTILL COUNTY
ENERGY PARTNERS, LLC FOR A
CERTIFICATE TO CONSTRUCT A COAL
COMBUSTION/ELECTRIC GENERATING
FACILITY

CASE NO. 2002-00172



TRANSCRIPT OF EVIDENCE

DATE OF HEARING: August 24, 2004

1 APPEARANCES

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6 LAJUANA S. WILCHER

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8 JUDGE WALLACE TAYLOR

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CHAIRMAN GOSS:

Good morning. We'll be on the record in the case of Commonwealth of Kentucky before the Kentucky State Board on Electric Generation and Transmission Siting in the matter of the application of Estill County Energy Partners, LLC for a certificate to construct a coal combustion/electric generating facility, Case No. 2002-00172. My name is Mark David Goss. I am Chairman of the Kentucky State Board on Electric Generation and Transmission Siting. Seated to my left and to my right are my fellow Board members. As you all can tell, we're a little bit cramped up here. This is a bench that's meant for three people and there's seven of us up here, so we may be elbowing each other during the course of this, so please forgive us. Let me introduce the Board members, if I may. The Vice Chair of the Siting Board is Ellen Williams, who is also Vice Chair of the Public Service Commission. Ellen is seated right there. Greg Coker, who is seated right here, is Commissioner of the Public Service Commissioner and also a statutory member of the Siting Board. Then we have Secretary LaJuana Wilcher, seated to my left, who is the Secretary of the Environmental and Public Protection Cabinet. We have J. R. Wilhite right next to me. J. R. is the Kentucky Commissioner of Community

1 Development and is the designee of Secretary Gene
2 Strong, who is the Secretary of the Economic
3 Development Cabinet. Seated to my far right is Wallace
4 Taylor, who is the County Judge Executive for Estill
5 County, Kentucky, and seated to my far left is Mr. John
6 St. Clair, who is an ad hoc member, along with Judge
7 Taylor, who is a citizen and businessman in Estill
8 County. This matter was formally initiated on June 10,
9 2004 when the applicant, Estill County Energy Partners,
10 LLC, by and through its counsel, Honorable Lisa
11 Underwood, filed its application for a certificate to
12 construct a merchant electric generating facility with
13 this Board. Soon thereafter, a procedural Order was
14 entered, setting out certain deadlines which the
15 parties were to follow in order to comply with the
16 mandates set forth pursuant to KRS 278.700 et seq.
17 Included in that Order was a site visit to the location
18 of the proposed construction site of this facility,
19 which occurred on August 2, 2004. A public hearing was
20 then held on August 5, 2004 at the Estill County
21 Courthouse where the Board heard public comment
22 regarding the application. We are now at the point in
23 the process where a formal hearing on the application
24 is to occur and that, of course, is why we are here
25 today. Prefiled direct testimony of the parties'

1 witnesses is before the Board and the purpose of this
2 hearing is to formally receive that testimony and to
3 afford the parties an opportunity to cross examine all
4 witnesses. Of course, the Board will not issue its
5 decision at the conclusion of the proof today but
6 rather will receive simultaneous briefs of the parties
7 and issue a decision on or before the statutory
8 deadline of October 12, 2004. At this point in time,
9 I'd like to take appearances of counsel, and we'll
10 start with the applicant. Ms. Underwood, we'll start
11 with you and then go from there.

12 MS. UNDERWOOD:

13 Thank you, Mr. Chairman. I'm Lisa Underwood for Estill
14 County Energy Partners, and with me today are Stephen
15 Watts and Joe Tirone.

16 MR. WATTS:

17 Good morning. I'm Stephen Watts. I'm in the Richmond
18 office of McGuire Woods. My partner, Joe Tirone,
19 beside me is in our Baltimore office. We are very
20 pleased to be here today. I might say - to have the
21 opportunity to appear before you. I might say also
22 that I'm particularly pleased because my son just
23 graduated from the University of Kentucky this summer,
24 and so, having written a number of out-of-state tuition
25 checks, I feel like I've made a contribution to the

1 economy of your Commonwealth. So I'm very pleased to
2 be here.

3 VICE CHAIRWOMAN WILLIAMS:

4 We appreciate that.

5 CHAIRMAN GOSS:

6 Thank you very much.

7 MR. WATTS:

8 Also, at the conclusion of the introductions or
9 appearances of counsel, I have a preliminary matter I'd
10 like to bring before the Board.

11 CHAIRMAN GOSS:

12 All right. Thank you, gentlemen, very much.

13 MR. WATTS:

14 Thank you.

15 CHAIRMAN GOSS:

16 For the intervenors, DLX, Inc. and Harry LaViers, Jr.,
17 Trustee?

18 MR. COLLIER:

19 Wayne Collier on their behalf, and I would note that I
20 have filed a motion to dismiss on jurisdictional
21 grounds.

22 CHAIRMAN GOSS:

23 All right. We'll take that up here just in a few
24 minutes. For Mr. Will Herrick, intervenor?

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MR. FITZGERALD:

Tom FitzGerald, Mr. Chairman.

CHAIRMAN GOSS:

Good morning, Mr. FitzGerald.

CHAIRMAN GOSS:

For the Staff?

MR. TURNER:

May it please the Board, A. W. Turner with the Staff.

CHAIRMAN GOSS:

Thank you, Mr. Turner. All right. Let's go over just a few ground rules, if we may, prior to beginning the hearing. First, sort of a pet peeve I have is with regard to cell phones. Certainly I have no problem with parties having cell phones and having them on, but I would request that those cell phones, if you have them on, would be either on silent or on vibrate. So, if you get a call, you can go outside and get it. Certainly, if one of the attorneys gets a call, that's not a good thing. We'll ask you to take the call a little bit later, maybe during the break or something, but anyone in the audience that has a cell phone I'd ask you to turn the ringer off. We will try to have a break. It's about ten after ten. We may not have a break this morning, but, if it goes into the afternoon, we'll try to have a break midafternoon. There are

1 meeting rooms available throughout the PSC offices
2 here. Certainly there's a pretty good size conference
3 room right outside the door. If any of you all need to
4 meet with any of the litigants or witnesses or parties
5 during a break, please feel free to do so, and, if you
6 can't find a room, just ask one of the folks out front
7 and whoever is out there will lead you to an empty
8 room. With regard to posthearing data requests,
9 because we're all sort of operating on a short leash
10 here in terms of trying to meet the statutory deadline,
11 I would request and it will be the order of the Board
12 that any posthearing data requests will need to be
13 completed and filed no later than August 31, 2004.
14 Certainly, if there's some extraordinary or extenuating
15 circumstance which any of the parties need to bring to
16 the attention of the Board with regard to some data
17 request response, we'll take that up at the appropriate
18 time. Procedurally, I think, under the regulations,
19 there is a seven-day briefing rule. However, I
20 understand that, because of certain issues, the
21 parties, I think, are prepared to waive that seven-day
22 rule and the briefing schedule, the briefing dead-
23 line, that's set forth in the procedural Order of
24 September 7, 2004 is the briefing schedule that the
25 parties will agree to abide by. Am I correct in that

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belief?

MR. WATTS:

Yes.

MR. TURNER:

Mr. Chairman?

CHAIRMAN GOSS:

Yes.

MR. TURNER:

As a default, yes, I think that's September 7th. I think we might at the end of the hearing ask the Court Reporter when she might be able to have a transcript . . .

CHAIRMAN GOSS:

Okay.

MR. TURNER:

. . . and, if that crowds us, then that September 7th could conceivably be moved some.

CHAIRMAN GOSS:

All right.

MR. TURNER:

But September 7th ought to be the default, I believe.

CHAIRMAN GOSS:

All right. I'll ask you to remind me of that, please, Mr. Turner, before we all leave. As I said, a public hearing was held in this matter on August 5, 2004 down

1 in Irvine and, as such, the Board will not be taking
2 any sort of live public comment at the hearing today.
3 However, certainly, if any member of the public wishes
4 to offer any posthearing comments, you are welcome to
5 do that in writing and you may submit those to us here
6 at the Public Service Commission. You can go to our
7 web site and do it by e-mail if you want to. If you
8 want to do it in writing, just mail it to us or bring
9 it to Mr. Turner, or Mr. Melnykovich, or someone here
10 at the PSC and we'll be happy to accept those. Now,
11 with regard to order of proof, it is my intention,
12 since the - of course, the Estill County Energy
13 Partners are the applicant so they carry the burden.
14 They will go first, followed by the intervenors, DLX,
15 Inc. and Harry LaViers, Jr., Trustee, followed by Will
16 Herrick, intervenor, and, lastly, the Staff. Now,
17 let's take up any outstanding motions or housekeeping
18 matters that the parties wish to bring to the attention
19 of the Board.

20 MR. WATTS:

21 Thank you, sir, if I may be heard.

22 CHAIRMAN GOSS:

23 Yes, sir.

24 MR. WATTS:

25 As I indicated when I was up earlier, I did have

1 something to bring before the Board and I'd like to do
2 that now, if I can. It does relate to what might be
3 called the real estate dispute, those issues that have
4 been presented to you. As I believe you're aware,
5 Estill County Energy Partners proposes to develop and
6 construct its electric generation facility on a site of
7 approximately 620 acres in Estill County, Kentucky
8 which will be leased from an affiliate, Fox Trot
9 Properties, LLC, which has contracted to acquire that
10 property out of the Kentucky Processing Company
11 bankruptcy. That much I think you're aware. Mr. Harry
12 LaViers and a company called DLX have filed a motion to
13 intervene in this proceeding and also direct testimony,
14 and they have asserted some competing claims to a
15 portion or portions of the site, and I'd like to talk
16 just a moment about those portions just so we can
17 understand what we're referring to. There are, as I
18 understand it anyway, three pieces of property that
19 have been referred to. One is the Sandhill property,
20 and I'd like to just make clear that that property is
21 not included within the 620 acres of the site. It's
22 across the Kentucky River. There is no litigation that
23 I'm aware of with respect to that site. So I just
24 wanted to sort of put that in context. That's not
25 within the area that's being claimed for as the site.

1 The second piece of property or properties that I
2 understand to be involved is called the Calla
3 Subdivision and it is within the site, but it's in the
4 area of the coal waste piles from which coal would be
5 reclaimed for combustion in the facility, and there is
6 no litigation that I'm aware of, no formal claim that's
7 been made or litigation pending with respect to that
8 piece of property. So I wanted you to understand that.
9 And then, finally, there is . . .

10 CHAIRMAN GOSS:

11 Okay. Let me stop you, sir.

12 MR. WATTS:

13 Yes.

14 CHAIRMAN GOSS:

15 So you're saying the Calla Subdivision part is not in
16 dispute in terms of the title?

17 MR. WATTS:

18 It appears to be in dispute in the sense that I
19 understand the LaViers Trust to claim some rights in
20 it. What I want you to understand is there is no
21 pending litigation with respect to such a claim that
22 I'm aware of, and I just wanted to make that clear.

23 CHAIRMAN GOSS:

24 And that includes in the bankruptcy proceeding?
25

1 MR. WATTS:

2 That's correct. That's correct. That's my
3 understanding, and then there is what has been referred
4 to as the refuse pile - we refer to it as the river
5 pile - property and that is claimed by, or some
6 ownership rights in that property are claimed by DLX,
7 and it is that property which is the subject of the
8 litigation in bankruptcy court, as I understand it, and
9 that, of course, is within the site as well. Mr. Jerry
10 Mack, who is one of our witnesses, who is the Project
11 Manager, can actually explain this in more detail than
12 I can. I just wanted to sort of set that stage for you
13 so that you can appreciate what these properties are.

14 CHAIRMAN GOSS:

15 Do you have any idea, roughly, and I'm sure the
16 gentleman that you spoke of will tell us more, but
17 about how many acres are we talking about?

18 MR. WATTS:

19 I prefer if you directed that question to him.

20 CHAIRMAN GOSS:

21 All right. Okay.

22 MR. WATTS:

23 So Mr. LaViers, as a Trustee, and DLX have argued in
24 their motion to intervene and also in their direct
25 testimony, and we agree with this, that this Board does

1 not have the jurisdiction nor should it attempt to
2 decide the merits of these disputes. Obviously, one of
3 them is actually pending before the bankruptcy judge
4 here in Kentucky, and so we don't - we agree with them
5 with respect to that, as we indicated in response to
6 their motion to intervene, and you ruled to that effect
7 on July 23 in your Order in response to our filing, and
8 we think that's appropriate and an accurate statement
9 of the law. So the question then arises how should the
10 Board approach this issue as it considers the
11 application, and so, in preparation for this hearing,
12 we had sort of focused on trying to provide an approach
13 that we thought could work, and we were going to submit
14 that to you and will submit that to you, but let me
15 come back to that in just a minute. We were packing up
16 this morning to come over here and found that a motion
17 to dismiss has been at least prepared. I don't know
18 whether it's been filed or not. It hit the fax machine
19 of Ms. Underwood at a quarter to midnight last night,
20 so we found it this morning. We haven't had much of a
21 chance to review it this morning, but I think it
22 provides even more impetus for a solution, and we
23 believe we have that, but I have to say - I'm not going
24 to respond to it in detail right now - obviously, I
25 haven't had time to do that - but it is a remarkable

1 document, and it says three things, as I read it. The
2 first is that the Board can't decide the real estate
3 ownership issue that's been raised by the parties, at
4 least if you're going to decide it adverse to them.
5 They say you can't do that. Then it says you must,
6 however, decide on the merits in their favor. That's a
7 remarkable contravention of their argument that you
8 don't have jurisdiction, but they say you can decide it
9 and, in fact, must decide it in their favor, but you
10 cannot decide it against them, and then they say, if
11 you don't grant the motion, that the members of the
12 Board, as I read the motion, are personally, jointly,
13 and severly liable for damages if you don't grant the
14 motion and don't decide the issue in their favor. I
15 consider that to be a remarkable document. As I said,
16 I'm not going to respond to it now except to say that
17 it is without merit and it should be dismissed. But,
18 returning to the solution that we believe we have, we
19 have developed a condition which will address the
20 concerns of the opponents and also allow this
21 proceeding to go forward in an orderly manner in a way
22 in which we're not trying to argue about deeds for the
23 next two weeks, which I think is not something this
24 Board either should desire to do or I think has
25 jurisdiction to do. So we've developed a condition

1 that we are going to propose to you, and I'd like to
2 put it in front of you at this point, but what it would
3 do is, and I'll read it, it says - it would say that,
4 "A boundary survey shall be obtained and recorded in
5 the Estill County Clerk's Office by ECEP or an
6 affiliate of ECEP as lessor to ECEP for the real
7 property upon which ECEP will construct the facility
8 and upon which on-site waste coal will be mined as a
9 fuel source for the facility," and what that would do
10 is provide that, in the unlikely event that the
11 opponents are successful in their claims, either in
12 litigation or otherwise, that that portion of the site,
13 to the extent that they were successful, would not be
14 included and could be excluded in the survey that would
15 be filed. So their rights would be protected. At the
16 same time, the applicant would be able to proceed with
17 its project, and so everybody's interests would be
18 served by that. So I'd like to put this in front of
19 you. Mr. Mack can answer questions about it, to the
20 extent that you have them, but it's intended to try to
21 address the situation that's been created by these real
22 estate claims, and I hope it will be helpful.

23 CHAIRMAN GOSS:

24 Well, isn't a delineation of the boundaries something
25 that's required to be in the application on its face?

1 MR. WATTS:

2 Well, the application contains such a description of
3 the property, which is what's actually required, and it
4 describes - there are a couple of different exhibits
5 that have been provided which do provide the boundaries
6 of the property as we understand them to be, and so our
7 point is that, to the extent that there's some question
8 about that, then we believe this condition would - it
9 might be a revised boundary survey, but it would be a
10 survey that would accompany a legal document that would
11 be filed at the Clerk's Office. So I hope that's an
12 approach that would be helpful, and we'd be happy to
13 hand this out to you and to the parties. It's very
14 short.

15 CHAIRMAN GOSS:

16 All right. Mr. Collier, I presume you have something
17 you want to say to the Board.

18 MR. COLLIER:

19 Right. I was waiting to hear how that was a motion. I
20 think it was a response to the motion that my parties
21 filed and trying to get ahead of it. I realize that it
22 won't be possible for the Board to consider the motion
23 today, but it was tendered so that it would be in the
24 record prior to the holding of this hearing. However,
25 I think that there are several things that are simply

1 not correct about the applicant's position. I think
2 everyone would readily admit that this body is not
3 going to sit as a court and adjudicate real estate
4 matters; that's a given, but there is a threshold
5 question that every Board, whether it's a Board of
6 Adjustment, a Zoning Board, the Public Service
7 Commission, the Siting Board, any other Board that
8 meets to discuss matters that concern real estate, must
9 deal with and that is the threshold question of whether
10 the applicant, for whatever right that they seek from
11 the governmental body, has to make some sort of prima
12 facie showing to show that they're entitled to invoke
13 the Board's jurisdiction and have relief granted to
14 them that will affect the real property. In this
15 particular case, what ECEP wants to do is to construct
16 a power plant and mine refuse coal and other coal from
17 these properties and possibly from other properties.
18 As it turns out, and I haven't been able to ask these
19 questions yet, it turns out that the plant site - and
20 I've gone around and looked at the maps that are on the
21 walls throughout this room - you will see that the
22 property that DLX currently has record title to -
23 record title, not some sort of claim or anything else,
24 record title, has a deed - is actually the place where
25 this plant is proposed to be built. This is no small

1 matter and not, as they said in their application or in
2 their responses to the data requests, that it's a small
3 portion of the property. In acreage, it may not
4 represent 50 percent, but, in fact, it is the key
5 property in this application. Not only that, the best
6 refuse coal and the coal that is closest to the site
7 happens to be owned by DLX, so that granting a permit
8 to construct is essentially a green light to ECEP or to
9 Fox Trot, if you will. I haven't figured out exactly
10 what the relationship is, because I haven't seen a
11 lease or any other document that indicates what the
12 true nature of the legal relationship is between these
13 parties, but they want to go in and begin constructing
14 something on property for which they have no legal
15 title, which they have no color of title, only a claim.
16 I mean, I could claim to own the building that we now
17 occupy, but I'd have to have something more than good
18 intentions and an idea in expectation of profit, and
19 they propose to mine this coal. These changes will be
20 profound. There will be a structure that my client
21 doesn't want on their property plus they propose to
22 begin removing, depleting, the asset that is on one of
23 the refuse piles. So these are very significant
24 issues. What can the Board do about it without
25 deciding the legal title? The burden is on the

1 applicant to satisfy this Board that it has the
2 requisite interest to entitle itself to the
3 construction permit that they seek. Now, that was one
4 of the reasons that I tried to get this in. I
5 apologize. I've been on vacation, and the research was
6 rather lengthy, but it turns out that other juris-
7 dictions have considered these issues, and principally
8 Kentucky actually has talked about - there's one case
9 that talks about what you have to have, and they talk
10 about legal rights, and they cite cases from other
11 jurisdictions, one of which actually involves a power
12 plant application in Rhode Island. Fortunately, for
13 that applicant, the real land owner was part of the
14 proceeding. It was a case of Dunham v. - whatever the
15 body was in Rhode Island, but they said, as to the
16 power plant that had nothing more than a bare option to
17 purchase and no right to actually develop the plant,
18 said they had no standing whatsoever to proceed. Their
19 bacon was pulled out of the fire simply because the
20 owner was present. In this case, the people who want
21 to build it are trampling upon the rights of the owner,
22 have caused them to, forced them to, attend the
23 hearing, to expend legal fees and costs, and run the
24 risk that a permit will be issued as to their property.
25 DLX and the Trust vehemently oppose any of these acts,

1 vehemently oppose the granting of any permit on their
2 property. So the real question is their burden to
3 satisfy that they are entitled to invoke this body's
4 jurisdiction. So certain basic prima facie showing
5 should be made as to record title on their behalf.
6 They can't do it.

7 CHAIRMAN GOSS:

8 Where in the statute can you point me that it's the
9 obligation of the Board to determine record title
10 ownership?

11 MR. COLLIER:

12 Well, I've addressed that in two ways, and I realize
13 there's - you're correct; there is nothing that has
14 those precise words in the statute. What I have done
15 is I have gone through and catalogued some of the
16 places in the statutory enactments that require various
17 things that have to do with legal title. For instance,
18 more, it would seem, is required of adjoining
19 landowners. You would have to establish, "I'm an
20 adjoining landowner" before you can come in and entitle
21 yourself to the protections they're afforded in notices
22 to adjoining landowners. There are things in the
23 statute that have to do, particularly with the power
24 lines, under 278.714, you have to notify owners, you
25 have to come up with a survey, etc. So there are

1 various references in it. If the Board should conclude
2 that there are not sufficient references to require
3 that on the face of the statutory scheme, it's perhaps
4 unconstitutional unless those requirements are
5 inferred, and what I've cited the court to is a case
6 from Maine called Walsh v. City of Brewer where they
7 say this: "When ... there is lacking a clear,
8 affirmative and express provision to the contrary, such
9 'title, right or interest' in the land is implicitly a
10 valid precondition of 'standing' to be a proper
11 'applicant' under the ordinances," and then they go on
12 to give some public policy rationales which are fairly
13 obvious. One, it prevents public agencies from
14 spending time on applications which are just wishful
15 thinking. If we were before a court of law, there
16 would be questions of ripeness, standing, judi-
17 ciability, and other concepts that would attend the
18 discussion, but those are ways in which other courts,
19 other jurisdictions have handled similar circumstances.
20 It's such an obvious question that it's almost as
21 though perhaps it was overlooked because one might
22 presume that no one would come forward and say, "I'd
23 like to build something over here on property that I
24 don't own," but, if that actually occurs, there's got
25 to be some protection for the people who actually own

1 the property or their rights are meaningless. So
2 that's the primary basis for the motion, and it's a
3 burden they've got to satisfy, and you'll notice - I've
4 gone through the application - there's not a single
5 signed - there is no survey, signed or unsigned. There
6 are no documents, title documents, which show any
7 record title to the refuse pile tract, in particular,
8 and, as to the exceptions that are contained in the
9 deed that they say their, one day, lessor will one day
10 get if the litigation results in a judgment, they say,
11 "Copies of these deeds are attached to Question No. 11
12 of the Board's First Data Request. Please note that
13 certain exceptions and exclusions described in these
14 deeds are not shown on Exhibit B," and one would wonder
15 why not. If they're excepted in the deed, why don't
16 they want to show them? Why are they claiming to own
17 them? They go on to say, "However, Fox Trot Properties
18 and ECEP believe that Fox Trot has valid rights to all
19 the property shown on Exhibit B," with nothing more.
20 That's not title; that's just a statement. It has no
21 legal efficacy other than to perhaps constitute a
22 slander of title against the rights my clients own.

23 CHAIRMAN GOSS:

24 So does your client claim ownership to at least that
25 portion of the property where the facility itself will

1 be constructed, the turbines, and the stack, and the
2 bed, and those sorts of things?

3 MR. COLLIER:

4 Yes. There is an overlay on this wall. I guess the
5 Staff has prepared it from a variety of the maps. In
6 fact, we had prepared one perhaps for use that has a
7 bright yellow line on it, but it's remarkably similar
8 to what they have prepared, and, if you go over and
9 examine it, you'll see the bend in the river there.
10 You can see it all the way over there in the
11 photographic map. In that corner running from
12 southwest to northeast is what I would call the refuse
13 pile tract where the largest and best pile of coal
14 refuse is. There's kind of a white spot that is a
15 little bit to the southeast of that, and in that area
16 is where ECEP proposes to construct the merchant power
17 plant facility. That happens to be on the
18 southeasternmost portion of the refuse pile tract.
19 There is a specific exclusion in the deed from DLX to
20 Kentucky Processing that describes that property. It's
21 specifically stated that it's excluded.

22 CHAIRMAN GOSS:

23 If you would, tell the Board what litigation there is
24 currently pending, if any, with regard to title
25 ownership of the disputed tracts.

1 MR. COLLIER:

2 Kentucky Processing Company, which I mentioned earlier
3 that had received this deed from DLX back in 1944,
4 August 2nd, or whatever it is, went into bankruptcy,
5 changed ownership. Chuck Yates bought an ownership
6 interest. Then that company and a series of related
7 companies of Mr. Yates went into bankruptcy and have
8 been in bankruptcy in the Eastern District for some
9 period of time. DLX learned that it may be that Mr.
10 Yates, or his family, or affiliated companies, or
11 something, were interested in acquiring this tract and
12 thought they were going to acquire the refuse pile
13 tract which they own, so they investigated and found,
14 in fact, that's what they were going to claim. So they
15 filed an adversary proceeding to protect those rights.

16 CHAIRMAN GOSS:

17 In bankruptcy?

18 MR. COLLIER:

19 In bankruptcy. Judge Lee has the case. In fact, that
20 case has been tried. That case concerns not only the
21 property but the access road from the public highway
22 that you've seen that goes by the industrial park, down
23 to the property, crosses the railroad and goes up.
24 That case was tried in June of last year. It's been
25 briefed. It's awaiting decision. They mentioned . . .

1 CHAIRMAN GOSS:

2 Is that in the nature of a quiet title action or . . .

3 MR. COLLIER:

4 Actually, it was filed as a reformation which ended up
5 of Fox Trot and KPC denying to reform the boundary
6 lines, so that may or may not happen, as a matter of
7 fact, and it's unclear because . . .

8 CHAIRMAN GOSS:

9 So the issue is reformation of the deed, not an actual
10 - an action to quiet title?

11 MR. COLLIER:

12 Actually, Fox Trot never pled that it had title or had
13 acquired title, and the interesting thing is there I'm
14 not sure how it can, because DLX filed a Notice of Lis
15 Pendens prior to the auction. There was an
16 announcement made prior to the auction, which was
17 attended by Mr. Yates and his employees, stating the
18 nature of the claim that DLX had and DLX had filed
19 suit. So, if they bid, they bid with full knowledge
20 that this was going on. But I want to make . . .

21 CHAIRMAN GOSS:

22 So is there anything pending in Circuit Court in Estill
23 County with regard to . . .

24 MR. COLLIER:

25 Nothing, nothing.

1 CHAIRMAN GOSS:

2 . . . title of this property?

3 MR. COLLIER:

4 One of the - no, there is not. The lis pendens was
5 filed in the real estate record simply to give notice
6 to those who may choose to examine the title that they
7 would be on notice to go check the bankruptcy records
8 and find out. That's provided by Kentucky statute, of
9 course, but that's been done.

10 CHAIRMAN GOSS:

11 All right.

12 MR. COLLIER:

13 Interestingly, at the time it was made, and it seemed
14 to me the inference was that somehow the Trust has not
15 initiated any litigation for the inference that perhaps
16 they are only now claiming to own the Calla Subdivision
17 property. The reason no case has been filed is only
18 when we got a copy of the application and saw these
19 maps did we realize, especially with this statement
20 that, even though are exceptions in the deed, Fox Trot
21 is now going to claim those too. This was news to us.
22 So we have busied ourselves with trying to make sure
23 that there's no permit issued on the property, but that
24 doesn't mean that an action will not be filed possibly
25 in bankruptcy court with respect to those properties

1 either, because statements have now been made, contrary
2 to the deed under which Fox Trot would have to take,
3 that it now owns these properties which are
4 specifically excluded in the deed. So we don't
5 understand that either, and that is primarily their
6 position. It does - it has to do with the threshold
7 question of what interest must an applicant have, what
8 must it demonstrate, to make a prima facie showing to
9 entitle it to the relief that this Board can grant.

10 CHAIRMAN GOSS:

11 I presume you'll brief that extensively.

12 MR. COLLIER:

13 Yes.

14 CHAIRMAN GOSS:

15 All right. I would presume, Mr. Tirone, . . .

16 MR. WATTS:

17 Watts.

18 CHAIRMAN GOSS:

19 You're Mr. Watts. I'm sorry. Mr. Watts?

20 MR. WATTS:

21 Yes. Thank you. Very briefly, - yes, to the extent
22 that the Board would like to receive such briefing -
23 just a couple of points. The first is the reference to
24 the property on which the proposed facility itself,
25 that is the generation facility, would be located, a

1 claim with respect to ownership about that is not in
2 bankruptcy. That's not in litigation in the bankruptcy
3 court. That has been asserted, to the extent it's been
4 asserted, since that litigation. It's not involved in
5 that litigation, no litigation pending with respect to
6 that claim. So I wanted to make that clear. Secondly,
7 I think it should be clear to the Board that whatever
8 rights that DLX and LaViers Trust believe they have are
9 fully protectable in court. They can go to court and
10 assert whatever claims they have and receive a
11 resolution of those claims as opposed to before this
12 Board. Finally, I misspoke . . .

13 CHAIRMAN GOSS:

14 Court where?

15 MR. WATTS:

16 Well, apparently they may go back to the bankruptcy
17 court with additional claims. They can go to circuit
18 court and seek to quiet title. Whatever claims they
19 may have, they have recourse in an appropriate forum.
20 I misspoke apparently with respect to the Calla
21 Subdivision. It's my understanding that there isn't
22 minable coal in the Calla Subdivision, but I'd like for
23 Mr. Mack to address that.

24 CHAIRMAN GOSS:

25 Okay.

1 MR. WATTS:

2 Thank you. I appreciate your time this morning.

3 CHAIRMAN GOSS:

4 Thank you. Let's hear from Mr. FitzGerald next.

5 MR. FITZGERALD:

6 Mr. Chairman, it is, I think, acknowledged by all,
7 although A. W. can speak for himself, that you are not
8 here to adjudicate the title dispute, but it seems that
9 there are two different issues irrespective of whether
10 or not DLX has any claim to this property. One of the
11 threshold questions which is implicit in the statute is
12 that this Board does not busy itself rendering advisory
13 opinions for applicants who have no sufficient claim on
14 a piece of a property to support construction of a
15 merchant power plant; otherwise we would be endlessly
16 entertaining applications from people who have no
17 option, no deed, no claim, no contract to purchase. In
18 all of the other cases that have come before this Board
19 under the statute, and there are three that I'm aware
20 of, and, fortunately or not, I participated in each of
21 them, there was a deed or a contract to purchase which
22 gave sufficient title to the applicant to be able to
23 commit to the mitigating conditions, to be able to
24 represent the boundaries and the distance of the
25 exhaust stack, for example, from the property

1 boundaries. There is, I think, assumed that there is
2 sufficient ability to control the property to support
3 the application, and so I think that is one issue that
4 needs to be demonstrated as part of the applicant's
5 case in chief regardless of whether there is a disputed
6 claim. The second is, and I think Mr. Collier pointed
7 out, is that there is a prima facie showing of
8 sufficiency, which is related to the first claim, that,
9 where it is assailed by an intervenor, there is, I
10 think, a slightly higher burden to show that there is a
11 sufficient claim of title. Now, I would suggest that,
12 and I know you're not going to entertain the motion to
13 dismiss now, because it has just been filed, to go
14 ahead and put all the proof on record, but I think it
15 should be subject to posthearing briefing on the issue
16 of whether they do, in fact, have standing to be
17 applicants and then also whether, in light of the
18 claim, they have made a prima facie showing of
19 sufficiency of title. There's a third question,
20 though, which is that the applicant is required not
21 merely to provide, as counsel indicated, a description
22 of the site but legal boundaries to the site, and that
23 entails that there is a survey of some sort that is
24 signed and certified, and I've not seen that. Now, it
25 may be that it will be produced either as part of a

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data request or as part of the applicant's case in chief, but I don't know that it's something that could be made a condition after the fact; rather, it is part of what makes a complete application that invokes the jurisdiction of this Board.

CHAIRMAN GOSS:

Well, certainly the setback - one of the requirements is there's a setback requirement contained in the statute that talks in terms of 1,000 feet, 2,000 feet from the boundary of an adjoining property owner, and . . .

MR. FITZGERALD:

Certainly, and there is - specifically, in the Site Assessment Report, they're required to provide, under 278.708(3)(a)2., the legal boundaries of the proposed site, and your point is well taken; you can't define who the adjoining property owners are, you can't define your setbacks, unless you know what the legal boundaries are, and that requires a meets and bounds description, a legal survey, I believe, under Kentucky law, and I have not seen that. Perhaps that will be provided, but I think that is a condition precedent to a complete Site Assessment Report rather than something that can be supplied after the fact.

1 CHAIRMAN GOSS:

2 Thank you, Mr. FitzGerald. Mr. Turner, do you have
3 anything to add on behalf of the Staff?

4 MR. TURNER:

5 No, Your Honor.

6 CHAIRMAN GOSS:

7 I think I speak for all the Board when I say that, in
8 the course of the posthearing briefs, this matter
9 should be briefed very extensively. This is an issue
10 that the Board takes very seriously and will take very
11 seriously, and certainly we're plowing new ground here.
12 This is the first one of these that I have presided
13 over, and certainly I think Mr. FitzGerald is correct
14 that the other two probably did involve more than just
15 colorable title; it involved a lot more, and so I think
16 that that matter does need to be briefed by the parties
17 in addition to all the other issues that the Board must
18 consider under 278.710. All right. So the ruling of
19 the Board with regard to the motion to dismiss will be
20 that the Board will take that motion under advisement
21 and will consider the briefs and respective positions
22 of the parties and a ruling on that motion will be part
23 and parcel of the final decision with regard to the
24 certificate that the Board enters. Do any of the Board
25 members have any questions of any of the attorneys with

1 regard to what we've just heard? I've done most of the
2 talking. Anybody? All right. Hearing none, are there
3 any other housekeeping matters or any other motions
4 that the Board needs to take up prior to receiving
5 testimony? All right. Hearing none, then we'll begin
6 with the applicant. Mr. Watts, you may call your first
7 witness.

8 MR. WATTS:

9 Thank you, sir. I call Gerard Mack.

10 WITNESS SWORN

11 CHAIRMAN GOSS:

12 Please be seated. Mr. Watts, you may proceed, sir.

13 MR. WATTS:

14 Thank you. May I take a moment to get situated?

15 Just a moment.

16 The witness, GERARD B. MACK, after having been
17 first duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. WATTS:

20 Q. Would you please state your name, position of
21 employment, and business address?

22 A. My name is Gerard B. Mack. I am the Project Manager
23 for Estill County Energy Partners, LLC. My business
24 address is 121 Hermitage Road, Charlotte, North
25 Carolina.

1 Q. Now, Mr. Mack, do you have in front of you six pages of
2 typed questions and answers that purports to be the
3 "Direct Testimony of Gerard B. Mack on Behalf of Estill
4 County Energy Partners, LLC?
5 A. I do.
6 Q. Was it prepared by you or under your direction?
7 A. It was.
8 Q. Okay, and was this the direct testimony that you
9 submitted for filing with the Board?
10 A. Yes, it was.
11 Q. Okay, and was it prepared by you or under your
12 direction?
13 A. Yes.
14 Q. Okay. Do you have any corrections or additions to it?
15 A. No, I do not.
16 Q. If you were asked these questions, would you provide
17 the same or substantially the same answers?
18 A. I would.
19 MR. WATTS:
20 I'd like to have this identified, if that's the
21 process, sir.
22 CHAIRMAN GOSS:
23 Yes, sir. That's fine.
24 MR. WATTS:
25 Do you assign exhibit numbers, or do you just put

1 it all in the record?

2 CHAIRMAN GOSS:

3 Yes, we do. We'll do Applicant Exhibit so on.
4 We'll do Intervenor, and we'll designated which
5 intervenor, and, if the Staff has any exhibits,
6 which is doubtful, we'll call them Staff Exhibits.
7 So we do number them.

8 MR. WATTS:

9 Okay.

10 CHAIRMAN GOSS:

11 Have you passed the witness for cross?

12 MR. WATTS:

13 Not quite yet.

14 CHAIRMAN GOSS:

15 Oh, I'm sorry.

16 MR. WATTS:

17 I have just a little bit of additional testimony
18 that I'd like to proceed with, if I can.

19 Q. Mr. Mack, are you familiar with the letters that were
20 sent on August 6, 2004 and August 18, 2004 by John
21 Gardner, TVA's Manager of Transmission Commercial
22 Operations, in response to the Board's July 19, 2004
23 letter on ECEP's interconnection arrangements?

24 A. I am.

25 Q. Thank you, and did you respond to TVA after seeing

1 their first letter?

2 A. Yes, I did. I called John Gardner and then provided
3 him copies of e-mails which were sent a little over a
4 year ago during the interconnection evaluation process
5 which clearly demonstrated that TVA had been copied on
6 the documents and that part of the evaluation.

7 Q. And why did you do that?

8 A. Well, I was . . .

9 CHAIRMAN GOSS:

10 Excuse me just a minute. Mr. Watts, are we
11 going beyond - are you asking him questions now
12 that goes beyond the questions and answers in the
13 prefiled direct?

14 MR. WATTS:

15 Yes, I am, and there's a reason for that. Because
16 of a development since this testimony was
17 prepared, there was something in the record that
18 we wanted to clarify, and that's the purpose of
19 this additional direct testimony.

20 CHAIRMAN GOSS:

21 Typically, we're limited to the prefiled direct.
22 Do any of the parties have any problems or
23 objections to going beyond that? Isn't that
24 typically - isn't that correct, Mr. Turner? Is
25 that in the Order?

1 MR. TURNER:
2 That is typically the case, Your Honor. In this
3 particular case, it was a Board letter that went
4 and TVA professed not to know anything about the
5 project. So, if that's the extent of the Q and
6 A, . . .

7 MR. WATTS:
8 That is the purpose.

9 MR. TURNER:
10 . . . I think Staff believes that they ought to
11 proceed.

12 CHAIRMAN GOSS:
13 All right. Okay.

14 MR. WATTS:
15 And that was the - the question that I just asked
16 was the reason for doing this.

17 CHAIRMAN GOSS:
18 All right. I'm sorry to interrupt you, but I
19 wanted to be fair to everybody.

20 MR. WATTS:
21 Oh, no. That's fine.

22 CHAIRMAN GOSS:
23 Go ahead.

24 Q. Do you recall the question? Why did you take the
25 actions that you just said you had taken?

1 A. I took the actions because the letter stated that TVA
2 was not aware of our project.

3 Q. All right, and have you prepared copies of that e-mail
4 correspondence?

5 A. I have.

6 Q. Thank you.

7 MR. WATTS:

8 We have prepared copies of the correspondence for
9 submission to the record so that the record will
10 include what TVA knew and when they knew it.
11 Unfortunately, it's rather extensive.

12 Q. And could you identify what I've just handed out, sir?

13 A. Yes. This book includes an e-mail that I sent to John
14 Gardner at TVA on August 10th, and it includes copies
15 of the, I believe, five or six exhibits that were
16 attached to that August 10th e-mail.

17 Q. And what were the attachments? What do the earlier
18 e-mails do?

19 A. Well, the earlier e-mails were the transmittal of
20 things like meeting minutes, progress reports, interim
21 and final results of thermal analyses, stability, short
22 circuit, all of the work that was done during the
23 interconnection evaluation that was performed by the
24 Midwest Independent System Operator, MISO, and Kentucky
25 Utilities.

1 Q. Now, when was TVA first informed of the proposed ECEP
2 interconnection?

3 A. We had our first kick-off meeting for the evaluation on
4 May 8th of 2003, and, at that kick-off meeting, I was
5 there representing the project. KU was represented;
6 East Kentucky Power Co-op was represented; and the MISO
7 was represented, and we decided that, because they were
8 adjoining systems, although not very close, that we
9 would copy AEP and TVA on all the documentations and
10 all the analyses that were performed.

11 Q. Why did you decide to include TVA and AEP?

12 A. Well, we wanted to make sure that the results of the
13 evaluation and the results of the studies were
14 available to them and to give them an opportunity to
15 participate in the evaluation work that was being done,
16 to ask questions, to request further analyses, to
17 provide their own analyses to us.

18 Q. Just for the record, you referred to MISO. Could you
19 identify what that is?

20 A. Sure. That's the Midwest Independent System Operator.

21 Q. And what information did MISO provide to TVA?

22 A. Well, MISO provided the minutes of all of the meetings.
23 They provided the progress reports from their
24 evaluation. They provided all of the interim results
25 to discuss. They provided the final results to

1 discuss, and, although it's not included in your book,
2 because I didn't send it to John Gardner, they also had
3 an opportunity to review several draft copies of the
4 final report.

5 Q. Did TVA respond to MISO with any comments, questions,
6 or suggestions concerning the interconnection
7 evaluation?

8 A. Not to my knowledge.

9 Q. Did TVA have opportunity to participate in the MISO and
10 KU evaluations and to do their own corresponding
11 studies at that time?

12 A. They did.

13 Q. What additional information has TVA requested?

14 A. Well, as a result of the e-mail that I provided to Mr.
15 Gardner, they had originally asked me to fill out a
16 generator interconnection form, which was totally
17 inappropriate, because we're not requesting an inter-
18 connection from TVA. They've since scaled down the
19 request and what they're looking for is some of our
20 output data and transformer data to perform their own
21 thermal analysis.

22 Q. And the project will interconnect with KU; is that
23 correct?

24 A. That's right.

25 Q. Okay. Has ECEP satisfied the conditions of

1 KRS 278.706(2)(i) with the MISO interconnection and
2 facilities evaluations and the Interconnection and
3 Operating Agreement executed by MISO, KU, and ECEP and
4 filed and accepted by the FERC?
5 A. Yes.
6 Q. Okay.
7 MR. WATTS:
8 That's all I have on that. I appreciate you
9 taking the time to do that, . . .
10 CHAIRMAN GOSS:
11 Thank you. All right. Mr. Collier?
12 MR. WATTS:
13 . . . but I hope that completes the record.
14 CHAIRMAN GOSS:
15 I'm sorry. Did you move for admission of
16 the . . .
17 MR. WATTS:
18 I would.
19 CHAIRMAN GOSS:
20 Okay. Any objection? We're calling this
21 Applicant 1, Connie? Have you marked it?
22 COURT REPORTER:
23 This six pages of testimony, was that going to
24 be Exhibit 1?
25

1 CHAIRMAN GOSS:
2 No. The testimony is prefiled and is already
3 of record so that does not need to be formally
4 admitted. The testimony doesn't. You can go
5 through that with him, but we don't mark that as
6 an exhibit.
7 MR. WATTS:
8 All right. What about the application, sir? Does
9 that need to be separately identified?
10 CHAIRMAN GOSS:
11 The application is a part of the record already
12 and does not need to be made an exhibit.
13 MR. WATTS:
14 As well as the discovery responses, I mean, the
15 data requests?
16 CHAIRMAN GOSS:
17 All of the data requests, yes.
18 MR. WATTS:
19 Okay. Thanks very much.
20 CHAIRMAN GOSS:
21 All right. So, hearing no objection, then, to the
22 motion to admit Applicant Exhibit 1, let it be
23 offered and admitted.
24 APPLICANT EXHIBIT 1
25

1 CHAIRMAN GOSS:

2 Mr. Collier, you may cross, sir.

3 MR. COLLIER:

4 Thank you.

5 CROSS EXAMINATION

6 BY MR. COLLIER:

7 Q. Mr. Mack, looking at your testimony, you indicate that
8 you have been in the power generation business for 25
9 years, and I presume that your responsibilities have
10 risen over time with your experience in the industry;
11 correct?

12 A. That's correct.

13 Q. With ECEP, how would you describe your job responsi-
14 bilities?

15 A. Well, my job title is Project Manager and, in my
16 thinking, that's fairly descriptive. My responsibility
17 is to coordinate all aspects of the development of the
18 power generating station.

19 Q. All aspects then would include the acquisition of the
20 real estate and real estate interests necessary for the
21 completion of the project?

22 A. Well, if you're referring to the acquisition of the
23 real estate by Fox Trot Properties, LLC, that's not one
24 of my responsibilities, no.

25 Q. That's not what I asked. I said real estate and real

1 estate interests. Doesn't ECEP plan to acquire some
2 real estate or interests in real estate in this
3 property to operate the plant?
4 A. ECEP plans to lease real estate.
5 Q. All right, and, in connection with leasing real estate
6 in your prior experience prior to ECEP, have you been
7 involved in leasing real estate for the benefit of your
8 employer?
9 A. Yes.
10 Q. Tell me what your understanding of the value of
11 acquiring an interest in the property is to the
12 project.
13 A. Are you asking me to quantify something?
14 Q. Yes. How important is it to acquire an interest in
15 real estate before you invest significant time, money,
16 to build a plant? I don't know - in the particular
17 situation, your past experience you've been involved,
18 how important is it?
19 A. Well, my experience has been that the final acquisition
20 of real estate is essential for the completion of the
21 financing of the power plant in the beginning of the
22 construction.
23 Q. Would you, as Project Manager, advise ECEP to construct
24 a plant if it did not own a valid interest in the real
25 estate where the plant was to be constructed?

1 A. Well, you asked if I would advise them. I don't think
2 that you can build a power plant and secure financing
3 if you don't have an interest in the property.

4 Q. And I would ask you the same question with respect to -
5 you do plan to burn on-site coal and refuse coal, do
6 you not, in the plant?

7 A. We plan to burn on-site refuse coal. I don't know what
8 you mean by on-site coal.

9 Q. I don't know what you're going to call it. I say coal
10 and refuse coal.

11 A. Okay.

12 Q. So you do plan on burning . . .

13 A. As long as it's the same thing, yes.

14 Q. But you're the engineer. That's why I'm asking you.

15 A. Actually I'm the Project Manager.

16 Q. But you do have a degree in engineering, don't you?

17 A. I do.

18 Q. All right. Now, some of the - you would also expect to
19 have the requisite valid legal interest in this coal
20 before you took it and burned it in this plant,
21 wouldn't you?

22 A. Yes.

23 Q. Does ECEP intend to acquire those interests?

24 A. ECEP intends to enter into a lease with Fox Trot
25 Properties that would provide for the ability to mine

1 the coal.

2 Q. What if Fox Trot Properties, LLC does not have the
3 interests that you require?

4 A. If Fox Trot Properties doesn't have the interests that
5 we expect to receive through the lease, then obviously
6 they can't provide us those interests through the
7 lease.

8 Q. How much longer will you continue with this project if
9 those interests do not become available?

10 A. That's a real interesting question. I don't know that
11 I can answer that.

12 Q. You wouldn't buy the plant, the machinery, the
13 structure that's going to be constructed until you were
14 certain that you had those rights, would you?

15 A. Well, let me explain. I want to be responsive to your
16 question, so let me explain the process. Prior to the
17 purchase of the equipment for the power plant, we will
18 have put all the various development components
19 together, including property, and secure financing for
20 the power plant.

21 Q. The reason I ask is I looked in your answers to the
22 Staff's First Data Request and I believe that the
23 response was that ECEP plans to begin construction in
24 early 2005. That's just a few months away, and you
25 have just said that you would not begin that

1 construction until you had assured yourself, on ECEP's
2 behalf, that it had acquired valid interests in the
3 real estate and in these refuse coal reserves that you
4 intend to burn on site; correct?

5 A. I'm not sure what you're asking me. Are you asking
6 me . . .

7 Q. Isn't that what you just said; you want to start
8 construction in early 2005, but, as a precondition,
9 ECEP wants to acquire valid interests in the real
10 estate and in the coal that it intends to burn from the
11 site?

12 A. That's correct.

13 Q. What steps has ECEP undertaken to assure itself that
14 it, in fact, has those rights?

15 A. Could you rephrase that? Because I'm not sure - you're
16 asking me the whole basket of development activities?

17 Q. What steps has ECEP taken to assure itself that it has
18 or will acquire the requisite rights in the real estate
19 and the coal to be burned?

20 A. Fox Trot Properties is the entity that is investigating
21 the rights to the property and to the waste coal. That
22 work is continuing.

23 Q. That's not my question. What is ECEP - you have just
24 said that ECEP is going to take the lease. Who is
25 going to own the power plant, the structure, the

1 facility?

2 A. The power plant will be owned by ECEP.

3 Q. How much is that plant projected to cost installed?

4 A. The projections are about \$150 million.

5 Q. All right. So you're going to spend, or somebody is
6 going to spend, \$150 million, and you're going to put
7 it on a piece of real estate. What steps is ECEP
8 taking to assure itself that its investment in this
9 plant will be secure once it's placed on that real
10 estate?

11 A. Oh, I understand your question now. The steps that
12 ECEP is taking to make sure that the power plant that's
13 built on the site is supported by the property rights
14 is that we are not going to start construction or not
15 going to finance this plant until such time as those
16 property rights are in hand.

17 Q. All right. So what steps, then, are you taking on
18 ECEP's behalf to investigate and acquire those property
19 rights?

20 A. We will be developing a lease between ECEP and Fox Trot
21 Properties.

22 Q. Will you conduct a title examination?

23 A. Yes.

24 Q. Have you conducted a title examination?

25 A. I have not.

1 Q. Have you authorized someone on ECEP's behalf or has
2 ECEP authorized someone on its behalf to conduct a
3 title examination with respect to the properties that
4 are the subject of this application?
5 A. We have looked at the record titles in the Estill
6 County Courthouse and used that information in
7 preparation of the application. We have not
8 commissioned a title insurance company to provide us a
9 binder, if that's what you're asking.
10 Q. Not quite. Have you had an attorney run the title to
11 the property that is the subject of this application?
12 A. I can't tell you directly that we have . . .
13 Q. Well, you don't know . . .
14 A. I'm sorry. Go ahead.
15 Q. Have you retained an attorney to run the title to this
16 property?
17 A. ECEP has . . .
18 Q. Has ECEP retained an attorney to run the title to the
19 property that is the subject of this application?
20 A. No, we haven't. That title work that has been done, in
21 my understanding, has been done through Fox Trot
22 Properties.
23 Q. And what then has Fox Trot Properties done for ECEP in
24 that regard?
25 A. Well, they've done it for themselves.

- 1 Q. Well, to whom will ECEP be liable when it purchases
2 this \$150 million plant? In other words, there will be
3 more than the plant itself. ECEP is going to incur a
4 lot of indebtedness; correct?
- 5 A. That's correct.
- 6 Q. So it will be obligated to people for the repayment of
7 whatever these sums are in excess of \$150 million.
- 8 A. That's right.
- 9 Q. And title will be run and they will undoubtedly require
10 title insurance, won't they?
- 11 A. That's right.
- 12 Q. And, before that can happen, you've got to figure out
13 whether these rights can be acquired. You're not going
14 to, in fact, rely on Fox Trot, are you? ECEP is going
15 to have to speak for the validity of its titles and
16 answer in the form of a note or other obligation to
17 whoever it borrows the money from and promise that it
18 has title and promise that it will repay those sums and
19 a mortgage will be placed in the Estill County Clerk's
20 Office; isn't that right?
- 21 A. That's right.
- 22 Q. So what is ECEP doing to assure itself for its own
23 benefit that it can rely on anything that anyone tells
24 it about the property since it's going to have to make
25 those representations?

1 A. At the time that those representations are necessary
2 when we close financing, ECEP will conduct a title
3 search.

4 Q. When do you plan on entering into a lease with Fox
5 Trot?

6 A. I don't know that we've got that scheduled. That will
7 be sometime prior to close of financing.

8 Q. When do you project to close on financing?

9 A. Well, the answer that I give in public, because I'm a
10 developer, is that we expect to be able to close
11 financing by the first quarter of 2005. Now, that's
12 going to require us to do quite a number of things, not
13 only to secure the certificate to construct the power
14 plant from this Board but also to secure all of the
15 environmental permits, the air permits, the water
16 permits, waste disposal, all of those things. So
17 there's really quite a basket of things that need to be
18 done.

19 Q. Well, I've read your application. You plan to begin
20 construction in early 2005 and, based on everything
21 you've said, that means that the deal will have closed.
22 You'll have a lease. You will have borrowed the money.
23 There will be a mortgage. You'll have purchased the
24 plant and made arrangements to have it constructed on
25 the site.

1 A. That's right.

2 Q. So when do you plan on investigating the title and
3 assuring yourself that you can enter into this highly
4 leveraged situation?

5 A. Well, the title investigation to prepare the
6 application was performed prior to the application
7 going in, obviously. The title insurance policy, in my
8 experience, is one of the last things to be developed
9 prior to the closing of financing, because the title
10 insurance company wants to run the title and make sure
11 there are no outstanding liens on the property right
12 before they authorize the closing.

13 Q. So have you retained any attorneys to review any of the
14 real estate issues that relate to my clients? And,
15 when I say "you," I mean ECEP.

16 A. ECEP has not directly retained an attorney to
17 investigate claims of your client.

18 Q. What do you mean "has not directly retained"?

19 A. I mean that . . .

20 MR. WATTS:

21 I'm going to ask that we be careful here in
22 terms of intruding into attorney/client relation-
23 ships, communications, and so forth. I didn't
24 object because I thought I wanted to see what
25 direction this was going, but I do think we're

1 getting on thin ice here, and I would object to
2 the question.

3 CHAIRMAN GOSS:

4 Yeah. I think the question was, "Have you
5 retained counsel?" I don't think he asked him
6 what counsel has told you or if counsel has given
7 ECEP any sort of opinion. So I think he can -
8 I'll overrule the objection and let him answer the
9 question as to whether or not counsel has been
10 retained, but certainly, Mr. Collier, you're not
11 to go into any opinions or any communication that
12 ECEP's counsel might have had with Mr. Mack or
13 anyone else.

14 MR. COLLIER:

15 Well, I think that his answer thus far has been
16 they've retained - ECEP has retained no counsel
17 with respect to these real estate issues but said
18 that indirectly they have received some
19 information, and that's the basis of my question.
20 There would be no attorney/client privilege
21 because ECEP did not retain that lawyer.

22 CHAIRMAN GOSS:

23 Well, I don't know if there'd be privilege or not,
24 but I'm going to err on the side of respecting the
25 privilege. So certainly you can answer the

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question, Mr. Mack, with regard to whether or not
counsel has been indirectly retained, I think was
your word.

A. Well, if Fox Trot Properties has retained counsel to
investigate the claims, they did not do that at my
request, if that's responsive to the question that I
understand.

Q. Has - you said earlier that you were relying on
information that had been provided to ECEP by Fox Trot.
What information has Fox Trot supplied to ECEP
regarding my clients' property interests?

A. Oh, I understand now, sure. Fox Trot has provided me
with copies of the testimony and the filings under the
adversary proceeding in the bankruptcy court.

Q. Would that include the surveys which my clients have
also filed in the record in this matter?

A. Yes.

Q. The affidavit of Richard Hall with the explanatory
maps?

MR. WATTS:

I'm going to try to restrain my inclination to
object to too many questions, but we also need to
be careful, in my view, not to retry the case that
was heard by the bankruptcy court or these real
estate disputes, period, and so I - it seems to me

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we're getting into that area, and I would object to it.

CHAIRMAN GOSS:

I'm not sure I know who Mr. Hall is anyway. I don't think he's testified in this case. So, if we are going into issues that are currently pending in the bankruptcy proceeding, let's not do that.

MR. COLLIER:

I'm not doing that at all.

CHAIRMAN GOSS:

Okay.

MR. COLLIER:

I haven't asked that question. I'm asking what he knows, what he's found out, what steps he's taken to apprise ECEP of these matters, and I just asked if he had reviewed it.

CHAIRMAN GOSS:

Go ahead and ask your question again.

Q. Mr. Hall was the surveyor whose survey has been filed along with his affidavit for the documents that are from the record in that case. So, when you said you reviewed records from the bankruptcy action, I will just tell you that Mr. Hall's survey was . . .

1 MR. WATTS:

2 I'm going to object to counsel testifying as to
3 what was testified to in the bankruptcy case.

4 CHAIRMAN GOSS:

5 Well, I don't think that's of record. If Mr.
6 Mack knows what Mr. Hall has previously said or
7 what he's offered, certainly he can speak to that,
8 but I'm not sure counsel needs to represent what
9 Mr. Hall might have said or not said that's the
10 subject of another proceeding.

11 MR. COLLIER:

12 I'll just return to my original question.

13 CHAIRMAN GOSS:

14 Okay.

15 Q. Have you reviewed, as part of the materials that were
16 sent to you by Fox Trot from the bankruptcy case, the
17 affidavit, attachments, and survey of Richard Hall?

18 A. Yes, and I've also seen that as one of the exhibits in
19 your clients' filings.

20 Q. They're the same document, aren't they?

21 A. Well, now, that's an interesting question, because I
22 didn't compare the two.

23 Q. Did you read it and review the comments that he made
24 regarding the boundaries?

25 A. Well, I've looked at the survey and I've read the words

1 that were on the survey. I certainly couldn't answer
2 any questions about them, but I have read them.

3 Q. You said that people on ECEP's behalf have taken a look
4 at deeds in the Estill County Courthouse. What did you
5 mean by that?

6 A. I don't know that I mean anything other than that
7 direct statement.

8 Q. Did you perform that task?

9 A. No.

10 Q. Other ECEP employees?

11 A. Actually, any work that was done to investigate at the
12 courthouse was done by one of our engineering
13 consultants.

14 Q. And who might that have been?

15 A. That would be CBC Engineers & Affiliates.

16 Q. And that's Mr. Dell Jagers who's employed by . . .

17 A. Mr. Jagers didn't perform the work, but that is the
18 company that he manages.

19 Q. Did you examine any of the work that they performed?

20 A. Yes.

21 Q. What did you examine?

22 A. I examined the materials that were provided in response
23 to the Board Staff's First Data Request.

24 Q. In examining those, are you familiar with the deed from
25 - first, have you examined many surveys in your career,

1 legal descriptions?

2 A. I've looked at a few.

3 Q. Do you know what an exception is?

4 A. I do.

5 Q. What is it?

6 A. Well, an exception is essentially a carve-out.

7 Q. Did you examine the Osborne tract and the Osborne tract
8 exception in the deed from DLX to Kentucky Processing?

9 CHAIRMAN GOSS:

10 Hold on just a second. Mr. Watts?

11 MR. WATTS:

12 Yes, sir. I object to this question and this line
13 of questions in that we are heading into trying
14 the real estate dispute right here in front of
15 you, and we're going to be here for two weeks.

16 CHAIRMAN GOSS:

17 I'm going to sustain your objection. I think we
18 are getting into detail, Mr. Collier, that this
19 Board really, as we said before, does not have
20 jurisdiction to consider. Certainly everyone
21 recognizes that there's a dispute as to title to
22 the property, and to the boundaries, and those
23 sorts of things, but I don't think we need to get
24 into the specifics of which exception is where,
25 and which deed is where, and that sort of thing.

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That's just not something that we have the opportunity to consider.

MR. COLLIER:

The only thing, and I regret having to explain where I'm going with my line of questioning, but ECEP has represented that its would-be lessor owns this property and they've said that these deeds that they've examined - they submitted the deeds. They submitted them, purportedly, I guess, to induce the Commission to grant it its application, and, if they've examined them and understand that the deeds do not describe the property, then they're misrepresenting that fact, and I think that DLX and the Trust are entitled to see what knowledge they have, what steps they took, and what they've represented in the papers that they've filed, and what knowledge they actually had and when they got it.

CHAIRMAN GOSS:

Well, I just - I think certainly you have the right to ask what they know with regard to the dispute, but we do not need to get into the specifics and the fine points of what the deeds say and what the exceptions say and those sorts of things, because we will be here all day and it's

1 just not something that we have the authority to
2 rule on. So what I'd ask . . .

3 MR. COLLIER:

4 I want to know if he understood, when he saw the
5 Osborne tract, which is one of the tracts that
6 underlies this property, if he understood that
7 there was an exception that carved out, as he
8 said, the property where they want to build the
9 plant.

10 CHAIRMAN GOSS:

11 Well, I would just ask you to move on, if you
12 would, please, sir.

13 Q. Has ECEP caused anyone to begin or complete a survey
14 concerning any of the properties that are claimed by my
15 clients?

16 A. Yes.

17 Q. And who was that?

18 A. That would be CBC Engineers.

19 Q. Has the survey been completed?

20 A. No.

21 Q. When was it begun?

22 A. I don't remember exactly when it was begun. Maybe a
23 little over a month ago.

24 Q. All right. Has ECEP, or anyone from whom ECEP would
25 like to acquire rights by lease or otherwise, acquired

1 a permit of any kind with respect to the properties
2 which my clients claim?
3 A. No.
4 Q. I noticed in the responses to the Staff's data requests
5 that there was mention made of a power line easement.
6 I think it was Jackson Electric. I may get the name
7 wrong, but you're familiar with that easement; correct?
8 A. Which question are you referring to?
9 Q. There are two power line easements that go to the
10 proposed facility where it will be constructed. One is
11 Kentucky Utilities. It goes across the river. There's
12 one Jackson Electric. Are you familiar with those?
13 A. I am.
14 Q. If you can correct me as to the name, I'm just
15 struggling with it.
16 A. I think the current name is Jackson Electric
17 Cooperative.
18 Q. Okay, Jackson Electric Cooperative. Have you dealt
19 with them concerning the relocation of that easement?
20 A. Yes.
21 Q. Do you understand that it crosses the property that my
22 clients', DLX specifically, claims to own?
23 A. I understand that the JEC line crosses the tract that's
24 subject to the dispute in front of the bankruptcy
25 board.

1 Q. Has any agreement been reached to relocate it?

2 A. No.

3 Q. What about the roads to the property? I noticed that

4 there was mention made that you have been negotiating

5 with CSX for appropriate - I don't know what sort of

6 agreements you might have to enter into with CSX to use

7 the road, because the plant is going to be on the

8 outside, if you will, of the railroad; correct? In

9 other words, to trail from the public highway, you'll

10 have to go across the industrial park, cross the

11 railroad, and then go to the plant?

12 A. That's right.

13 Q. A large portion of the refuse coal lies across the

14 railroad from the plant; correct?

15 A. That's correct.

16 Q. Have you done any studies to determine how much coal on

17 a daily basis you'll have to haul from there to the

18 plant?

19 A. Yes.

20 Q. Has that been discussed with CSX?

21 A. Yes.

22 Q. Has CSX imposed any restrictions on the amount of daily

23 traffic on its railroad crossing?

24 A. Not to my knowledge.

25 Q. Has the possibility been discussed with CSX as to what

1 effect that might have if my client, DLX, wished to
2 haul coal from its site across the crossing?

3 A. No.

4 Q. At present, ECEP does understand that DLX claims that
5 the Osborne exception under which it claims in fact
6 encompasses the site where the power plant is proposed
7 to be built?

8 A. I don't think that's correct.

9 Q. Why do you think it's not correct?

10 A. Well, I've seen the drawing of the area that was
11 claimed by DLX and . . .

12 Q. Which drawing was that? Was this one of the documents
13 that you were provided from the bankruptcy action?

14 A. Yes. That would be the Richard Hall survey.

15 Q. So why did you form an - how did you form your opinion
16 that you didn't think it included the portion where the
17 plant would be built?

18 A. Looking at the area that was claimed in the adversary
19 proceeding, I can see that it does not include the area
20 where the plant is going to be built. It's adjacent to
21 it.

22 Q. Did ECEP retain counsel to advise it as to the effect
23 and impact of the legal proceedings in the bankruptcy
24 case?

25 A. No.

1 Q. So you reached this conclusion on your own?
2 A. That's right.
3 MR. COLLIER:
4 This is why I asked about the exception, because
5 I wanted to know how he came to that conclusion.
6 Q. What do you plan to do if it turns out that my clients
7 are right?
8 MR. WATTS:
9 Could you rephrase the question? Right about
10 what?
11 MR. COLLIER:
12 Title to the property.
13 MR. WATTS:
14 Well, to what property?
15 MR. COLLIER:
16 The property that they claim.
17 CHAIRMAN GOSS:
18 Could we please address the presiding officer of
19 the Board and not each other?
20 MR. WATTS:
21 Yes.
22 CHAIRMAN GOSS:
23 I'd appreciate that very much.
24 MR. WATTS:
25 Yes, sir.

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CHAIRMAN GOSS:

If you would, rephrase the question. Be a little more specific.

MR. COLLIER:

I'd be happy to.

Q. What does ECEP plan to do if it turns out that my clients own the property that they claim to own?

A. If you're asking about your client DLX and if you're asking about the approximately 80-acre river pile or refuse pile tract or prelaw pile or whatever it's called, then, regardless of the ownership of that pile, ECEP can continue with the development and the construction of the power plant.

Q. I would add to that, because DLX, according to the documents in my face, claims the property, at present, has record title to where the plant will be built. What if that is the outcome and DLX has, as it says, record title to the property upon which ECEP plans to build the power plant?

A. Well, sir, I'm not a lawyer, but, from what I read with the adversary proceeding, the claim was for the river pile tract only.

Q. That wasn't - that's not the question I asked. What if DLX is correct that it does have record title to the property upon which ECEP plans to build the merchant

1 power plant?

2 A. If - you're asking me a theoretical question, that

3 if . . .

4 Q. I'm just asking that question.

5 A. I'm sorry?

6 Q. I'm just asking that question.

7 A. So, if the bankruptcy board or the bankruptcy court

8 accedes the claim that was made by DLX and provides

9 them with title to property that's outside the area

10 that they claimed and that property includes the

11 property that we will build the plant on and if all

12 those theoretical things are true, then we can't build

13 the plant there.

14 Q. If you can't build the plant, then there will be no

15 need for this certificate, will there?

16 A. I don't know if I would put it as an "if then," but

17 it's true that, if the plant is not built, then the

18 certificate is not going to be utilized.

19 Q. Well, if ECEP cannot acquire the rights in the property

20 necessary to build the plant, then there will be no

21 need for this construction permit; correct?

22 A. If, as I stated before when you asked the question, if

23 the bankruptcy court were to accede the area that your

24 client is claiming and somehow provide them with

25 property rights that underlie the power plant, then,

1 yes, we won't build the power plant there.

2 MR. COLLIER:

3 If I might, this is why I wanted to ask about
4 the exception, because he's giving his legal
5 opinion about the bankruptcy proceedings and I
6 want to ask him to look at the deed which he says
7 he's examined, which ECEP has furnished everyone,
8 and ask if he bothered to read that exception and
9 understand, as best he could, what its implication
10 was for ECEP.

11 CHAIRMAN GOSS:

12 Mr. Watts?

13 MR. WATTS:

14 If I may be heard, I believe the witness has very
15 carefully listened to and answered these
16 questions. What Mr. Collier would like to do is
17 to expand beyond the ruling that you've already
18 made and get into the guts of the title issue, and
19 I object to it.

20 CHAIRMAN GOSS:

21 Well, I'm going to sustain the objection. I don't
22 think it's appropriate for him to go into the
23 specifics of the exception. He indicated that he
24 didn't do any of the title work. He didn't go and
25 look the deeds up and that sort of thing.

1 Certainly, as an engineer, he can look at a deed
2 and at a legal description, I would presume, and
3 know what it says. Certainly I think it's
4 appropriate to ask him if he's looked at the
5 exception and if he understands it, but I don't
6 want to litigate, Mr. Collier, the . . .

7 MR. COLLIER:

8 No, I don't intend . . .

9 CHAIRMAN GOSS:

10 Okay.

11 MR. COLLIER:

12 I just want to look - okay. Let's see.

13 Q. There is attached to Staff Data Request No. 1, No. 10,
14 a series - I'm sorry. I had the wrong one. The Staff
15 made two data requests. The first one has several
16 questions. No. 11 stated, "Provide deeds for each
17 parcel shown." And I realize it says that Gerry Mack
18 respond to those questions, but you said that you had
19 reviewed the deeds, including the deed from DLX to KPC;
20 correct?

21 A. That's right.

22 MR. COLLIER:

23 If you will, turn to Pages 2 and 3 of that deed.

24 MR. WATTS:

25 Mr. Chairman, are we going to now go through these

1 deeds? Because I strongly object to this.

2 CHAIRMAN GOSS:

3 Well, . . .

4 MR. WATTS:

5 I thought you had ruled on this point.

6 MR. COLLIER:

7 The . . .

8 CHAIRMAN GOSS:

9 I thought I had too. I mean, we're not . . .

10 MR. COLLIER:

11 All I'm going to ask is if he's - I want to

12 point, so I'm sure that - I'm not talking about

13 the whole deed - if he's read this part of it and

14 if he's read the exception.

15 CHAIRMAN GOSS:

16 All right. You can ask him if he's read it.

17 MR. COLLIER:

18 That's all I'm trying to get to.

19 CHAIRMAN GOSS:

20 Okay. What number or what data request are we

21 on?

22 MR. COLLIER:

23 It was No. 11, . . .

24 CHAIRMAN GOSS:

25 All right.

1 MR. COLLIER:
2 . . . Pages 2 and 3 that are attached. There's
3 the deed and then there's the attached, the
4 proverbial Exhibit A, Legal Description. I'll
5 just wait until everybody has got it.
6 CHAIRMAN GOSS:
7 You say Page 2 and 3. I see the deed here from
8 DLX to Kentucky Processing.
9 MR. COLLIER:
10 Part of it is their deed may be out of order. In
11 the copy I've got, the pages are shuffled a little
12 bit.
13 CHAIRMAN GOSS:
14 Okay. Let's try to . . .
15 MR. TURNER:
16 Your Honor, may I make an inquiry? Is it the
17 deed itself or is it an attachment to the deed?
18 MR. COLLIER:
19 It's the exhibit. If you'll look, there's one
20 at the bottom that says "Parcel II (Nellie Osborne
21 Tract.)" That's the beginning of it, but it
22 appears two pages after the actual description.
23 They're out of order in this.
24 CHAIRMAN GOSS:
25 Two pages after Exhibit A, the description?

1 MR. COLLIER:
2 Okay . . .
3 CHAIRMAN GOSS:
4 Yeah, there's Exhibit A.
5 MR. COLLIER:
6 Exhibit A . . .
7 CHAIRMAN GOSS:
8 Uh-huh.
9 MR. COLLIER:
10 The page that follows actually occurs three pages
11 later . . .
12 CHAIRMAN GOSS:
13 Okay.
14 MR. COLLIER:
15 . . . with Parcel I, the Morris Elliott tract, and
16 then Parcel II is the Nellie Osborne tract, and
17 then the third page is the Osborne tract. They
18 were just somehow copied and submitted by ECEP out
19 of order.
20 CHAIRMAN GOSS:
21 All right. Show him what you want him to . . .
22 MR. COLLIER:
23 All right.
24 CHAIRMAN GOSS:
25 Ask him if he's read what you want him to . . .

1 MR. COLLIER:
2 All right.
3 Q. Have you been able to follow us, what I'm referring to
4 there? It begins, "Parcel II (Nellie Osborne Tract)"
5 at the very bottom?
6 A. Yes.
7 Q. All right, and then that description continues, does it
8 not, on what follows two pages before and it's marked
9 Page 3?
10 A. Yes.
11 Q. And you have reviewed those?
12 A. I have read these.
13 Q. Did you review the exception that follows on the bottom
14 half of Page 3?
15 MR. WATTS:
16 He's just stated that he read it.
17 CHAIRMAN GOSS:
18 He can ask him if he reviewed it. We're not going
19 past that.
20 A. I have read it.
21 Q. Did you make any attempt to locate it, locate the
22 exception?
23 A. I'm sorry. I'm not following that question.
24 Q. Did you make any attempt to locate the exception?
25

1 MR. WATTS:
2 It's right here on the page.
3 CHAIRMAN GOSS:
4 I'm not sure what he means by "locate." On the
5 ground or . . .
6 MR. COLLIER:
7 On the ground or understand to what property it
8 applied.
9 MR. WATTS:
10 Well, once again, it seems to me we're getting
11 into the title question here, the dispute that I
12 thought we weren't going to get into.
13 MR. COLLIER:
14 I'm not asking the legal . . .
15 MR. WATTS:
16 I understood the question to be, "Have you read
17 it?" He's testified, yes, he did read it. I
18 thought we weren't going past that. I hope we
19 will not.
20 CHAIRMAN GOSS:
21 Mr. Collier?
22 MR. COLLIER:
23 I'm not asking whether the deeds are properly
24 executed, acknowledged, or any of that. I just
25 want to know if - he says he's reviewed the deeds.

1 He's looked at them. They've prepared property
2 maps here. I just want to know if he made any
3 attempt to find out to what property this
4 exception applied.

5 CHAIRMAN GOSS:

6 Why don't you just ask him that question?

7 MR. COLLIER:

8 I did.

9 Q. Did you make any attempt to find out what property this
10 exception applied to?

11 A. Yes.

12 Q. What did you do?

13 A. I have looked at some of the very old maps from the
14 transfer of the property from South-East Coal to DLX
15 that had some of these different tracts and exceptions
16 on them.

17 Q. Did you plat it out to see what it might look like?

18 MR. WATTS:

19 I'm going to object. We had one question; that's
20 going to be the last one. Then we follow with
21 another one, and that's going to be the last one.

22 CHAIRMAN GOSS:

23 Yeah. I think we need to move on, Mr. Collier,
24 please, sir.

25

1 MR. WATTS:

2 Thank you.

3 Q. As to the other property, did you find any description
4 in this deed which applied to the other part of the
5 refuse pile tract?

6 MR. WATTS:

7 I'm sorry, sir. I don't want to keep standing up
8 and objecting . . .

9 CHAIRMAN GOSS:

10 Well, . . .

11 MR. WATTS:

12 I feel like I have to do this because each
13 question is being asked one after the other, and
14 we don't seem to get to where the end of it is.

15 CHAIRMAN GOSS:

16 Well, let me say for the third or fourth time that
17 we're not going to try the title to this property.
18 Now, I think it's appropriate for you to ask him,
19 as the construction manager and as an engineer,
20 what he did and what he saw and what he observed,
21 but we're not going to try the title to this
22 property. Okay? So let's move on, please.

23 MR. COLLIER:

24 All I want to know is if he made any . . .
25

1 CHAIRMAN GOSS:

2 Let's move on, please.

3 Q. Did you make any attempt to locate the remainder - to
4 find out what the source was for the remainder of the
5 refuse pile tract in this deed?

6 A. No.

7 MR. COLLIER:

8 That's all the questions I have.

9 CHAIRMAN GOSS:

10 Thank you. Mr. FitzGerald?

11 CROSS EXAMINATION

12 BY MR. FITZGERALD:

13 Q. Mr. Mack, I'm Tom FitzGerald. I'm representing the
14 intervenor, Will Herrick. As I ask you these
15 questions, I've tried to identify those where you were
16 identified either in your direct testimony which has
17 been prefiled or in the data requests as being the
18 person responsible for the answer, but, if I ask you
19 something that you're not comfortable answering, don't
20 guess at it. If Dell or someone else is the more
21 appropriate person, please feel free to tell me that.
22 With that understanding, I'll assume that, when you do
23 answer it, you're answering with authority on behalf of
24 your client, ECEP. Let me first ask, what is your
25 relationship with ECEP? Are you an employee or a

1 contractor with them?

2 A. I'm a contractor.

3 Q. Okay. To your understanding, - and I would like to try
4 to flesh this out because I will admit to some
5 confusion - ECEP, are they a limited liability company,
6 to the best of your knowledge?

7 A. Yes.

8 Q. Okay. Who are the principals of that company?

9 A. ECEP, LLC has a sole Member.

10 CHAIRMAN GOSS:

11 I'm sorry. You need to speak up a little bit.
12 None of us can hear you.

13 A. I'm sorry. ECEP, LLC has a sole Member. That is Calla
14 Energy Holding, LLC.

15 Q. Okay. Calla Energy Holding, LLC?

16 A. And I believe this was the subject of one of the data
17 requests.

18 Q. Right, and I'm just trying to flesh this out.

19 A. Okay.

20 Q. And who is Calla Energy Holding, LLC?

21 A. Calla Energy Holding, LLC has a sole Member who is Ms.
22 Jacquelyn Yates.

23 Q. Okay. Fox Trot Properties, LLC is identified in your
24 application as being the owner of the property.

25 A. That's right.

1 Q. I want to clarify, are we talking about the 620 acre
2 property that has been identified?
3 A. Yes.
4 Q. Okay. So, to your knowledge, Fox Trot owns the entire
5 620 acres?
6 A. That's right.
7 Q. Okay. Who is, to your knowledge, Fox Trot Properties,
8 LLC?
9 A. Fox Trot Properties, LLC has a sole Member who is Fox
10 Trot Corporation, and the sole shareholder of Fox Trot
11 Corporation is Ms. Jacquelyn Yates.
12 Q. Okay. So Ms. Yates is then ultimately the sole Member,
13 through Calla Energy, of ECEP and of Fox Trot
14 Properties?
15 A. That's correct.
16 Q. Okay. Do you currently hold a lease to the - when I
17 say "the property," the 620 acres - does ECEP currently
18 hold a lease to this property?
19 A. No.
20 Q. Does ECEP have an option on the property?
21 A. No.
22 Q. Does ECEP have any legal entitlement to the property by
23 license, privilege, easement?
24 A. Well, I don't know what you mean by "license" or
25 "privilege."

1 Q. Do you have any legal status - does ECEP have any
2 ownership interests in the property, the Fox Trot
3 properties?
4 A. Not except to the extent that ultimately they're
5 affiliated companies and the sole Member of ECEP and
6 the sole member of - well, the sole shareholder of Fox
7 Trot Corporation is Ms. Jacquelyn Yates.
8 Q. Okay. Who - you said Fox Trot Properties is listed as
9 the owner, both in the application and on the maps. Do
10 they hold a deed to the property?
11 A. No, not yet.
12 Q. Okay. So is their ownership, do I understand that it
13 is based on a contract?
14 A. Yes.
15 Q. Okay. Is that a contract to purchase? If you don't
16 know, just say, "I don't know." I'm just trying to
17 understand the nature of - you've testified, correct me
18 if I'm wrong, that ECEP, who is the applicant, doesn't
19 own, doesn't lease, or have any legal interest in the
20 property except to the extent that it's affiliated with
21 someone who does.
22 A. That's right.
23 Q. And that company that does is identified as Fox Trot
24 Properties?
25 A. Yes.

1 Q. Now, are you aware that they have filed a notice in
2 this action that they're specifically disclaiming any
3 part of this action, that they are not parties and do
4 not wish to be served? Were you aware of that?

5 MR. WATTS:
6 I'm sorry. Could counsel restate the question?

7 MR. FITZGERALD:
8 Yes.

9 Q. Were you aware that Fox Trot Properties filed a notice
10 in this action indicating that they are not parties to
11 this proceeding?

12 A. No.

13 Q. Okay. Okay. Let me try to go back. You indicated
14 that you didn't have - that ECEP did not have an
15 ownership interest except to the extent that it's
16 affiliated with someone who does, Fox Trot Properties?

17 A. That's right.

18 Q. Are they applicants with ECEP for the construction
19 certificate?

20 A. No. The applicant is ECEP.

21 Q. And that's the only applicant?

22 A. That's correct.

23 Q. Jacquelyn Yates is not an applicant either?

24 A. There's only the one applicant.

25 Q. Okay. Let me ask, if I could, about - and I will

1 apologize in advance. I'm going to be jumping around a
2 little bit, because I'm trying to fill in some gaps.
3 One of the requirements that ECEP was obligated to meet
4 in the application was a summary of the efforts made by
5 the applicant to locate the proposed facility on a site
6 where existing electric generating facilities are
7 located. Is the site that was chosen a site where an
8 existing electric generating facility is located?
9 A. No, it's not.
10 Q. Okay. Were you the individual who responded to the
11 data requests to describe those efforts in more detail?
12 A. I was.
13 Q. Okay. You didn't identify any particular facilities
14 that you considered locating at, and I was wondering if
15 you could do that now.
16 A. Well, . . .
17 MR. WATTS:
18 May I ask a procedural question, Mr. Chairman?
19 CHAIRMAN GOSS:
20 Certainly.
21 MR. WATTS:
22 The interests of Mr. FitzGerald's client that
23 were expressed in this case in the motion to
24 intervene and also in their testimony were very
25 limited, and they certainly don't cover this

1 particular aspect of the application. Is it
2 customary for the counsel to be able to go far
3 beyond what the interests of his client are stated
4 to be in the case?

5 MR. FITZGERALD:

6 Chairman, if I could respond briefly . . .

7 CHAIRMAN GOSS:

8 Certainly.

9 MR. FITZGERALD:

10 Our standing interests are the requisite interests
11 necessary to demonstrate that we are interested
12 parties under the statute. We were granted the
13 rights of full intervention, and I believe that we
14 are entitled to ask about any and everything that
15 has been submitted as part of the application.

16 CHAIRMAN GOSS:

17 I believe you are as well.

18 MR. FITZGERALD:

19 Thank you.

20 CHAIRMAN GOSS:

21 You may proceed, and certainly what you're asking
22 is, as I understand it, specifically the criteria
23 that this Board must consider in ruling upon the
24 certificate.

25

1 MR. FITZGERALD:

2 Mr. Chairman, I don't intend to ask anything
3 that's not within the scope of the procedure,
4 and I'm sure that counsel will correct me if I
5 try to.

6 CHAIRMAN GOSS:

7 All right, sir.

8 Q. Getting back to the question, Mr. Mack, if I could,
9 would you identify specific facilities that you did
10 consider collocating?

11 A. Well, I'm looking at Section 7. of our application on
12 Page 15, and it says that the nearest existing
13 generating facilities are located in Clark County.
14 Those are the East Kentucky Power Co-op facilities.

15 Q. Did you - I guess - I'm sorry. Did you consider
16 collocating at that facility?

17 A. We did.

18 Q. And what was the reason for rejecting collocation at
19 that facility?

20 A. Well, the reason for not attempting to collocate this
21 facility at that one was because of the unique nature
22 of this facility, the fact that we're burning on-site
23 waste coal and that on-site waste coal, in my opinion,
24 can't be economically transported, or it's not
25 desirable to transport it also, to another facility.

1 Q. Okay. If I could explore that a little bit, you say,
2 in your opinion, it cannot be economically transported.
3 Have you run the numbers to determine when transport or
4 to what extent transport is economically feasible?
5 A. No.
6 Q. Okay. This material will have to be transported on
7 site in order to be combusted; is that correct?
8 A. It will have to be picked up off the ground and
9 transported to the hoppers, yes.
10 Q. Okay. So there are certain set costs, the cost of
11 loading. Will it have to be processed in any way
12 before it's combusted?
13 A. No.
14 Q. Okay. So it's just going to be the raw coal fines that
15 are on the property will be collected. Will they have
16 to be dewatered in any way?
17 A. Well, it's more than just fines that are on the
18 property. There's also coarse material.
19 Q. Okay.
20 A. And, during the mining operation and during the storing
21 of the material prior to putting it into the silos or
22 the bunkers, we will let the material dewater.
23 Q. Okay. You mentioned that you rejected this one other
24 property because of the unique nature of the facility;
25 it's burning on-site waste coal. Did you consider

1 other facilities that have coal fines and coarse
2 material available within the region in terms of
3 locating this facility?

4 A. Are you asking me did we look to see if there were
5 other areas where waste coal was located that we could
6 construct the facility on?

7 Q. That might be near a facility to collocate at.

8 A. That might be near another electric generating
9 facility?

10 Q. Uh-huh.

11 A. No.

12 Q. Okay. So is the only facility you looked at this one
13 East Kentucky facility, or were there others?

14 A. Well, it was my determination that there was not an
15 ability economically to transport the waste coal to the
16 nearest electric generating facility, and so I didn't
17 go further than that.

18 Q. Okay. So then your consideration of other facilities
19 was tied to the fact that you wanted to get rid of this
20 waste coal on this property?

21 A. It was tied to the fact that we wanted to use this
22 waste coal as a fuel.

23 Q. Okay. If DLX is correct in their assumptions concern-
24 ing the ownership, how much of the waste coal would
25 remain available out of the 620 acres?

1 MR. WATTS:

2 Could counsel restate the question, please?

3 MR. FITZGERALD:

4 Yeah.

5 Q. There's 620 acres that were identified in your
6 Exhibit B to your Data Request 9, I believe, of
7 the Staff, and that was a map that showed, in purple
8 dotted lines, the 620 acres subdivided by a number of
9 different properties, all of which are owned by Fox
10 Trot Properties, LLC, and you had indicated in the
11 response that you were going to remove waste coal from
12 all of those areas except where the plant would be
13 located. My question is, assuming that DLX is correct
14 regarding their ownership of portions of that property,
15 how much of the acreage of waste coal remains to be
16 used by your facility?

17 A. Well, I can't answer that question directly, but what
18 I can say is that their claims involve approximately
19 80 acres.

20 Q. Okay. Do you know which 80 acres?

21 A. Are you asking do I know the area that they've claimed?

22 Q. Yeah.

23 A. Yes.

24 Q. Have you surveyed or taken sampling to identify how
25 much waste coal is available on the property?

1 MR. WATTS:

2 I'm going to object to this question which tracks
3 a data request to which we also objected as
4 getting into the proprietary project economics,
5 project feasibility, which is beyond the scope of
6 these proceedings, in our opinion, and not
7 relevant to them.

8 CHAIRMAN GOSS:

9 Mr. FitzGerald?

10 MR. FITZGERALD:

11 Mr. Chairman, let me see if I can do this
12 cogently, which for me is always a challenge.
13 They have represented that their efforts to
14 collocate will not be availing because the
15 economics will not support what they want to do,
16 which is to burn on-site waste coal. That is the
17 basis for not having gone out and collocated
18 elsewhere. The Legislature has specifically
19 identified collocation as a preferred option and
20 they require a justification about why you don't
21 do it. They have represented that no more than
22 10 percent, on average, of coal will have to come
23 in from elsewhere onto the site, because they will
24 be, I would assume, using 90 percent on-site coal
25 to burn. It is squarely within the scope of this

1 proceeding to inquire the basis for assuming, over
2 the design life of this facility, that they have
3 enough waste coal on site, both in terms of
4 tonnage and in terms of BTU value. If they want
5 to submit that in confidence, there are procedures
6 for signing confidentiality agreements. We would
7 be happy to adhere to them, but stonewalling and
8 saying, "We're not going to provide it, period,"
9 is not an acceptable response. Otherwise, if
10 they're not going to disclose the facts concerning
11 their representation on waste coal availability,
12 we must assume that the waste coal may not be
13 available and that they have to go back and make a
14 more earnest demonstration of why they have failed
15 to collocate. They can't have it both ways.

16 CHAIRMAN GOSS:

17 Is it within the ambit or within the authority of
18 this Board to make economic - or to make decisions
19 with regard to the economic rationale of the
20 applicant?

21 MR. FITZGERALD:

22 I think it is squarely within the ambit of this
23 Board's jurisdiction. This Board is required to
24 consider as part of the determination on whether
25 to issue a merchant certificate - the Legislature

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was concerned about a few things. One is that these facilities carry their own weight, both economically and environmentally. Second was looking at the economic impact on the affected region and on the state of these proposed facilities. The economics - they have represented that they can't collocate somewhere because the economics won't support it because of on-site coal. If, in fact, they intend to - you know, their representation is that they will use no more than 10 percent of off-site coal, but, if the reserves are not there to support this facility over its design life, I would assume they're going to bring more off-site coal in. Those are matters that we have a right to explore during this proceeding.

CHAIRMAN GOSS:

Mr. Collier, do you have a dog in this fight?

MR. COLLIER:

I do, but Mr. FitzGerald is doing an excellent job.

CHAIRMAN GOSS:

Mr. Watts, do you want to respond? I'll get Staff's opinion last.

1 MR. WATTS:

2 Thank you, sir. What the question was designed
3 to get at is the criterion in 278.710(1)(e),
4 "Whether the proposed facility . . ." Excuse me.
5 I'm sorry, (d), sub (d), "Whether the facility is
6 proposed for a site upon which existing generating
7 facilities, capable of generating ten megawatts
8 (10MW) or more of electricity, are currently
9 located." He's asked questions about what
10 investigation the applicant did with respect to
11 this criterion. Those questions have been
12 answered, and Mr. FitzGerald can certainly comment
13 on the testimony, but it is absolutely not, in my
14 view, within this Board's purview to get into the
15 project economics of a proposed project. I don't
16 think that's a criterion at all. I don't think
17 you can find it in the statute, and we strongly
18 object to it. Thank you.

19 CHAIRMAN GOSS:

20 Mr. Turner, what's the Staff's position? I'd
21 like to hear what you've got to say on this.

22 MR. TURNER:

23 Mr. Chairman, I believe that the amount of on-site
24 coal that is going to be burned by the plant has
25 ramifications above and beyond simply those that

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Mr. FitzGerald was asking about. If there's not enough on-site coal, especially if part of DLX's claim is sustained and it does impact the amount of outside coal that's brought in, then it will impact noise levels; it will impact traffic levels; it will impact a variety of other considerations that the statute requires the Board to look at, and so, while I do agree with counsel that the information may well be confidential and then perhaps should be subject to a proprietary agreement, I believe the inquiry is appropriate.

CHAIRMAN GOSS:

You believe what?

MR. TURNER:

The inquiry that Mr. FitzGerald is making is appropriate.

MR. WATTS:

Very briefly, sir, I think we need to be careful about what information is being requested. The question was directed to sampling, which is a very different question than what I understood Mr. Turner to be talking about, which is on-site/off-site coal, and so let's take it a question at a time if you're going to go down this path, but the concept of getting into sampling information with

1 respect to the coal on site is something I
2 strongly, strongly object to.

3 CHAIRMAN GOSS:

4 Well, now, I didn't understand the question to be
5 sampling of the quality or anything like that of
6 the coal. The question went to the quantitative -
7 it was a quantitative question; right? How much
8 coal has there been projected is there to burn, is
9 that essentially the question?

10 MR. FITZGERALD:

11 Mr. Chairman, - and if my question was unartfully
12 phrased, I will rephrase it and, as counsel
13 suggested, go step by step, question by question -
14 if there are those that are objected to that are
15 objected to because they are business confidential
16 information that relate to the presence and the
17 volume of waste coal on this property, I would ask
18 that that be made a data request and be subject to
19 a proprietary agreement, but we can go ahead and
20 take the questions one by one. I'll withdraw the
21 one that I asked and go ahead and ask them in a
22 more stepwise fashion.

23 MR. WATTS:

24 I have to say, sir, had he not used the word
25 "sampling," I would not have risen and responded

1 as I did.

2 MR. FITZGERALD:

3 Well, I mean . . .

4 CHAIRMAN GOSS:

5 He says he's going to rephrase it. Let's let him

6 rephrase it and see where we are at that point.

7 MR. WATTS:

8 All right. Thank you.

9 MR. FITZGERALD:

10 Counsel objected - they objected during the data

11 requests to anything relating to the composition,

12 volume, quantity. So let's see if, in fact, it's

13 just sampling that triggered the nerve.

14 Q. Mr. Mack, what's the design life of this facility? How

15 many years are you proposing to operate the plant?

16 A. Well, there's really two ways of looking at that. The

17 first, probably the only relevant question would be

18 what would be the initial expected term of the

19 financing, and the second part of the question is the

20 design life on a power plant. As we all know, plants

21 that are built have design lives that can be extended

22 through maintenance and refurbishment, and, if you're

23 asking - the first question that I think is more

24 relevant is the initial term of the financing will

25 probably be in the range of 15 to 20 years.

1 Q. Actually, it was more the second question that I have
2 an interest in, because you have represented that the
3 fuel mix will be 10 percent off-site coal and 90 per-
4 cent on-site, and my question is, given what you know
5 of the volume of on-site waste, how long will it take
6 to exhaust those resources?

7 MR. WATTS:

8 I think this question gets directly into the
9 project economics, and I object to it.

10 MR. FITZGERALD:

11 I guess it wasn't just sampling after all, Mr.
12 Chairman. It gets squarely into the question of
13 why they have to justify being here as opposed to
14 somewhere else. If you have a plant that . . .

15 CHAIRMAN GOSS:

16 I think it does too. I'm going to overrule the
17 objection and let him answer.

18 A. There's a number of assumptions that go into a
19 calculation of the amount of reserves and the duration
20 for burning those reserves. Today, we're looking at
21 anywhere from 25 to 30 years of supply.

22 Q. Twenty-five to thirty years of supply at a 90/10 ratio,
23 90 percent on site, 10 percent off site, roughly?

24 A. Well, the 10 percent assumption was made for the
25 purpose of assuring ourselves that we were being overly

1 conservative in the traffic impacts and noise impact
2 analyses. We actually expect, based on talking with
3 other plants that are burning this type of material, to
4 be somewhere in the neighborhood of 5 to 10 percent on
5 an annual basis.

6 Q. So you're saying, then, that up to 95 percent will be
7 on-site reserves that are combusted?

8 A. That's right.

9 Q. Okay. At anytime in the life of this facility will you
10 exceed 10 percent?

11 A. Well, it's an interesting question. Obviously, the
12 reserves are finite.

13 Q. Right.

14 A. The life of a power plant can be extended through
15 maintenance and refurbishment.

16 Q. Okay.

17 A. So, given the fact that there's a finite amount of
18 material on the site, then I would have to answer that
19 there could be a period of time where that material is
20 exhausted.

21 Q. Do you know how long that period of time would be after
22 the material is exhausted that you would continue to
23 operate the facility?

24 A. No.

25 Q. So then the upward bound estimates of traffic, both

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rail and road traffic, that are in the application may not, in fact, be upper bound during the later years of the facility's life once the on-site reserves are depleted?

A. Once the reserves are depleted in 25 or 30 years, the facility will be securing a different supply of fuel. Now, given that the site is bisected by CSX Railroad, it's my expectation that whatever fuel would be burned after the initial period of operation would be coming in on the CSX Railroad.

Q. That's your expectation? Do you have a contract with CSX for that?

A. No.

Q. Could it be brought in by road?

A. Physically, yes.

Q. Okay. Thank you. If we could, there's a couple of other areas, and, if you need to take a break at anytime, just let me know. There are a couple of . . .

CHAIRMAN GOSS:

Mr. FitzGerald, my stomach is telling me it's lunchtime. Why don't we - if you're at a sort of in-between point, do you want to take a break?

MR. FITZGERALD:

Mr. Chairman, I'm at your - you tell me when we're

1 taking a break. Don't ask me, and I'd be happy to
2 break at any point and resume.

3 CHAIRMAN GOSS:

4 Well, I mean, I don't want to disturb your flow
5 here, but, if you've got quite a bit more, let's
6 go ahead and take a break and we'll come back
7 after lunch.

8 MR. FITZGERALD:

9 That would be fine, Mr. Chairman.

10 CHAIRMAN GOSS:

11 All right. Let's go ahead, then, and break for
12 lunch. We'll come back at one o'clock. That
13 gives everyone an hour to go out and get a
14 sandwich, and we'll resume at one o'clock. We'll
15 be off the record.

16 OFF THE RECORD

17 CHAIRMAN GOSS:

18 Thank you. Please be seated. All right. We'll
19 be back on the record. Mr. FitzGerald, I think we
20 were finishing up, or not finishing up, but I
21 think you had the floor when we broke for lunch.
22 So, if you would, sir, go ahead and proceed.

23 MR. FITZGERALD:

24 Thank you, Mr. Chairman.

25 Q. Mr. Mack, a few other areas I'd like to ask you about.

1 The application for the construction certificate for
2 the merchant plant indicated the environmental
3 compliance record of ECEP. Do you have available to
4 you the environmental compliance record of the parent
5 companies of ECEP, which you indicated was Calla and
6 then Ms. Yates?

7 A. There would be no difference in the data that was
8 provided in the application for Calla Energy Holding,
9 LLC or Ms. Yates.

10 Q. Okay. So she has no equitable or other interests in
11 any other companies that would have had an
12 environmental compliance history that you could
13 disclose?

14 MR. WATTS:

15 I object to the question. That's not the question
16 that was asked before.

17 MR. FITZGERALD:

18 Well, that's the question I'm asking now.

19 A. I have specifically asked her that question and she has
20 told me that the answer . . .

21 COURT REPORTER:

22 And she's told you what?

23 CHAIRMAN GOSS:

24 You need to speak up, please, sir, if you don't
25 care.

1 A. I'm sorry. Let me lean forward a little bit. Yes,
2 I've asked her that question and the answer wouldn't
3 change with the information she provided me.

4 Q. Okay. Would you be willing to provide that information
5 for the record?

6 A. Yes.

7 MR. FITZGERALD:

8 I would ask that be a data request, if that's
9 possible, Mr. Chairman, to get the same environ-
10 mental compliance information up the ownership
11 chain from ECEP.

12 CHAIRMAN GOSS:

13 Well, let's be specific. Let's be . . .

14 MR. WATTS:

15 I'm sorry. Please feel free.

16 CHAIRMAN GOSS:

17 I was just going to say let's be specific as to
18 who you're asking for, or what entities you're
19 asking for.

20 MR. FITZGERALD:

21 Certainly. As I understand, ECEP is entirely
22 owned by Calla which is, in turn, entirely owned
23 by Ms. Yates, and so I would ask for both Calla
24 and Ms. Yates that the environmental compliance
25 information be provided.

1 CHAIRMAN GOSS:

2 You're talking about Calla Energy Holding, LLC?

3 MR. FITZGERALD:

4 Yes.

5 CHAIRMAN GOSS:

6 Ms. Yates, individually, and Estill County Energy
7 Partners, which has already been disclosed?

8 MR. FITZGERALD:

9 They've already provided that, Mr. Chairman, yes.

10 CHAIRMAN GOSS:

11 All right. Okay. Did you have an objection?

12 MR. WATTS:

13 I'll just state for the record that I do object
14 to it. Jackie Yates I do not object to. I do
15 object to Calla Holding, and I just want to state
16 that for the record. We'll provide the
17 information, subject to the objection.

18 CHAIRMAN GOSS:

19 Well, what's the basis for your objection?

20 MR. WATTS:

21 Well, if I understood it correctly - well, let
22 me state it a different way. The statute
23 contemplates the applicant and anyone with an
24 ownership interest in the applicant.

25

1 CHAIRMAN GOSS:
2 All right.
3 MR. WATTS:
4 And so that's who we would provide that for.
5 CHAIRMAN GOSS:
6 But Calla Energy Holding, LLC is the sole Member
7 of Estill County Energy Partners.
8 MR. WATTS:
9 I'm sorry. You're correct about that, and
10 obviously we'll provide that.
11 CHAIRMAN GOSS:
12 Okay.
13 MR. WATTS:
14 Thank you.
15 CHAIRMAN GOSS:
16 Okay. Go ahead, Mr. FitzGerald.
17 Q. Along that same line, to your knowledge, does any other
18 entity have an ownership interest in ECEP or Calla, the
19 parent company of ECEP, other than Ms. Yates?
20 A. No.
21 Q. Are there other employees or agents of ECEP, to your
22 knowledge, aside from Ms. Yates?
23 A. I'm sorry. I don't know that she's an employee.
24 Q. Who do you communicate with? Is there an officer or an
25 agent, a principal for ECEP with whom you have com-

1 municated?

2 A. I would have communicated with Ms. Yates, yes.

3 Q. Okay. To your knowledge, are there any other employees

4 or agents of ECEP other than Ms. Yates?

5 A. I don't think that I'm an employee. I'm a contract

6 consultant.

7 Q. Okay. To your knowledge, does ECEP have any employees?

8 A. No.

9 Q. Where is ECEP's office located?

10 A. The address, as stated on the application, is

11 6000 Sulphur Well Road.

12 Q. Okay. Is that an office building or an office?

13 A. It's an office.

14 Q. I'm sure this will also - you might want to wait to

15 answer this, because your counsel may need to impose an

16 objection on this, but, my question, how does ECEP

17 intend to finance the construction of this merchant

18 power plant?

19 MR. WATTS:

20 Well, I do object to it, Your Honor. It's not a

21 criterion that is included in the statute for the

22 Board to consider, and I think - I hope that the

23 Board will address the criteria that are laid out

24 for it by the Legislature.

25

1 CHAIRMAN GOSS:
2 What is the relevancy, Mr. FitzGerald?
3 MR. FITZGERALD:
4 Well, let me more specifically ask, Mr. Chairman,
5 the extent to which any public financing will be
6 obtained for the facility, and the reason it's
7 relevant is because the economic impact of the
8 facility on the affected region and the state is
9 one of the criteria
10 CHAIRMAN GOSS:
11 I think that's appropriate.
12 MR. FITZGERALD:
13 . . . that they're required to address. So
14 CHAIRMAN GOSS:
15 If your question is limited to that, I think it's
16 appropriate.
17 MR. FITZGERALD:
18 I'm sorry. I should have limited it.
19 Q. To what extent will any public financing be - has any
20 public financing been obtained or will it be obtained
21 for this facility?
22 A. Well, no financing for the facility has been obtained.
23 Q. Okay. I should have probably asked this first. What
24 relationship does ECEP and this proposed facility have
25 to the earlier Calla power plant that was proposed for

1 this same general location?

2 A. There is no relationship.

3 Q. Okay. Do you recall the principals of the Calla
4 project?

5 A. That was well before my time.

6 MR. WATTS:

7 I'm also going to object to this line of
8 questioning. I don't think it's relevant to this
9 proceeding at all. He said that there's no
10 relationship between that project and this one.

11 CHAIRMAN GOSS:

12 Yeah, he just answered that. I assume Mr.
13 FitzGerald is going somewhere with this.

14 MR. FITZGERALD:

15 I have one other question.

16 Q. In, I believe it was, the year 2000, a Charles or Chuck
17 Yates, who is the husband of Jacquelyn Yates, as I
18 understand, and correct me if I'm mistaken on that,
19 secured a \$105 million loan, I believe, guaranty. It
20 was in industrial revenue bonds from Estill County, and
21 my question is, is that part of your financing, part of
22 ECEP's financing, to your understanding?

23 A. I don't know anything about a \$105 million Estill
24 County bond financing that was closed.

25 Q. That was closed?

- 1 A. Isn't that what you asked?
- 2 Q. Are you aware of one that was unclosed?
- 3 A. No.
- 4 Q. Okay. So you're not - at this point, you have no
5 expectation of securing loan guaranties or financing
6 from County Government?
- 7 A. At this time, I can't rule out any source of funding or
8 financing.
- 9 Q. Have you had any communications with Estill County
10 towards that end?
- 11 A. I have not.
- 12 Q. Okay. Has anyone in ECEP, to your understanding?
- 13 MR. FITZGERALD:
- 14 Thank you for your indulgence, Mr. Chairman.
- 15 Q. Is the proposed exhaust stack for the facility 1,000
16 feet or more from all the adjoining property
17 boundaries?
- 18 A. I think that's probably a question for Mr. Jagers.
- 19 Q. Okay. I'll ask him that. Just a couple of others,
20 and, again, this may be questions that you want me to
21 direct to him, and feel free to tell me. Do you know
22 the status of the various environmental permits that
23 will have to be obtained by the facility?
- 24 A. Generally, yes.
- 25 Q. Okay. Have any of them been obtained yet?

1 A. No.

2 Q. Okay. Have any been applied for yet?

3 A. Yes.

4 Q. What have you applied for?

5 A. We've applied for our water discharge permit.

6 Q. Okay, and, at this point, have you made application for
7 your air permit?

8 A. No.

9 Q. Okay. Do you know what the time frame is when you
10 intend to do that?

11 A. We are intending to file that very shortly.

12 Q. Very shortly, within the next month?

13 A. Yes.

14 Q. Okay. Can I assume, then, that you've done what you
15 believe is the necessary modeling to support that
16 application?

17 A. No.

18 Q. You haven't done that?

19 A. We are in the process of finalizing the modeling.

20 Q. Okay. You mentioned also that you're in the process of
21 having a survey done of the property?

22 A. Yes.

23 Q. Okay. When might that be concluded?

24 A. I don't know.

25 Q. Okay.

1 MR. FITZGERALD:

2 Mr. Chairman, I'd like to make that a second data
3 request, is to have the official survey be made
4 part of the record.

5 CHAIRMAN GOSS:

6 Well, I guess we have a problem, we may have a
7 problem, in that, as I said earlier, data request
8 responses are to be provided within seven days
9 following the close of this hearing. Certainly,
10 if the survey is going to be completed in the next
11 seven days, I think it's appropriate. If not,
12 then I think we've got a problem.

13 MR. FITZGERALD:

14 Mr. Chairman, I would assume at that point they
15 would say it's not available . . .

16 CHAIRMAN GOSS:

17 Okay.

18 MR. FITZGERALD:

19 . . . and then we will argue whether it is
20 required or not.

21 CHAIRMAN GOSS:

22 Okay. All right.

23 Q. The last question I had in that regard was - well,
24 actually I'll direct that to Mr. Jagers - is what
25 basis you used for determining the location of the

1 adjoining properties in the absence of a survey, but
2 I'll ask him. He can think about that now and I'll ask
3 him later. Let me ask you just a couple more
4 questions. Have you done any sort of analysis of, a
5 quantitative or qualitative analysis, of emissions from
6 the proposed power plant?

7 MR. WATTS:

8 I'm going to object to the question. The con-
9 struction certificate contemplated by the statute
10 is expressly subject to obtaining permits with
11 respect to air, water, waste disposal, mine
12 reclamation, and so forth, and it's our position
13 that the statute contemplates that those will be
14 obtained and can be obtained at a point in time
15 after this proceeding is concluded and an Order is
16 issued - there's a period of time provided for in
17 the statute to obtain those - and that this Board
18 should not address the specifics of those permits
19 or what goes into them.

20 CHAIRMAN GOSS:

21 I agree with you. I don't think Mr. FitzGerald
22 is asking specifics. I think he's merely asking
23 him if the emissions data or information has been
24 completed. Is that basically the question?
25

1 MR. FITZGERALD:

2 Yes, Mr. Chairman, and I'll go ahead and let her
3 do the tape and then I'll clarify further.

4 CHAIRMAN GOSS:

5 All right.

6 MR. FITZGERALD:

7 Mr. Chairman, I am aware that the Siting Board's
8 jurisdiction does not extend to matters of choice
9 of technology and whether or not the particular
10 permit limits for the Environmental Public
11 Protection Cabinet have been met. Clearly, they
12 are allowed to come in and get this permit or this
13 construction certificate before they make appli-
14 cation. In fact, there's a two-year window from
15 the last permit by which they have to construct it
16 or the construction certificate lapses, but this
17 is, out of the first four that have come before
18 the Board, this is the first time that this
19 construction certificate was applied for prior to
20 the air quality permit, the Title V permit, being
21 obtained and all of the other permits, and what I
22 am attempting to do is to find out the extent to
23 which they've analyzed the potential impacts of
24 the facility, because, in my estimation, it's hard
25 to identify the affected region and the economic

1 consequences, positive and negative, unless you
2 know what the potential footprint of the facility
3 is, and a facility's footprint is larger than just
4 the area that it is sited on. I think this Board
5 in the Thoroughbred case has recognized that and
6 has recognized that, for example, to the extent
7 that they are going to consume air quality
8 increments, there are potential economic
9 consequences, and I'm merely trying to identify
10 the extent to which they have quantified or
11 considered these matters.

12 CHAIRMAN GOSS:

13 You're asking if they've done it or if they've
14 started doing it, not specifically what the data
15 is; is that correct?

16 MR. FITZGERALD:

17 That's right.

18 CHAIRMAN GOSS:

19 I think that's - Mr. Watts?

20 MR. WATTS:

21 Well, I'd just like to state for the record that
22 I would have made the same objection regardless of
23 whether the air permit had been applied for before
24 this application was submitted or not, because I
25 think the statute covers both eventualities, and

1 there was a reference, I think, to the Thorough-
2 bred case. We can argue about the vast
3 differences in the facts in that case and in this
4 one. I don't necessarily want to do that now,
5 but, if we get into it, that's something to be
6 discussed later. I don't object to the question
7 as to whether or not it's been done, but the door,
8 in my view, needs to be shut at that point.

9 CHAIRMAN GOSS:

10 Well, I think it will be shut.

11 MR. WATTS:

12 Thank you.

13 CHAIRMAN GOSS:

14 Can you answer the question, Mr. Mack, or do you
15 want - why don't you just rephrase it, Mr.
16 FitzGerald?

17 Q. Have you performed any analysis of the quantitative and
18 qualitative emissions from this proposed facility?

19 A. Yes.

20 Q. Have you performed any economic analysis of the impact
21 of those emissions?

22 A. No.

23 Q. Okay. The Economic Impact Estimate that you provided
24 in your application was prepared, according to the
25 document, by a Staff Economist with the Economic

1 Development Cabinet. Are you familiar with that
2 document?

3 A. Yes. I think that was Tab K in the application.

4 Q. It is, in fact, at Tab K. Who requested that estimate,
5 Economic Impact Estimate, be conducted?

6 A. Estill County Energy Partners did.

7 Q. Okay, and was that done under contract with Estill
8 County Energy Partners? Do you know, is there a
9 contract? Did they hire or contract with the agency to
10 perform this, or is this a study that was done in the
11 usual course of business for the Cabinet?

12 A. I don't know.

13 Q. Okay. The study, as I understand it, looked at the
14 impact of 35 direct electric utility service jobs,
15 8 coal mining/coal transportation jobs, and 3 building
16 services jobs. Is that your understanding of the
17 assumptions that were made in this study?

18 A. Actually, it's not. It's 46 jobs at the plant
19 categorized into those three groups.

20 Q. Okay, and I guess my question is, do you understand
21 that study to be limited to the impacts of the
22 additional employment, or did it look at the potential
23 negative impacts, if any, of the facility?

24 A. The study is what it is.

25 Q. Okay. To your knowledge, will this facility be

1 considered a major source, under the Clean Air Act, for
2 criteria air pollutants?

3 MR. WATTS:

4 I'm going to object to that question as being
5 beyond the door having been shut.

6 CHAIRMAN GOSS:

7 Would you repeat the question?

8 MR. FITZGERALD:

9 I was asking whether it would be considered a
10 major source, under the Clean Air Act, for
11 purposes of criteria air pollutants.

12 MR. WATTS:

13 The witness has testified that the application is
14 going to be filed, and Mr. FitzGerald can
15 participate in that proceeding if he chooses to,
16 and he can examine these issues if he'd like to.
17 This is not the forum for it.

18 MR. FITZGERALD:

19 That's a gracious offer, Mr. Chairman, but, in
20 truth, the consumption of air quality increments
21 is an economic matter that has, as this Board has
22 found in the Thoroughbred case, a potentially
23 significant economic consequence on the region and
24 on the state. They're required by statute to
25 consider the impacts on the region. It may, to

1 the extent that it consumes air quality increment,
2 foreclose other jobs in the county or in the
3 affected region, and I'm merely asking if they're
4 going to be a major source. They've already
5 acknowledged they haven't done any economic
6 analysis of the potential impacts of it. I'm just
7 trying to get that fact on the table. It is
8 relevant. It is an economic matter of significant
9 consequence, potentially, to the extent that they
10 are going to consume air quality increment.

11 CHAIRMAN GOSS:

12 I take it you would - well, I won't take anything.
13 You tell me.

14 MR. WATTS:

15 Well, just for the record, Mr. FitzGerald has his
16 own interpretation of the statute, which he's just
17 expressed to you, and he believes that his
18 position should be examined in this case. I don't
19 think it should be. I don't think it's within the
20 purview of this proceeding at all, and, to the
21 extent that he bases it on what he considers to be
22 the result in Thoroughbred, it simply doesn't
23 apply here. I think this is an issue for briefing
24 to the extent that he's got a legal position that
25 he wants to express, but I don't think he should

1 take - be allowed to take this proceeding into the
2 air permitting process.

3 CHAIRMAN GOSS:

4 All right. I'm going to sustain the objection. I
5 think it's probably going a little far afield, Mr.
6 FitzGerald.

7 MR. FITZGERALD:

8 Your Honor, I appreciate that. Just I'd like to
9 note for the record Page 14 of the Thoroughbred
10 Order in which this Board has previously
11 determined that these are significant issues
12 related to unfavorable economic consequences.
13 It's remarkable. I've not met an applicant as
14 closed lipped as this applicant is regarding these
15 matters. I appreciate your ruling and obviously
16 will defer to it, . . .

17 CHAIRMAN GOSS:

18 Thank you.

19 MR. FITZGERALD:

20 . . . but please do note our concern.

21 CHAIRMAN GOSS:

22 All right, sir. Thank you.

23 Q. Mr. Mack, you may be off the hook here. Hold on one
24 second. This may be a question you want me to ask Mr.
25 Jagers, because I think he did answer the data

1 request. Do you know if any of the property is
2 currently under a surface mining permit?
3 A. That's definitely a question for Mr. Jagers.
4 Q. I'll ask him, then, and I have no further questions.
5 MR. FITZGERALD:
6 Thank you, Mr. Chairman and members of the Board.
7 CHAIRMAN GOSS:
8 Thank you, Mr. FitzGerald. Mr. Turner, do you
9 have questions?
10 MR. TURNER:
11 Unfortunately, I do, Your Honor.
12 CROSS EXAMINATION
13 BY MR. TURNER:
14 Q. Mr. Mack, I'm A. W. Turner. I'm with the Staff, and,
15 unfortunately, I have to plod you through some more
16 mundane questions, I'm afraid. There are several
17 recommendations that the Brighton report made that you
18 contested and that's going to be the primary focus of
19 my questions. First of all, and this may be similar to
20 Mr. FitzGerald's last question and, if so, I'll ask Mr.
21 Jagers. Do you know when this facility - I believe
22 you address, actually - I think this is yours, because
23 you address, on Page 3, Lines 21 through 22, that . . .
24 CHAIRMAN GOSS:
25 Page 3 of what, Mr. Turner?

1 MR. TURNER:

2 Of his testimony.

3 CHAIRMAN GOSS:

4 Okay.

5 Q. Of your testimony.

6 MR. TURNER:

7 I apologize, Mr. Chairman.

8 Q. At the bottom of Page 3, you say that the Brighton
9 report incorrectly states that the site has not been
10 active since the early '90s and that it was last used
11 for coal processing in '98 and '99; is that correct?

12 A. That's my understanding, yes.

13 Q. And what company did the coal processing in '98 and
14 '99?

15 A. I don't know that I know that for a fact.

16 Q. Okay, and do you know if the permit that whoever this
17 was in '98 and '99 was operating under, do you know if
18 that permit is still valid?

19 A. No, I don't.

20 Q. Okay. Are those questions that I should ask of Mr.
21 Jagers?

22 A. Yes.

23 Q. Okay. Mr. Mack, I need to ask you a very, very few
24 questions, I hope, about the property issue, because
25 we've already beat that one pretty good. Do I take it

1 that the total size of the project that you're
2 proposing is 620 acres?

3 A. Yes.

4 Q. Okay. Now, there's been reference to the "28 acres,"
5 quote/end quote, and I take it that that's the area
6 where the turbine is going to be, the stack, that type
7 of thing.

8 A. That's correct.

9 Q. How is that 28 acres defined? Is it defined on the
10 maps by the perimeter fencing?

11 A. The 28 acres is best defined by the fence line that
12 shows up in our Exhibit G, which was revised in - oh, I
13 don't even want to guess - one of these data requests.

14 Q. Okay, but it's Exhibit G as revised; is that correct?

15 A. Yes, sir.

16 Q. Okay. Now, your counsel passed out, early today, a
17 proposal for a survey, and I note that it is somewhat
18 similar to one of the recommendations that we're going
19 to talk about in a minute, but it doesn't have an
20 acreage noted on it. The document that I'm talking
21 about, I don't know that it was ever identified as a
22 particular exhibit, but do you know the document that
23 I'm talking about?

24 A. I do, and I would ask for a copy of it.

25 Q. And really what I'm asking is, what is it that you are

1 proposing be subject to the survey? What size area are
2 you proposing be surveyed by this proposal?

3 A. The proposal for the boundary survey condition
4 contemplates that the survey would be done for the
5 28 acres on which we're going to construct the facility
6 and the areas that we're going to mine the on-site
7 waste coal.

8 Q. And does that constitute the 620 acres?

9 A. If Fox Trot Properties prevails in the adversary
10 dispute that's in front of the bankruptcy court, then
11 yes.

12 Q. And, if DLX prevails, then you're proposing that a
13 smaller area be surveyed, only that portion that Fox
14 Trot is determined by the bankruptcy court to own; is
15 that correct?

16 A. That's correct. It would not include the 80 acres
17 that's in front of the bankruptcy court.

18 Q. All right. So, just for rough numbers, then, we're
19 either talking about 620 acres or 540 acres being
20 surveyed?

21 A. If we're talking roughly, yes.

22 Q. Okay. Thank you. Now, I believe that - and I don't
23 remember who at this point; I could check back in my
24 records - I believe someone asked and you answered a
25 couple of questions similar to what I'm going to ask

1 now, but I'm a long ways away from you and I had some
2 trouble hearing your answers, so I hope your counsel
3 won't get on "Asked and answered" too quickly, and I'll
4 try to be as brief as possible. What impact on the
5 project will it have if DLX prevails on the 80 acres of
6 the refuse pile? I believe someone asked you that, and
7 I don't remember - you used the word "can't," and I
8 don't know whether it was "can" or "cannot."

9 A. It was definitely "can."

10 Q. "Can."

11 A. And the facility can, can, will be constructed even if
12 the 80 acres that's under dispute is not part of the
13 site.

14 Q. Okay. Now, how will the exclusion of this 80 acres,
15 which I assume is a fair amount of the refuse coal, how
16 would that impact the 90/10 ratio or 95/5 ratio that we
17 have discussed earlier?

18 A. It would not impact that ratio.

19 Q. Okay. Then would it impact the projected life of the
20 plant? I know, with Mr. FitzGerald, we talked about
21 25 to 30 years being the life of the plant based on the
22 coal that's available to be burned, the refuse coal.
23 Would it impact that 25 to 30 years and, if so, to what
24 degree?

25 A. I can't tell you exactly how it would impact that,

1 because there's a number of assumptions, but the range
2 of 25 to 30 years that I mentioned previously takes
3 into account consideration of do we have material
4 available to us from that portion of the site or not.
5 Q. Is it fair to say, then, that, if DLX prevails, the
6 25 years is more likely to be the lifespan and, if Fox
7 Trot prevails, the 30 years is more likely to be?
8 A. Oh, I don't know that I would put that fine of a point
9 on it.
10 Q. Would it tend in that direction?
11 A. Well, certainly.
12 Q. Okay.
13 A. I mean, there's waste coal on that site, so taking that
14 waste coal away from the plant inventory would have an
15 effect.
16 Q. Okay. Now, the next questions that I was going to ask
17 you related to impact on truck traffic and impact on
18 train traffic, but I take it from your earlier answer
19 that, regardless of the title to that, the 90/10 or
20 95/5 ratio is going to remain the same, so I take it
21 that truck traffic and train traffic would be no
22 different . . .
23 A. That's correct.
24 Q. . . . whether DLX prevails or not.
25 A. That's correct.

1 Q. Okay.

2 A. And maybe I could explain. I know my counsel will tell
3 me not to do this, but the 5 percent off-site coal that
4 we're considering burning at the plant has no require-
5 ment other than to make sure that we have enough
6 material readily available to operate the plant. The
7 waste coal that's on the site can get wet; it can
8 freeze up in the wintertime; it can have handling
9 problems. So what we plan to do is have a very small
10 stockpile of off-site coal. That way, we can assure
11 our customer, we can assure our financiers that we're
12 going to be operating a reliable power plant. So,
13 under normal circumstances, we're not going to be
14 burning coal from off-site sources. We'll have some
15 available to us and, if conditions warrant, we might
16 have to burn some.

17 Q. Okay.

18 A. I'm sorry, Mr. Watts.

19 Q. I'm not asking you to speculate here. I'm asking you
20 if you actually have knowledge. I understand from
21 questions that you were asked earlier by Mr. Collier
22 that this matter before the bankruptcy court has been
23 fully tried and briefed. Does the applicant or Fox
24 Trot have any expectation as to when an Order might be
25 forthcoming in that case?

1 A. I have no idea.

2 Q. Okay. Can we go back to your testimony again, Mr.

3 Mack? And I'm going to proceed through your testimony

4 in a page by page order so you don't have to be

5 flipping back and forth.

6 A. Thank you.

7 Q. Okay? The first recommendation that you have a problem

8 with appears on the middle of Page 4 of your testimony,

9 beginning at Line - well, actually, the survey we just

10 talked about. The next one is Recommendation Number 4

11 at the bottom of Page 4, Line 20, and that deals with

12 access control to the site; correct?

13 A. Yes.

14 Q. Okay. In your response, and I know it was Mr. Jagers

15 who responded to the question, but, in your response to

16 Staff Data Request No. 1, Question 13, there's a map

17 indicating gates and access points to the property.

18 A. Yes. That was Exhibit G before the revision.

19 Q. Okay, and so you're familiar with that?

20 A. Yes.

21 Q. Okay. Are the number of access points, the number of

22 gates, on that map the same as Brighton recommended in

23 its recommendation?

24 A. I don't know. I believe that the recommendation was

25 for two controlled access points. We did have some

1 discussion and some additional data requests concerning
2 the number of gates and access points and roads, but
3 I've not matched the two documents up.

4 Q. Okay. At this point, how many gates and access points
5 will you have?

6 A. I'm sorry. I can't answer that question. I would have
7 to open up the drawing and count. The point that I was
8 trying to make, however, is that limiting it to two
9 access points is the current design of the facility.
10 However, in the final design of the facility, there may
11 be a need for a third access point, depending on the
12 construction of the new access road from Highway 499,
13 as an example, and it would be difficult to limit us to
14 two unless there was a compelling reason for that.

15 Q. Is it possible that the railroad might impact how many
16 access points you have, or is that already factored in?

17 A. That is already factored in.

18 Q. Okay. Would you accept the recommendation of Brighton
19 if it simply reflected the number of access points that
20 you thought you might need, so, instead of saying two,
21 if it said two or three, depending on final design of
22 the project?

23 MR. WATTS:

24 Before the witness speaks, I would just like to
25 say that this is really Mr. Jagers' primary area.

1 You know, if you insist on asking the questions of
2 this witness, he'll try to answer, but Mr. Jagers
3 - it's his field.

4 MR. TURNER:

5 If Mr. Jagers is the right person, Your Honor,
6 I'll be glad to ask him. The recommendation
7 disagreement was in Mr. Mack's testimony, and so I
8 didn't know which way I was supposed to go.

9 CHAIRMAN GOSS:

10 Well, I . . .

11 MR. WATTS:

12 Mr. Mack says he's pleased to answer the question.

13 CHAIRMAN GOSS:

14 I was going to say let's let Mr. Mack tell us
15 if he's capable or not capable of answering it,
16 and, if he isn't, why, we'll ask it to Mr. Jagers
17 when he gets on the stand. So go ahead and answer
18 the question if you can, Mr. Mack.

19 A. I think that the remainder of the recommendations in
20 Number 4 can be generally considered to be industry
21 practice. So, with the exception of the limitation to
22 two gates, I think it would be acceptable.

23 Q. Thank you. Okay. Now, the last questions I have
24 relate to - let's see - it's on Page 5, Line 9,
25 and your disagreement with Brighton Recommendation

1 Number 6, and that deals with the moving of the Jackson
2 Electric line. Are you going to receive any
3 electricity from Jackson?

4 A. No. There will be no interconnection between the
5 project and Jackson Electric Cooperative.

6 Q. Okay, and so you won't be providing any electricity,
7 any electrons, to Jackson's lines either, will you?

8 A. No, we will not.

9 Q. Okay, and then that differentiates Jackson from, for
10 instance, KU, and the water company, the phone company,
11 others that would be providing essential services to
12 the plant?

13 A. It's a difference. I don't know that it, in our mind,
14 makes a difference.

15 Q. The Jackson line provides electricity to Jackson's
16 customers; is that correct?

17 A. That would be my understanding.

18 Q. Okay. Assuming that Jackson has an emergency on that
19 line that could impact those customers, could impact
20 trees or structures underneath the line, whatever, and
21 the emergency were at the location of the plant, if the
22 line is located within the barrier, within the secure
23 area, how will Jackson get to that line?

24 A. Well, first of all, in response to your question, the
25 plant is going to be manned 24 hours a day, seven days

1 a week, so there will be plant personnel who would be
2 there, able to allow JEC's crews to enter into the
3 internally secured fence. Beside that, it's customary
4 in this type of a situation for JEC's crews to have
5 their own independent means of entering into that area.
6 They would have a key card that would open the gate;
7 they would have a separate lock on the gate. I can
8 tell you that I've worked in a number of power plant
9 situations where utility lines have crossed through and
10 over the site and these arrangements are typical.

11 Q. Okay. But, if Jackson did not have to go through that
12 secure area, they, theoretically, could get to the line
13 quicker, could they not?

14 A. Well, of course, if they didn't have to open a gate,
15 they could get to it quicker, but the JEC line actually
16 goes quite a distance across our property. It goes all
17 the way up to Coal Wash Road and then off the property
18 and then onto Highway 89. So, to the extent that,
19 while it's not the inter-power plant secured fence, to
20 the extent that we have, say, a fence around the entire
21 property, they'll still need to go through that fence.

22 Q. Okay. Do you have an estimated time that you would be
23 reaching agreement with Jackson as to where the line
24 will be relocated? I heard you say earlier that you
25 had not yet reached an agreement.

1 A. No. We've had the Jackson Electric Co-op engineers out
2 to the site, and we've walked the line and we've looked
3 at it and provided them a copy of the Exhibit G showing
4 where the line is today and asked for some of their
5 suggestions on how do you think it could be best
6 relocated, and that's pretty much the status. I can
7 honestly tell you that I haven't pushed it with them.

8 Q. Okay. Thank you, sir.

9 MR. TURNER:

10 No more questions, Mr. Chairman.

11 CHAIRMAN GOSS:

12 All right. Do any members of the Board have any
13 questions?

14 EXAMINATION

15 BY SECRETARY WILCHER:

16 Q. I just, for clarification, wanted to understand whether
17 the coal that you intend to burn would come from two
18 separate stockpiles, potentially, and be consolidated
19 during generation or whether you would use the waste
20 coal and then use the other coal, the 5 to 10 percent,
21 as a backup when the refuse pile is not dried out
22 enough to use for generation.

23 A. The off-site coal would be commingled with the waste
24 coal from the site and they would be commingled in the
25 crusher building. So it wouldn't be a question of

1 turning one on and the other one off. It would be a
2 blending process and that blending would be
3 accomplished in the crusher.

4 Q. And I guess it's been asked and I'm still a little
5 uncertain about the potential impact of having 80 less
6 acres available on the economics of the plant and
7 particularly therefore the impacts on the economy of
8 the region and of the state, and, in terms of whether
9 that is available or not, that 80 acre part of the
10 site, to you, what do you predict the economic impacts
11 would be?

12 A. Well, as I said before, if the 80 acres were carved out
13 of the site, we could still construct the facility.
14 Now, there's material on that 80 acres which, if it
15 were not available to the project, would, of course,
16 reduce the period of time that the project would have
17 before it exhausted the available waste coal on the
18 site. Now, my personal belief is that there's probably
19 no better use for a pile of waste coal than a power
20 plant right next door that burns waste coal. So I
21 don't know if that material, you know, wouldn't be sold
22 to the project, wouldn't be available to be sold to the
23 project. I just don't know.

24 Q. Thank you.

25

1 EXAMINATION

2 BY CHAIRMAN GOSS:

3 Q. Is there a difference between what your understanding
4 was of what DLX claimed before you walked in here today
5 versus what you understand they claim now?

6 A. No, sir.

7 Q. So the 80 acres that you understand they claim today
8 and claimed before they walked in here was what you
9 understood?

10 A. That's right.

11 Q. Okay. What about the location of that 80 acres?

12 A. No difference.

13 Q. No difference. All right. Because I had - I thought I
14 had understood that you were surprised when Mr. Collier
15 indicated, on behalf of his client, that part of the
16 80 acres involved where the actual turbine and the
17 stack were to be placed, the actual plant was to be
18 built, but that doesn't surprise you? I mean, you
19 recognize that that's their claim?

20 A. I don't agree that that's the claim that's in front of
21 the bankruptcy court.

22 Q. Okay. Well, if you don't care, articulate for me what
23 you believe their claim is, as you, as ECEP understands
24 it.

25 A. The claim is for the perimeter of the pile that's on

1 the map up there on the wall.

2 Q. All right, which does include the site where the plant
3 itself is to be constructed?

4 A. No.

5 Q. Okay. All right. Who are the - I think Mr. FitzGerald
6 asked you who the employees and agents of ECEP were,
7 and I want to ask you a further question. Who are the
8 officers of ECEP?

9 A. The sole Member and, I believe, Manager of ECEP is
10 Calla Energy Holding, LLC, and the sole Member and
11 Manager of Calla Energy Holding, LLC is Ms. Jacquelyn
12 Yates. I don't . . .

13 Q. All right. Does . . .

14 A. I'm sorry.

15 Q. I'm sorry. Go ahead and finish your answer.

16 A. I don't know that there are other officers.

17 Q. Would it surprise you if you were told that Mr. C. E.
18 Yates signed the interconnection agreement with the
19 MISO, dated April 8, 2004, as Vice President and CEO of
20 Estill County Energy Partners, which is Exhibit . . .

21 A. M.

22 Q. . . O, I think, 13 O to the application?

23 A. Mr. Yates was made Vice President and CEO at that time
24 in order, in my understanding, to sign that agreement.

25 Q. Well, what do you mean "at that time"? Is he no longer

1 Vice President and CEO of ECEP?
2 A. He is not.
3 Q. Okay. Well, if you don't care, give us a little
4 history, then, about - I mean, quite frankly, Mr. Mack,
5 ECEP is a little bit - it's a little bit fuzzy in my
6 mind as to who ECEP is. I understand who the sole
7 Member is, and that sort of thing, but, if you know,
8 take us from the beginning of when ECEP, LLC was formed
9 and tell us who the principals were right on up to
10 today.
11 A. I can't tell you that. I don't know.
12 Q. Who would know that?
13 A. Probably Ms. Underwood, but that might be a data
14 request.
15 Q. Okay.
16 CHAIRMAN GOSS:
17 Well, let's make that a data request, Mr. Turner,
18 please.
19 MR. WATTS:
20 Just for the record, sir, could you restate the
21 request?
22 CHAIRMAN GOSS:
23 Yes. Essentially, what I'm interested to know
24 is, from the inception of Estill County Energy
25 Partners, LLC, who formed the LCC and some history

1 as to who the Members have been and history as to
2 who the officers of that limited liability
3 corporation have been.

4 MR. WATTS:

5 All right. Yes, sir.

6 Q. Do you know when Mr. C. E. Yates ceased to be Vice
7 President and CEO of ECEP?

8 A. I think he was Vice President and CEO in April and, I
9 believe, May.

10 Q. Do you know why he was only an officer for those two
11 months?

12 A. It's my understanding that he was made an officer in
13 order to sign the interconnection agreement.

14 Q. Do you know why that was necessary? I mean, I
15 understand you're not an attorney. I'm not holding you
16 to that standard, but I'm a little curious as to why
17 that transpired that way. Do you know?

18 A. No, I don't.

19 Q. Besides being a Member of ECEP, is Ms. Jacquelyn Yates
20 an officer of that entity?

21 A. I don't know the answer to that question. I believe
22 that Calla Energy Holding is the Member and Manager.

23 MR. WATTS:

24 Just for the record, sir, I want to point out
25 these are LLCs as opposed to corporations.

1 CHAIRMAN GOSS:
2 Well, I understand that.
3 MR. WATTS:
4 Thank you.
5 CHAIRMAN GOSS:
6 And I appreciate that, but that's why my interest
7 is piqued that Mr. Yates would sign in his
8 capacity as an officer of a limited liability
9 corporation.
10 Q. Do you know why that was?
11 A. No, sir, I don't.
12 Q. All right. Now, on Page 2 of your testimony, starting
13 at Line 15, you indicate, and actually it would start
14 at Line 17, you state, "... it should be noted that
15 only a small portion of the Site, only a refuse pile
16 tract, is subject to an adversary proceeding before the
17 ... Bankruptcy Court ..." When you say "a small
18 portion of the Site," is that the 80 acres that you're
19 speaking about?
20 A. Yes, it is.
21 Q. All right. Okay. Thank you.
22 CHAIRMAN GOSS:
23 Those are all the questions I have. Let's turn
24 it over to you, Mr. Watts, then, for redirect.
25

1 MR. WATTS:
2 Thank you, sir. If I may have just a moment.
3 CHAIRMAN GOSS:
4 Sure.
5 OFF THE RECORD
6 CHAIRMAN GOSS:
7 While you're doing that, Mr. Watts, there was
8 one other question, Mr. Mack, that I had and
9 forgot.
10 Q. As I understand it, FirstStar Bank had a mortgage, or I
11 guess - was it a mortgage or a judgment lien, or what
12 did FirstStar Bank have against Kentucky Processing?
13 Do you know?
14 A. No, I don't.
15 Q. All right. Are you aware that Fox Trot Corporation was
16 an assignee of FirstStar Bank in terms of whatever debt
17 obligation FirstStar Bank enjoyed with regard to
18 Kentucky Processing?
19 A. No, I'm not.
20 Q. All right.
21 CHAIRMAN GOSS:
22 Okay. Mr. Watts, that's all I have.
23 MR. WATTS:
24 Thank you. Just one second.
25

1 REDIRECT EXAMINATION

2 BY MR. WATTS:

3 Q. Mr. FitzGerald asked you a question about consider-
4 ation you had given, the project had given, to
5 collocation at an electric generating site; is that
6 correct?

7 A. Yes.

8 Q. Okay. Are there any other reasons for choosing this
9 site compared to that site in terms of unique
10 attributes that this site offers?

11 A. Well, there are. Development of this site with the
12 power plant is going to allow us to replace the old
13 wash plant structures that most of you have seen on the
14 site. It's going to allow us to reclaim the site after
15 the removal of the waste coal by putting the coal
16 combustion by-products back, and it's ideally suited
17 for industrial development, with the river and the
18 railroad and the fact that the surrounding community,
19 you know, has already been aware that there's been
20 industrial development on this site.

21 MR. WATTS:

22 No further questions.

23 CHAIRMAN GOSS:

24 Mr. Collier, recross?
25

1 A. ECEP performed, or had performed, an economic
2 evaluation of the impact of the power plant on the
3 surrounding community. We did not specifically look
4 only at the properties that DLX is claiming an interest
5 in.

6 Q. I didn't ask about - I just want to know about those
7 particular properties, because the plant is proposed to
8 be built on or adjacent to properties they claim,
9 depending on your viewpoint.

10 CHAIRMAN GOSS:

11 I think he answered your question.

12 Q. Did you consider the impact of moving, or the ability,
13 whether you'll even have the ability to move this
14 Jackson Electric power line, for instance, should DLX
15 end up owning the property, or should I say that Fox
16 Trot fails in the litigation?

17 A. If Fox Trot fails in litigation, then Fox Trot would
18 only be responsible for relocating the portion of the
19 JEC line that would go across our site. If JEC wanted
20 to relocate the line that went across a DLX pile, that
21 would be an arrangement between them and DLX.

22 Q. So it's not necessary to relocate the line?

23 A. It's necessary to relocate a portion of the line as it
24 crosses our facility, and we would be responsible for
25 that portion of it. If you're asking me would we

1 relocate the line off our property, the answer to that
2 one is no.

3 Q. But is it necessary, if the plant is built, to relocate
4 Jackson's power line?

5 A. Again, as it goes over our site, yes.

6 Q. The question had been asked earlier as to whether there
7 were any financial arrangements or negotiations with
8 public entities concerning this particular project, and
9 I believe one of the data requests or one of the
10 responses to the data requests indicated that ECEP
11 and/or Fox Trot had reached an agreement with Estill
12 County concerning property taxes.

13 A. I don't believe that's correct.

14 Q. Are you aware of a problem relating to property taxes?

15 A. Yes. I've been made aware that there are some property
16 taxes.

17 Q. Has ECEP or, to ECEP's knowledge, Fox Trot made an
18 arrangement to remove whatever lien may be represented
19 by those taxes?

20 A. Well, I don't necessarily know that there is a lien
21 associated with those taxes, but no final arrangement
22 has been made.

23 Q. Have discussions been held to solve that issue?

24 A. I don't know. I'm not involved in that issue.

25

1 MR. COLLIER:

2 If I might allow someone else - I would rather
3 just find it. Rather than to sit here and flip
4 and waste your time, if someone else wants to ask
5 a question, I'll be happy to pass until I can find
6 it.

7 CHAIRMAN GOSS:

8 Well, that's fine. That prompts a question of
9 mine.

10 EXAMINATION

11 BY CHAIRMAN GOSS:

12 Q. I understood you to say, when we were in Irvine the
13 other night for the public hearing, I understood you to
14 tell the public that ECEP intended to satisfy all the
15 outstanding county property taxes in Estill County once
16 this project was closed.

17 A. And I believe that that the statement I made was that,
18 prior to closing the project, either Fox Trot
19 Properties or ECEP would settle and pay whatever taxes
20 it was determined were due and owing.

21 Q. Okay. All right.

22 CHAIRMAN GOSS:

23 Okay. Mr. FitzGerald, do you have anything on
24 recross?

25

1 MR. FITZGERALD:

2 Just a couple.

3 CHAIRMAN GOSS:

4 Okay.

5 MR. FITZGERALD:

6 Fools rush in. I should probably not even go
7 here, but I will.

8 RE CROSS EXAMINATION

9 BY MR. FITZGERALD:

10 Q. On redirect, you indicated that it was not merely the
11 presence of on-site waste coal that made you choose
12 this site and you indicated two additional reasons
13 which were not part of your response to my question why
14 did you not look at collocating elsewhere. The only
15 answer here was that because on-site coal is available
16 and can be economically transported. You also
17 indicated that you'll also reclaim the site and it
18 gives you an opportunity to replace old buildings and
19 potentially to create an industrial park. Is that a
20 fair summation of your response to the redirect?

21 A. I think that my response was describing other benefits
22 to having this plant on that site.

23 Q. Oh, okay. Do you intend to reclaim the entire
24 620 acres or rather those areas that you redisturb
25 to remove waste coal?

1 A. Yes.

2 Q. That's an either/or.

3 A. I'm sorry?

4 Q. You intend to reclaim all 620 acres?

5 A. We intend to reclaim the areas that we remove waste
6 coal.

7 Q. And will you be removing waste coal from the entire
8 620 acres?

9 A. No.

10 Q. Okay. So then your statement that reclaiming this
11 site, you will actually only reclaim those areas that
12 you redisturb?

13 A. There are areas on the site that were not disturbed
14 when the waste coal was placed there, so we're not
15 going to disturb them further.

16 Q. How many acres would that consist of?

17 A. I don't know.

18 Q. Roughly, you don't have . . .

19 A. I wouldn't even want to guess.

20 Q. Are you going to be removing all of the buildings that
21 are currently there on site?

22 A. No.

23 Q. Okay. So, in the statement "replacing old buildings,"
24 you are going to remove some of the buildings?

25 A. That's right.

1 Q. Okay, and how many buildings will you be keeping?

2 A. There was a data request on this topic, and I believe

3 that our statement was we're going to be removing the

4 big old rusty buildings that are down by the river and

5 that some of the, I'll call them, outbuildings, some of

6 the maintenance shops, that aren't directly on that

7 site that are still in fairly good condition and can be

8 recovered may be kept and may be used as maintenance

9 facilities for the plant.

10 Q. Okay. Do you know whether those, as you put it, rusty

11 old buildings down by the river are under a mining

12 permit now? Are they part of a permitted area?

13 A. I don't know the answer to that.

14 Q. Okay. Mr. Jagers might?

15 A. He might.

16 Q. Okay. I'll ask him, then. The last question I had -

17 I'm a little confused, and I'll admit my confusion. I

18 asked you to describe the relationship, in Data Request

19 20, and you responded to this, between ECEP and any of

20 its owners, principals, or agents and Calla Energy

21 Partners, The Institute of Gas Technology, Chuck Yates,

22 Donnie LaViers, Kentucky Processing, and DLX, Inc., in

23 that order. You responded regarding Charles (Chuck)

24 Yates that he is the husband of Ms. Jacquelyn Yates but

25 didn't note that he was, for a two-month period, the

1 Vice President and CEO of ECEP, and I'm curious - did
2 that slip your mind?

3 A. I answered the question to the facts that were correct
4 at the time that the question was answered.

5 Q. Well, I mean, you told me that he was an officer of
6 Kentucky Processing under e. Why didn't you tell me he
7 was an officer of ECEP for a two-month period?

8 A. We answered the question based on the facts that were
9 correct at that time.

10 Q. You didn't know at the time that he was the Vice
11 President and CEO for a two-month period?

12 A. I knew at the time that he had been the Vice President
13 and CEO to sign the interconnection agreement.

14 Q. Okay. Was he the Vice President and CEO only for that
15 purpose, or was he the Vice President and CEO of ECEP
16 generally for that two-month period?

17 A. I don't know that there was any exclusion.

18 Q. Okay. Is there a document that indicates the
19 termination of his employment as Vice President and CEO
20 of ECEP that we could make a data request?

21 A. I assume that there is. I don't have that document.

22 Q. Okay. Could we make that a data request? Because, as
23 of June 11th, if he was not a former Vice President and
24 CEO of ECEP, there should have been an environmental
25 compliance and disclosure, and I'd like to just verify

1 that, in fact, his brief participation ended before
2 that time.
3 A. (No verbal response.)
4 MR. FITZGERALD:
5 Thank you, Mr. Chairman. That's all I have.
6 CHAIRMAN GOSS:
7 We'll turn it back over to you, Mr. Collier.
8 Did you find what you needed?
9 MR. COLLIER:
10 I did. It was in one of the other data requests.
11 COURT REPORTER:
12 Just a moment. I have a question. When he said
13 could he make that available, there was no
14 response, or somebody might have shook their head.
15 A. Yes.
16 COURT REPORTER:
17 Thank you.
18 CHAIRMAN GOSS:
19 Have you got that on your list, Mr. Turner?
20 MR. TURNER:
21 I will.
22 CHAIRMAN GOSS:
23 All right.
24 MR. TURNER:
25 I think that probably is already encompassed in

1 What discussions has ECEP had to assure itself that it
2 can make this statement?

3 A. The assurance that we can make to ourselves is that I
4 know that Fox Trot Properties is working on this. The
5 assurances that we can provide to Estill County is
6 that, without settling the outstanding taxes, there's
7 going to be a lien on the property and we're not going
8 to be able to close financing.

9 Q. Do you know with whom Fox Trot is negotiating?

10 A. No, I don't.

11 Q. Have any promises been made - I noticed the name of
12 Estill County Energy Partners is in the plural and, as
13 I understand it, there's but one Member at this point
14 in time. Have any agreements, discussions, negoti-
15 ations been had concerning the induction of additional
16 Members into Estill County Energy Partners upon closing
17 of the deal to get the lease, to purchase the plant,
18 etc.?

19 A. Not to my knowledge.

20 Q. Has anyone expressed an interest in becoming one of
21 those partners or a Member of ECEP?

22 MR. WATTS:

23 He just answered the question before.

24 CHAIRMAN GOSS:

25 Well, I think he - restate the question. I was

1 handing Secretary Wilcher her coffee and I didn't
2 hear the question. I apologize.

3 MR. COLLIER:
4 That's quite all right.

5 SECRETARY WILCHER:
6 It's my fault. It's my fault.

7 MR. COLLIER:
8 I can remember it.

9 Q. Has any person or entity expressed interest in becoming
10 a Member of ECEP?

11 A. Not to me.

12 Q. The final question has to do with the coal that the
13 plant burns. In a rough way, isn't it true that, when
14 coal is burned, the desire is to achieve a certain
15 level of BTU? I mean, the coal has to be capable of
16 putting out a certain amount of energy to make the
17 plant run?

18 A. Well, actually, no. To make the plant run, the boiler
19 has to receive a certain amount of energy.

20 Q. That's BTUs, is it not?

21 A. It's measured in BTUs, yes.

22 Q. Right. So that waste that has a higher BTU count, less
23 is required to produce the desired level of output than
24 would be of coal that doesn't have as high a BTU
25 content?

1 A. To the extent that a fuel has more BTUs per pound, you
2 would need to put in less pounds.

3 Q. Do you know whether the waste on this property varies
4 in BTU content?

5 A. Yes.

6 Q. Which is the best waste coal that you propose to burn?

7 MR. WATTS:

8 I'm going to object to that. This proceeding, in
9 large part, has been, at least in my view, an
10 exercise on the part of Mr. Collier and his
11 clients to try to gain information about this
12 project which they believe will be helpful to them
13 in their litigated position, and we're trying to
14 get now into project economics, and I object to it
15 and hope that you will sustain my objection.

16 CHAIRMAN GOSS:

17 Well, I think the amount of waste coal vis-a-vis
18 the amount of clean coal it must be blended with
19 is an issue as it relates to noise, potentially,
20 as it relates to dust, as it relates to traffic,
21 and those sorts of things. So, if the question is
22 meant to ascertain whether or not the percentages
23 of blended coal will change as the BTU changes in
24 a particular location on the waste site is being
25 mined, in my estimation, is an appropriate

1 question. Now, I don't know if that's what you're
2 asking. I think that's what you're asking.

3 MR. COLLIER:

4 There are additional factors that attend the BTU
5 content of the coal.

6 CHAIRMAN GOSS:

7 Well, certainly I don't think it's appropriate for
8 you to ask him specific questions as to the BTU of
9 the coal from a quantitative standpoint.

10 Certainly I don't think it's inappropriate for you
11 to ask him if, at various points on the 620 acres,
12 the waste coal is a better quality than it is in
13 other locations, but let's not get real specific
14 for proprietary reasons.

15 MR. COLLIER:

16 I don't mean to get into calorific, ash, and
17 sulphur, and all that.

18 CHAIRMAN GOSS:

19 Okay.

20 MR. COLLIER:

21 I don't mean to do it at all.

22 CHAIRMAN GOSS:

23 All right. I'm going to overrule the objection on
24 that limited basis, but let's try to keep it
25 pretty limited.

1 Q. My question, Mr. Mack, are there particular areas in
2 general that have a higher BTU value, this waste coal
3 that's on the site that you propose to mine, if you
4 will, and burn, than others?

5 A. Yes.

6 Q. Which sites have the highest level as compared to the
7 others?

8 MR. WATTS:

9 I'm going to object to that question.

10 CHAIRMAN GOSS:

11 Overruled. You can answer the question.

12 Q. Which sites on the property have a higher BTU content
13 relative to the others?

14 A. Generally, the river pile has a higher BTU per pound
15 content and a corresponding higher sulphur content.

16 Q. And what you mean, that is the property that DLX claims
17 to own, when you say the river pile? I've called it
18 the refuse pile tract, but I just want to make sure
19 we're talking about the same property.

20 A. It is.

21 Q. If that's true and if the DLX coal were not available
22 and you had to burn more coal of a lesser BTU content
23 from other areas, would not that mean that you would go
24 through that coal, on a tonnage basis, more quickly
25 than you would the higher calorific content coal from

1 the refuse pile site?

2 A. If you burn a lower BTU per pound coal, you have to

3 burn more pounds.

4 Q. So that would proportionally, once again, shorten the

5 period of time from which you could expect to burn coal

6 solely from that site if DLX owns that coal?

7 A. That's right.

8 MR. COLLIER:

9 That's all my questions.

10 CHAIRMAN GOSS:

11 Okay. Mr. Turner?

12 MR. TURNER:

13 No questions.

14 CHAIRMAN GOSS:

15 Does anybody have anything else?

16 MR. WATTS:

17 I do have one.

18 CHAIRMAN GOSS:

19 Okay.

20 REDIRECT EXAMINATION

21 BY MR. WATTS:

22 Q. Regarding the question you were just asked and an

23 earlier question that you were asked by Mr. Turner in

24 which there was discussion about the impact of having

25 the DLX coal not being available, and, as I recall, you

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25

testified, in the range of 25 to 30 years, was that your estimate of that range would not be affected by the loss of the DLX coal; correct?

A. I think my testimony was that it's impossible to say, you know, 25.2 years, because there's a range of assumptions that go with the period of time that you would exhaust a finite inventory that's on site but that not having a portion of that inventory would move you towards the lower range.

Q. And, when you answered Mr. Turner, did you include in your analysis the BTU content of the river pile coal vis-a-vis the other coal on site?

A. No, I didn't make a differentiation.

Q. Okay. Thanks.

MR. COLLIER:

That's all I have.

CHAIRMAN GOSS:

Any of the Board members have any other questions? As they say in an auction, all in, all done. Okay. Thank you very much, Mr. Mack. I'm a little bit concerned. It's twenty minutes after two and we've just gotten finished with the first witness. You have Mr. Jagers as your only other witness; is that right?

1 MR. WATTS:

2 Yes, sir.

3 CHAIRMAN GOSS:

4 Okay. Does anybody have any idea - will Mr.
5 Jagers take a similar amount of time, or no? I
6 see some head shakes "No," so that's good.

7 MR. FITZGERALD:

8 Mr. Chairman, we just have a handful of pretty
9 straightforward questions.

10 CHAIRMAN GOSS:

11 Okay. Well, let's go ahead and get Mr. Jagers up
12 here and see how far we get, and we'll take a
13 break here in just a few minutes. Mr. Jagers,
14 would you come forward, please, sir?

15 WITNESS SWORN

16 CHAIRMAN GOSS:

17 Have a seat.

18 MR. WATTS:

19 Do you need some water or anything?

20 MR. JAGGERS:

21 Yes, I do.

22 MR. WATTS:

23 Mr. Chairman, before we do this, I neglected to
24 ask, at the conclusion of Mr. Mack's testimony,
25 whether the proposed Condition that we presented

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at the beginning of the hearing had been identified, and, if not, I wanted to be sure that it was. I think I read it. So it's in the record, but I thought it would be good to have it identified.

CHAIRMAN GOSS:

Yeah, I'm not sure it has been identified. Do you wish to make it an exhibit?

MR. WATTS:

Yes, I think that would be appropriate.

CHAIRMAN GOSS:

Is there any objection to that?

MR. COLLIER:

I don't mind that it is made an exhibit, but DLX and the Trust do not agree to the portions of the proposal that are expressed therein . . .

CHAIRMAN GOSS:

Certainly. Okay. That . . .

MR. COLLIER:

. . . and, if that should be addressed later, that's fine.

CHAIRMAN GOSS:

Well, I think everyone understands what it is. It's the applicant's proffer. That's what the applicant wants.

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MR. COLLIER:

I can be specific and it's brief, is that clearly they're going to produce a boundary survey at some point. Whether it's within the time frame that you all will get to look at or not is another question. On the other hand, seeking the Siting Board's approval and direction to record it in the Estill County Clerk's Office has legal implications vis-a-vis my clients' property interests and also as to whether it would conform with Kentucky regulations governing surveys, and I certainly would like to weigh in on that, if that's going to be something that the Siting Board wishes to get into.

CHAIRMAN GOSS:

Well, I mean, the Siting Board is certainly not going to rule on the proposal at this point. If it's something that you think you want to argue in your brief, since it's going to be of record, then I would recommend that you do that, . . .

MR. COLLIER:

Okay.

CHAIRMAN GOSS:

. . . and we'll consider it at that time.

1 MR. COLLIER:
2 That will be fine.
3 CHAIRMAN GOSS:
4 So that will be Applicant 2. Is that right,
5 Connie?
6 COURT REPORTER:
7 I don't have it.
8 CHAIRMAN GOSS:
9 One was . . .
10 MR. WATTS:
11 The TVA book.
12 MR. TURNER:
13 Yeah, I think so. Applicant 1 was the big thing
14 from TVA, exactly.
15 APPLICANT EXHIBIT 2
16 MR. WATTS:
17 Thank you.
18 The witness, DELL JAGGERS, after having been first
19 duly sworn, testified as follows:
20 DIRECT EXAMINATION
21 BY MR. WATTS:
22 Q. Would you please state your name, position of
23 employment, and business address?
24 A. My name is Dell Jagers. I work with CBC Engineers,
25 112 Dennis Drive, Lexington, Kentucky, as Vice

1 President and General Manager.

2 Q. Now, do you have with you a document consisting of six
3 typed pages of questions and answers with, I guess, a
4 verification and certificate of service, and so forth,
5 that is entitled, "Direct Testimony of Dell Jagers on
6 Behalf of Estill County Energy Partners, LLC"?

7 A. Yes.

8 Q. All right, and was that prepared by you or under your
9 direction?

10 A. Yes.

11 Q. Do you have any corrections or additions to it?

12 A. No.

13 Q. All right, and, if you were asked the questions
14 contained in it, would you provide the same or
15 substantially the same answers?

16 A. Yes.

17 Q. All right, and you wish to sponsor it as your direct
18 testimony in this proceeding?

19 A. Yes, I do.

20 MR. WATTS:

21 Okay. Thank you. Mr. Jagers is available for
22 cross.

23 CHAIRMAN GOSS:

24 Thank you, Mr. Watts. Go ahead, Mr. Collier.

25

1 CROSS EXAMINATION

2 BY MR. COLLIER:

3 Q. What is your exact relationship to ECEP? Are you also
4 an independent contractor?

5 A. We're a consulting engineering firm, and we're acting
6 as a consultant.

7 Q. So you hold no position or any member of your firm with
8 ECEP?

9 A. No, sir, do not.

10 Q. And don't own a financial interest?

11 A. No, sir, do not.

12 Q. Your involvement - I've looked at your - yours has more
13 to do, I guess, with more engineering related issues
14 and not so much all the financial and other issues that
15 have been involved. I looked on Page 2 of your
16 testimony, and you said that "CBC has prepared mapping
17 for the Siting Application and is responsible for ...,"
18 and then you listed a variety of different things that
19 have been prepared. Were these done under your
20 direction?

21 A. Yes.

22 Q. So who works under your direction at CBC?

23 A. We have a total of nine people in my office.

24 Q. Does that include engineers and surveyors, other
25 employees who are members of your team?

1 A. Yes.

2 Q. Are you a surveyor as well? I looked at your
3 qualifications and didn't see any LS number there.

4 A. I am not a registered land surveyor.

5 Q. As part of your supervisory duties with CBC, do you
6 review surveys that are being performed in conjunction
7 with the project that you are managing?

8 A. Typically not.

9 Q. You don't review them?

10 A. I'll look at the maps, . . .

11 Q. Okay.

12 A. . . . but, in terms of actually preparing the surveys
13 and preparing that . . .

14 Q. No. When I say "review," I mean did you look at it and
15 read it and, you know, you might ask questions or that,
16 but I realize you can't sign off on it.

17 A. That's correct.

18 Q. Your firm, then, prepared all of what I guess a lay
19 person might refer to as the maps that are attached as
20 exhibits to both the application and the responses to
21 all the data requests?

22 A. Your question was "all," and I'm trying to think
23 through.

24 Q. Well, . . .

25 A. If not all, pretty close to. We did most of the

1 mapping and a lot of the data responses. I hesitate to
2 say all of it.

3 Q. When it comes to a map as opposed to, let's say, a
4 survey, and a survey does have a legal meaning - I
5 understand that - in Kentucky, did anyone at your firm
6 sign off on any of these maps?

7 A. In terms of signing off with some sort of professional
8 engineering stamp or . . .

9 Q. Some sort of certification.

10 A. . . . registered land surveyor stamp, no, they were
11 not.

12 Q. In particular, let me direct your attention to what's -
13 it's been referred to as Exhibit B. Do you know the
14 one I'm talking about? I think it's called the site
15 boundary map. I hope I can - I think it was revised in
16 connection with your Response 10 to the Staff's First
17 Data Request, if you want to pull that out, because I'm
18 going to ask you a question about that particular . . .

19 A. And it's in No. 10?

20 Q. Yes. Typically, if a survey is done, it's reported in
21 courses and distances; is it not?

22 A. If a survey is done?

23 Q. Yes. It's required by law to be in courses and
24 distances so that there's a legal description that
25 accompanies the survey.

1 A. If it's to be recorded. You can do a survey but it not
2 have to be specified. I guess I'm not sure what your
3 question is.

4 Q. Well, in other words, there's the graphic repre-
5 sentation, the layout, what I might call a map, that
6 shows where the lines are, outbuildings, whatever it is
7 that have been located on the diagram, but also, for a
8 quote, "survey" that a surveyor would sign, it would
9 have a legal description in a box or an inset that was
10 the courses. In other words, north so many degrees,
11 east X number of feet to whatever point is referred to,
12 and so forth and so on, until it closes; correct?

13 A. If you're asking me if a registered land surveyor is
14 going to put his stamp on there, that it have distances
15 and directions, . . .

16 Q. Yeah.

17 A. . . . then the answer to that question is yes.

18 Q. All right. This map does not have that, does it?

19 A. No, it does not.

20 Q. In fact, . . .

21 CHAIRMAN GOSS:
22 Let's identify - I know you said "10" . . .

23 MR. COLLIER:
24 Okay. I will.
25

1 CHAIRMAN GOSS:

2 Let's identify the map a little clearer, please,
3 as to date.

4 MR. COLLIER:

5 I think it was referred to as Exhibit B in the
6 application, but then it was modified in some way,
7 and I'm not sure what it is at this point, but it
8 was attached, again, to Staff Request . . .

9 CHAIRMAN GOSS:

10 I have one dated July 1, and I have one dated July
11 13. Now, which one are you talking about?

12 MR. COLLIER:

13 Well, if you've got one dated July 13, I don't
14 know why mine's July 1. I'm looking at the
15 Responses to Staff's Data Request 1, Tab 10.

16 MR. WATTS:

17 The one I have is dated July 1.

18 CHAIRMAN GOSS:

19 All right. That's fine. I just wanted to make
20 sure we're all looking at the same map.

21 MR. COLLIER:

22 All right.

23 CHAIRMAN GOSS:

24 Okay.

25 Q. In other words, there's a kind of purplish blue line on

1 the legend that says "Property Line."
2 A. Yes.
3 Q. I'm trying to figure out, in absence of a complete
4 survey, that's not necessarily accurate, is it? It's a
5 representation?
6 A. Probably best characterized as a representation of the
7 property.
8 Q. Okay, and right under the "Property Line," there is -
9 in fact, it says, "Boundary Disclaimer." Why is the
10 boundary disclaimer on this?
11 A. There are rules and standards for registered land
12 surveyors putting property boundaries, and, if it is a
13 registered survey, then it needs to have a surveyor
14 stamp and recognized as such. This would make it
15 recognizable that, in fact, this was not a recordable
16 survey document for a courthouse.
17 Q. Well, somewhere between a full survey and something
18 that is useful for trying to locate boundaries or
19 buildings or physical objects or something like that,
20 would it be fair to characterize this boundary
21 disclaimer as stating that anything represented on it
22 is not worthy of reliance?
23 A. That's what the parties believe, Estill County Energy
24 believes, that it owns based upon the boundary
25 descriptions in some deeds.

1 Q. But it says, "No certification is made or implied as to
2 the correctness or authenticity of any information
3 relative to the property boundaries as shown." That
4 exception seems to consume the entire statement that
5 this is a site boundary map. I mean, who can rely on
6 this? Can I rely on anything that I see on this map?

7 A. I guess it is an opportunity - and this is done in
8 surface mining permit applications and different things
9 - to try as best you can to reflect the property
10 boundaries as you believe them to be and as the owner
11 believes them to be, but they are not surveyed to the
12 accuracy so that they could be placed with a deed in
13 the courthouse, and, in order to be fair about that, as
14 a registered land surveyor, which I am not - we do have
15 them in the company which I am not one of them - in
16 order to do that, one must place a disclaimer on there
17 or jeopardize placing themselves in a bad position. So
18 that's the reason that disclaimer is added.

19 Q. Okay. Well, you've got surveyors at your office; why
20 didn't one of them sign this?

21 A. As earlier testified to, the survey is not complete.

22 Q. All right. In that case, if my clients, when reviewing
23 your data requests, can't rely on it, how can the
24 Siting Board rely on it? In other words, why is it
25 even here if it can't be relied upon for any of the

1 data that's shown on it?

2 A. It's because the applicant has done its best to
3 describe to the Siting Board what they believe the
4 property boundary is.

5 Q. I understand, and we've talked earlier - you were here
6 during Mr. Mack's testimony where we referred to
7 various statutes about boundaries and discussions of
8 the surveys, and all these things are presented for a
9 purpose, and that's to secure this certificate, but I
10 ask you again; is the Siting Board authorized to rely
11 on this? It doesn't say so here, at least the way I
12 read it. Is CBC telling the Commission, "Well, no,
13 that's not quite right. You can rely on this"?

14 A. I'm really not in a position to tell the Board what
15 they are and are not authorized to accept. I can only
16 tell you what I believe is represented on this map.

17 Q. Well, is it fair to say that CBC is making no
18 certification, is made or implied, to the Siting Board
19 as to the correctness or authenticity of any
20 information relative to the property boundaries as
21 shown? I've added "to the Siting Board" because this
22 was submitted to the Siting Board. You're telling me
23 that CBC is not certifying or implying to the Siting
24 Board that the boundaries can be relied upon?

25 A. We are certifying to this Board that this is not an

1 exact survey boundary of that property.

2 Q. Then are you all prepared to remove the disclaimer so
3 that they can rely on it?

4 A. Am I prepared to remove the disclaimer?

5 Q. Yeah.

6 A. Not until the boundary of the survey has been
7 completed.

8 Q. All right. Well, let's talk about the survey. When
9 was CBC first asked to conduct a survey on this
10 property?

11 A. Do I need to fold this up now?

12 Q. You can. I'm through with it.

13 A. Okay.

14 CHAIRMAN GOSS:
15 Why don't we stop right here and take about a
16 15 minute break. We've gone a little more than an
17 hour and a half. Let's come back about five
18 minutes to three.

19 OFF THE RECORD

20 CHAIRMAN GOSS:
21 All right. We're back on the record. Mr.
22 Collier, I think you were examining.

23 MR. COLLIER:
24 Yes.

25 Q. I had asked you a question out of ECEP's Responses to

1 the Staff's First Data Request, and I would like to
2 refer you again to that volume. Particularly, under
3 Tab 1, there is a - and it's going to be - I've asked
4 you a similar series of questions about the accuracy of
5 the lines and there's the same disclaimer, and it
6 appears to be very similar lines on that one as well.
7 It's called "Adjacent Property Owners" . . .
8 A. Yes.
9 Q. . . . map, if you will.
10 A. Okay.
11 Q. All the questions I asked you before about the other
12 one are going to be true about this one and your
13 responses as well in terms of the disclaimer and the
14 boundaries; correct? I mean, I don't need to - if you
15 want to look at it . . .
16 A. Let me state that by saying that the disclaimer was
17 added to this map for the same reason that it was added
18 to the other map.
19 Q. It just has more lines on it as to boundaries?
20 A. Correct.
21 Q. Is it also fair to say that that map does not represent
22 any of the properties claimed by the LaViers Trust or
23 DLX?
24 A. I believe, I mean, if I understand your question, . . .
25 Q. Right.

1 A. Let me tell you what it shows.

2 Q. All right. Go right ahead.

3 A. I guess. Why don't you shoot your question one more
4 time?

5 Q. Do you have it? I don't intend to ask you a question
6 and have you . . .

7 A. Just tell me what you want to know and I'll try to help
8 you.

9 Q. I'm looking at it, . . .

10 A. Okay.

11 Q. . . . and I don't see anything on there that - in terms
12 of the map index to the adjacent landowners, it doesn't
13 list either DLX or the LaViers Family Trust.

14 A. That is correct.

15 Q. All right. Now, in terms of certification, had it been
16 a proper survey, had it been a survey that not only met
17 the standards but was capable of being signed by the
18 surveyor, would it have not been required to show
19 encroachments or items which indicated competing claims
20 on the survey if they were known to the surveyor?

21 A. The surveyor would have taken the deeds as they were
22 recorded at the courthouse . . .

23 Q. Uh-huh.

24 A. . . . and recorded them as they believed that they fit.

25 Q. Okay. What you said is a true statement, but that

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wasn't an answer, I don't believe, to the question that I asked, if there were encroachments. An encroachment could be a building overlap, could it not? I mean, to those of us who live in the city, if somebody built their garage over my property line, if I had my property surveyed, it ought to show that somebody has got a building on my property; right?

A. If you're asking me if an encroachment were made on the property by another building, then property surveys typically do show a building on there; not always. It depends on the level of the survey and what you're doing it for. If it's an ALTA survey, you'll have a building on there. If it's not an ALTA survey, it won't have a building on there, or it doesn't have to.

Q. If land were in the adverse possession of another, it might be shown on there?

A. But, when you're saying "in adverse possession," . . .

Q. Uh-huh.

A. . . . you know, if something is in the courthouse that is shown that another property belongs to another person that's within a boundary that you're surveying, then, yes, you would be required to do that. You would be required to show that as it was deeded and shown in the courthouse.

Q. I thought - but to complete a survey, you actually go

1 to the property, don't you?
2 A. You have to have something to survey.
3 Q. Yeah, right. You go out to the land, and, if an
4 encroachment is visible when you see it, you have to
5 show that too, don't you?
6 A. Okay, and tell me what you mean by "an encroachment."
7 Q. It could be a number of things, but I used the . . .
8 CHAIRMAN GOSS:
9 Mr. Collier, I'm going to interrupt you, sir. I
10 think it has been well established that this is
11 not a survey that has been signed off by an RLS.
12 MR. COLLIER:
13 Right.
14 CHAIRMAN GOSS:
15 Everyone recognizes that, and, in fact, this
16 gentleman himself has indicated in his
17 qualifications that he is not a registered land
18 surveyor. So I guess I would ask you to move on
19 to something a little bit more relevant with
20 regard to what this particular witness can answer
21 to, if you would, sir.
22 MR. COLLIER:
23 All right.
24 Q. Now, I had asked you earlier if CBC was in the process
25 of performing a survey of the entire premises, as you

1 understand them. I can't remember the 600 - is it 640,
2 620? I can't remember the approximate acreage of the
3 site. Is CBC doing that?
4 A. Yes.
5 Q. When was it first asked to begin a survey?
6 A. The leaves weren't on yet. So it was probably
7 somewhere about February, March, April, something like
8 that time.
9 Q. Of?
10 A. This year.
11 Q. This year?
12 A. Uh-huh.
13 Q. How long has CBC been retained by ECEP?
14 A. CBC started working on this sometime about February of
15 2002.
16 Q. All right.
17 A. Excuse me; 2003.
18 Q. All right. That's fine.
19 A. Pardon.
20 Q. Has the survey been completed in terms of the field
21 work?
22 A. No, it has not.
23 Q. Have any surveys been completed . . .
24 A. Have any surveys been completed?
25 Q. . . . as to any portion of this property?

1 A. The survey of this entire property has not been
2 completed.

3 Q. I would like to direct your attention to Tab 13 of
4 ECEP's Responses to Staff Data Request No. 1.

5 A. In fact, that's the same one we were looking at,
6 Exhibit . . .

7 Q. No. Tab 13.

8 CHAIRMAN GOSS:

9 Is this one on an easel, on a hard board or
10 something?

11 MR. COLLIER:

12 Pardon?

13 CHAIRMAN GOSS:

14 Is this one mounted on a board that we can put it
15 on an easel or something where . . .

16 A. Yes.

17 MR. COLLIER:

18 Is it?

19 A. We have one.

20 MR. WATTS:

21 We have one.

22 CHAIRMAN GOSS:

23 Why don't we do it that way?

24 A. Sure.

25

1 CHAIRMAN GOSS:
2 I don't want to take over your examination, but it
3 seems like - there's seven of us up here and
4 there's no way we can look at seven maps. They're
5 too big. You're welcome to approach the exhibit
6 or whatever you want to do, Mr. Collier, and, Mr.
7 Jagers, you're welcome to come down off the
8 witness stand and refer to the exhibit as
9 Mr. . . .

10 MR. COLLIER:
11 Unfortunately, the part I'm about to refer him to
12 is the, quote, "fine print."

13 CHAIRMAN GOSS:
14 Okay. Well, that's fine.

15 MR. COLLIER:
16 So I hope you can bear with me.

17 CHAIRMAN GOSS:
18 Sure, whatever you need to do.

19 Q. This map was prepared by your office; correct?
20 A. Yes.
21 Q. All right. It shows a date of July 1, '04. Is that
22 simply the date of preparation, or was it prepared
23 before that time?
24 A. I would have to go back and check, but there was an
25 original submittal with the . . .

1 Q. Application.

2 A. . . . application. Then there was an additional data
3 request. We made the additional data request, and I
4 believe this was finalized with that additional data
5 request.

6 Q. All right. I'm looking at some of these things. For
7 instance, it says "Perimeter Fence." It's the exterior
8 kind of purplish blue line, and it's got some circles
9 on it. While this is not signed off, and I realize it
10 does not constitute, quote, "official survey," are
11 those corners, representative corners, those circles?
12 It says "Perimeter Fence." Do you know?

13 A. No, they are not.

14 Q. What are they?

15 A. It's the location of where we would place the perimeter
16 fence around the boundary.

17 Q. The circles?

18 A. Yes. The circles just are in there to designate the
19 different kind of a line.

20 Q. All right.

21 A. So it represents the perimeter fence.

22 Q. Now, if you'll look towards the signature block and
23 then immediately to the left of it, it says "Prepared
24 from survey by CBC Engineering & Affiliates, LLC . . ."

25 A. Uh-huh.

1 Q. What on this map was prepared from a survey?
2 A. The location of the perimeter fence there.
3 Q. Okay. What about the facility itself and the topo-
4 graphic lines of elevation?
5 A. Well, that's really - I take that back. Let me explain
6 that. The topographic features and the locations that
7 are shown in black, the information that's shown in
8 black, such as the railroad tracks or the existing rail
9 unloading shed, . . .
10 Q. Okay.
11 A. . . . those were surveyed by us in the field . . .
12 Q. All right.
13 A. . . . as opposed to the perimeter fence. Excuse me;
14 that's not correct.
15 Q. So whatever is in black is what was surveyed and
16 whatever the other colors are was not?
17 A. The other colors, which are in purple, are what is just
18 overlaid with the map in terms of the location of the
19 proposed facilities that are yet to be constructed.
20 Q. So, in fact, this says the survey has been done. Could
21 you explain that?
22 A. We went out and conducted a survey, located facility
23 structures and topographic features for that area.
24 Q. But the survey is not complete, and why is it not
25 complete?

1 A. There's a difference between a survey and a survey that
2 you're going to record at the courthouse. Okay. This
3 was done for purposes of locating all of the features
4 of the property and understanding the lay of the land
5 so that you can plan best where the facility should go.
6 Q. Okay. Now, have you, in the course of your review -
7 you oversee the survey crew that is doing this, I
8 guess. They're under your direction, but you're not
9 the surveyor who is actually performing the work, if I
10 understand it.
11 A. I am not a registered land surveyor nor do I do
12 surveying work myself. We have those in our firm, and
13 they have been out to the site.
14 Q. But all I'm interested in, they work at your direction.
15 In other words, you're in charge of the project, but
16 the surveyor is the one that's going to sign off?
17 A. That's correct.
18 Q. He's in charge of the survey?
19 A. That's correct.
20 Q. Did you see to it that the survey crew was provided
21 with the information that DLX and the Trust have both
22 provided in this matter and in the bankruptcy case?
23 A. What information?
24 Q. There has been information that DLX and the Trust have
25 filed in response to data requests and has attached to

1 their testimony. Was that provided to the survey crew?
2 A. No. This survey that we've done on this property right
3 here has nothing to do with the property boundaries.
4 Q. No. That's not my question. I'm not even referring to
5 that map at this point.
6 A. Okay. Well, I need to understand, because, . . .
7 Q. Right.
8 A. . . . if what you're asking me is did we provide our
9 surveyors information about the property dispute for
10 this map, no, . . .
11 Q. No. That wasn't my . . .
12 A. . . . we didn't.
13 Q. I am on to a general question at this point.
14 A. Okay.
15 Q. Sorry to confuse you.
16 A. Okay.
17 Q. Did you provide, or see that it was provided, the
18 information that DLX and the Trust have furnished or
19 filed in the record in this matter to the survey group?
20 A. Yes.
21 Q. Did you furnish information from - when I say "the
22 bankruptcy case," do you understand what I'm referring
23 to? This is the dispute between DLX and Fox Trot.
24 A. I'll have to say I understand pretty much what's going
25 on, but I do not know all the intricacies of it.

1 Q. Fair enough.

2 A. Okay.

3 REPORTER:

4 Mr. Collier, when you're speaking, would you move
5 up to the mike because that map being moved over
6 there is on your mike also.

7 CHAIRMAN GOSS:

8 Mr. Jagers, if Mr. Collier has left questioning
9 about this exhibit, . . .

10 MR. COLLIER:

11 Yes, for the moment.

12 CHAIRMAN GOSS:

13 . . . go on back up to the witness stand, please,
14 sir, so she can hear you.

15 MR. COLLIER:

16 I'm sorry. I had a map over the mike.

17 A. Take this down?

18 CHAIRMAN GOSS:

19 Take it down so the two end members there can see
20 you. Thank you.

21 Q. All right. So you have a general understanding what I
22 mean when I refer to the bankruptcy case?

23 A. Yes.

24 Q. All right. Did you furnish the survey crew or direct
25 that they be furnished with materials from the

1 bankruptcy case relative to the claims of DLX?
2 A. Yes, I believe I did.
3 Q. Or, I guess, did you instruct them to go obtain those
4 materials?
5 A. I wouldn't have known where to tell them to obtain them
6 from.
7 Q. Have you reviewed any of the maps that DLX has
8 submitted and the Trust have submitted in this
9 proceeding?
10 A. Yes.
11 Q. Okay. Have you overlaid them with your own to see what
12 the differences in those maps are?
13 MR. WATTS:
14 I think we're at a point now where I need to
15 object, because it's clear we're getting into the
16 boundary and property dispute, and I object to
17 this line of questioning.
18 CHAIRMAN GOSS:
19 Well, it sounds like that's where we're going, Mr.
20 Collier. Tell me if Mr. Watts is wrong in that
21 regard.
22 MR. COLLIER:
23 Well, the reason is, is they were permitted to
24 explain, at least Mr. Mack was, upon questioning
25 as to his opinions about the case, his under-

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standing about what property was claimed and what was not, and they've reviewed these documents, and I think it's fair, especially since it's been stated in the application and all the documents filed in connection with it what they believe it is, but I can't seem to get just to say, "Do you understand that that's where DLX claims the boundary line is?" and show a map, and I think that it's important to show that they have examined it; they do understand what it is that DLX and the Trust have gone into. I'm not going to produce all of these deeds and argue about all the intricacies of deeds, and granting clauses, and addendum clauses, and all that. That is not it.

CHAIRMAN GOSS:

Well, that's fine. I'm going to give you some leeway on that, but try to get to the point, if you can, with regard to what he did and what he directed his surveying crew to do and that sort of thing. Let's try to leave it there and not get into the nuts and bolts of the title issue.

MR. COLLIER:

Well, the statute is clear that adjoining land-owners are supposed to be identified and located,

1 and this does present a little bit of an unusual
2 situation in that it's not just adjoining; it's
3 right on top of. You know, it's the property, but
4 I think that it's going to be hard to have a
5 survey that doesn't show boundary lines, and I'm
6 just asking him a question about the boundaries
7 which is something they're already agreeing that
8 they're going to provide.

9 CHAIRMAN GOSS:

10 Well, and I just indicated to you that I'll permit
11 you to do that. So go on and let's get to it.

12 MR. COLLIER:

13 I don't remember what my question was.

14 Q. I think you had just said that you had reviewed
15 materials that DLX and the Trust had submitted, at
16 least insofar as the maps were concerned.

17 A. I have seen a map of the disputed property boundary.

18 Q. All right. Have you compared that map to the maps that
19 CBC has prepared . . .

20 A. Yes.

21 Q. . . . to see where the lines were relative to one
22 another?

23 A. Yes.

24 Q. Have you had a chance to examine the maps that the
25 Staff has placed along the wall over here?

1 A. Briefly, when I walked in. I saw some maps I didn't
2 recognize. I took a look.

3 Q. All right. Are those similar to the exercise that you
4 undertook in comparing the maps?

5 A. We did it a little differently, but similar to that.

6 Q. A similar exercise. One of those maps, I believe, is
7 the Hall survey that was submitted in connection with
8 DLX' documentation. You did look at that one. That's
9 the one on the wall in the middle. I can go point to
10 it. I realize you may or may not recognize it.

11 A. I didn't remember that it was Hall, . . .

12 Q. Okay.

13 A. . . . but I have seen a survey boundary of the disputed
14 area in the last couple of months.

15 Q. All right, and you've seen the Calla Subdivision maps
16 near that back corner, in fact, the very back corner?

17 A. I saw a representation of what somebody put down as the
18 Calla Subdivision in the back corner; yes.

19 Q. All right.

20 A. That's not our map.

21 Q. I understand that.

22 A. Okay.

23 Q. I totally understand. What I have in my hands is a
24 copy of the site boundary map that we talked about
25 earlier that's been referred to as Exhibit B. Do you

1 have it? I have a photocopy of it. If I could, I
2 would like you to just look at it first.

3 MR. COLLIER:

4 May I approach?

5 CHAIRMAN GOSS:

6 You referred to it as Exhibit B. I'm not too
7 sure.

8 A. Which book are you in and what . . .

9 Q. Well, it was the one . . .

10 A. Oh, okay.

11 MR. WATTS:

12 I'm going to have to make a preemptive attempt at
13 an objection here, because what's going to happen
14 is he's going to show this map to this witness and
15 try to take him through comparisons of their
16 claims versus our claims, and I think that would
17 be a big mistake and also contrary to your earlier
18 ruling in this case.

19 CHAIRMAN GOSS:

20 Well, I don't know if that's what he's getting
21 ready to do or not. If it is what he's getting
22 ready to do, I would admonish him not to do that,
23 because we all, as we sit here, understand there's
24 a dispute as to ownership and as to boundaries,
25 and I don't really know what benefit it would be

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to the Siting Board to . . .

MR. COLLIER:

Well, it's just this. This is not about - it's where the boundaries are, and Mr. Mack testified that, in his opinion, and he's neither a surveyor nor a lawyer, that he had read the - his review of the litigation in bankruptcy court was that DLX did not claim any interest or its deeds didn't describe the 28 acre portion where the plant is supposed to be sited. Now, he got to say that and, if they have reviewed data which shows to the contrary, that's impeachment. That's the very essence of cross examination.

MR. WATTS:

Well, . . .

CHAIRMAN GOSS:

Well, I don't think you can impeach what Mr. Mack says through Mr. Jagers. You can impeach what Mr. Mack says through Mr. Mack.

MR. COLLIER:

Well, except for the fact that they are testifying as representatives of an entity, ECEP.

CHAIRMAN GOSS:

Well, why don't you just - I mean, I don't want to tell you how to continue with your examination,

1 Mr. Collier, but why don't you just ask him the
2 same question that you asked Mr. Mack with regard
3 to the 28 acres and that might save us from having
4 to spend the next 30 or 45 minutes overlaying
5 maps. Why don't you try that?

6 Q. You said that you had reviewed the maps that we've just
7 referred to. Obviously, you're familiar with CBC's;
8 that you had reviewed them in connection with those
9 that have been produced by DLX and the Trust?

10 A. At some point in time, I have done that; yes.

11 Q. All right, and their claims are in the area of the
12 refuse pile tract and the site where the plant is
13 proposed to be constructed; correct?

14 A. No.

15 Q. Not in the area of the refuse pile?

16 A. You said refuse pile and where the plant is to be
17 built.

18 Q. Yeah. They're not in the area of the refuse pile?

19 A. They are in the area of the refuse pile, but then you
20 carried it further and said and where the plant is to
21 be built.

22 Q. Okay, and how did you conclude that DLX' claims, based
23 on their maps, didn't include the area where the plant
24 is to be built?

25 A. You have to overlap the map, overlay the maps.

1 Q. And you did?
2 A. That's what you asked me previously . . .
3 Q. Right.
4 A. . . . and that's what I answered you; that, . . .
5 Q. That's how you did it.
6 A. . . . yes, I did, or someone under my supervision did.
7 MR. COLLIER:
8 What I would like to do at this point is overlay.
9 CHAIRMAN GOSS:
10 I think it's appropriate at this point.
11 MR. COLLIER:
12 Okay. Thank you. Excuse me.
13 Q. Now, you'll see that there are yellow markings, but,
14 notwithstanding the yellow markings, is this a true
15 copy of your Exhibit B? It's down there in the . . .
16 A. Yes, as best I can tell, it is.
17 Q. All right.
18 A. Okay.
19 Q. Let me spread it out for you.
20 A. Uh-huh.
21 Q. And the Hall survey that was attached to DLX' . . .
22 CHAIRMAN GOSS:
23 I think it's appropriate, Mr. Watts, if your
24 witness is . . .
25

1 MR. WATTS:

2 Yes, sir, we're now doing exactly what you said
3 was not appropriate to be done, as I understood
4 you to say it.

5 CHAIRMAN GOSS:

6 Well, your witness has indicated that he arrived
7 at his conclusion by virtue of an overlay of the
8 maps, and, in light of his testimony in that
9 regard, I think it's totally relevant and totally
10 appropriate for Mr. Collier to ask him what he did
11 in that regard.

12 MR. WATTS:

13 Well, sir, you've ruled, apparently, but I
14 strongly object to it. We now have gone past the
15 slippery slope, and we're into territory that I
16 understood the Board to have ruled that we were
17 not going to get into.

18 CHAIRMAN GOSS:

19 And how are we past that point? How does that
20 ruling indicate that we've gone past what our
21 prior ruling was?

22 MR. WATTS:

23 Because we're now going to be comparing. The
24 questions were asked, "What did you look at? What
25 did you look at? Did you look at this? Did you

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look at that?" and I understood that those questions were fair game in your interpretation of your ruling but that we weren't going to start making actual comparisons of claims on the map, and that's what we're now getting into, as I understand the line of questioning, and I thought we were not going there.

CHAIRMAN GOSS:

Well, the line of questioning Mr. Collier is asking your witness is what did he do; did he overlay the maps. He indicated that he did in arriving at these various exhibits that his company, CBC Engineers & Affiliates, LLC, has prepared, and I think, in my estimation, it's appropriate for Mr. Collier to impeach Mr. Jagers with regard to how the maps were produced. I think that's the extent to which Mr. Collier is going to be permitted to ask Mr. Jagers, is how were these maps produced. They're exhibits in this hearing, and so I don't intend to - I'm not going to permit him to get into the title issues, but I think it is appropriate for him to ask the witness how he prepared the maps. So go ahead.

MR. COLLIER:

If I might approach the witness again.

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CHAIRMAN GOSS:

Certainly.

Q. I'll also show you what was filed as Response No. 1 to the Staff's Data Request to DLX and the Trust which is this document.

A. Uh-huh.

Q. You have seen that document before?

A. I do not remember seeing that document, no, but I remember seeing the survey.

Q. Not the document?

A. I do not remember seeing that specific document.

Q. Okay, but you've seen the survey they submitted?

A. Yes.

Q. All right. Are the lines in yellow, in the far left-hand side that have been marked, do they correspond roughly? Now, this is the survey, roughly.

A. No, they don't.

CHAIRMAN GOSS:

Mr. Collier, ask him, sir, what he overlaid.

That's the issue at hand.

Q. Did you overlay . . .

CHAIRMAN GOSS:

What did he overlay in preparation of these maps.

Q. . . . this description?

A. First of all, you know, we had nothing to do with the

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yellow markings on this map.

Q. Oh, I understand. I'm not saying that you did.

A. These are markings somebody else has put on here and not us. Secondly, the survey boundary that you have is not depicted by the boundaries you've got shown on this map. They are not the same.

Q. I hadn't finished my question but . . .

A. Well, that's what you asked.

Q. Now, did you overlay the DLX survey on your maps?

A. Not that survey but what we believe the disputed boundary was. That survey, I'm not sure when it came into play, but we did overlay what we thought was the disputed boundary.

Q. Was that, then, a map that CBC prepared perhaps of the disputed boundary?

A. No. It was what some attorney had provided us.

MR. WATTS:

Okay. I have to object now on the grounds of attorney/client privilege, because we're getting into matters of litigation.

CHAIRMAN GOSS:

I think your objection . . .

MR. WATTS:

Thank you.

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CHAIRMAN GOSS:

. . . in that regard should be sustained.

MR. COLLIER:

I don't intend to ask him any question about . . .

CHAIRMAN GOSS:

You didn't ask him that question. I understand.

MR. COLLIER:

. . . what the attorney said.

CHAIRMAN GOSS:

He offered that, but let's not go into that.

MR. COLLIER:

But I'm trying to figure out what map it is. I mean, they did one and I brought DLX' survey, and he's telling me he used another map, and I want to know what it is that he overlaid, and he doesn't have to tell me a word that any attorney said about that map.

CHAIRMAN GOSS:

Tell him if you know, Mr. Jagers.

A. I do not remember overlaying that particular map with the boundary of our site. I do remember an earlier map. I don't even know when that was provided to us, but I do remember having an earlier map and overlaying that with the surveyed area that we had out there, and what you have depicted on this map is overlaid with

1 where we have the power plant, and this isn't even the
2 same survey on this map that you've got on that map.
3 These are two separate . . .

4 Q. You mean those lines that are in yellow on the left
5 side aren't on this map?

6 A. They are on that map, but they are not the same. The
7 survey boundary on that map is not the boundary on this
8 map. Those are two different things.

9 Q. I understand that, but you're saying that there are
10 lines on this survey that aren't on there?

11 A. This boundary here is not this boundary on this map.

12 Q. That's correct, in part.

13 A. Well, . . .

14 Q. That's right.

15 A. Well, it's really not even close.

16 Q. Right, but are the lines that are in yellow on that one
17 on this map? I didn't ask if they were survey
18 boundaries.

19 A. Well, the survey boundary on that map is the disputed
20 boundary.

21 MR. COLLIER:

22 Well, now, if he's going to get into the legal
23 description . . .

24 CHAIRMAN GOSS:

25 Well, I want us to move on. We're getting way

1 beyond the scope here of what this Board needs to
2 consider. I thought you were going to ask
3 him . . .

4 MR. COLLIER:

5 I'm not trying to get . . .

6 CHAIRMAN GOSS:

7 Let me finish, please, sir. I thought you were
8 going to ask him which maps of DLX' did he overlay
9 on the CBC maps, . . .

10 MR. COLLIER:

11 I did and he . . .

12 CHAIRMAN GOSS:

13 . . . and I think you asked him that, and I'm not
14 sure he gave you an answer. That is the answer
15 that this Board would like to receive from Mr.
16 Jaggers, and, once we receive that answer, then
17 we're going to move on.

18 MR. COLLIER:

19 Okay.

20 CHAIRMAN GOSS:

21 So do you have an answer to that question, Mr.
22 Jaggers?

23 A. Early on, we had a map, and I do not know who it was
24 provided to me by, but one of the attorneys provided a
25 map that had what they believed to be the disputed

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boundary.

CHAIRMAN GOSS:

But don't tell us what an attorney said; okay?

A. Well, I received a map of what was communicated to me to be the disputed boundary. We overlaid that with our plans out there on the property for where the power plant was to go, and, yes, we did that.

CHAIRMAN GOSS:

Do you have that map in your possession?

A. No, I do not.

CHAIRMAN GOSS:

Do you know - can you identify that map as you sit here today?

A. No, I cannot. It's not here with me today.

CHAIRMAN GOSS:

Okay. Let's move on, then. Let's move on.

Q. You said that you had provided these . . .

CHAIRMAN GOSS:

Hold on just one second. Can we obtain - he says he doesn't know, can't identify the map, but can that map be obtained by a posthearing data request? Is there some way of identifying it?

MR. WATTS:

Sir, I'm going to object to that. He just said it was provided to him by a lawyer who was working

1 with my client with respect to this matter or the
2 other litigation.

3 MR. COLLIER:

4 He said it was provided by a lawyer. Let me ask
5 him whose lawyer it was before . . .

6 MR. WATTS:

7 That's privileged also.

8 CHAIRMAN GOSS:

9 Well, I had understood that it was a DLX map.
10 Maybe I'm wrong about that.

11 MR. COLLIER:

12 It's public . . .

13 CHAIRMAN GOSS:

14 I don't know whose map it is at this point.

15 MR. COLLIER:

16 It's a public record. I mean, I'm not asking for
17 any testimony about what was said again, and you
18 can tell him not to say anything about what the
19 lawyer said. That's fine, but perhaps that is
20 necessary.

21 CHAIRMAN GOSS:

22 Do you know who prepared the map, Mr. Jagers?

23 A. No, I do not.

24 CHAIRMAN GOSS:

25 Do you have any way to identify that map as you

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sit here today?

A. It is not here with me. In terms of identifying it, you mean putting my hands on it?

CHAIRMAN GOSS:

Yes.

A. I believe I can, but I don't know for sure. It was something that we did some time ago.

CHAIRMAN GOSS:

Well, let's go ahead and make it the subject of a data request. If it is work product, if it is subject to a privilege, then I presume, Mr. Watts, that you'll let us know about that.

MR. WATTS:

I will.

CHAIRMAN GOSS:

All right. So, if it's not subject to some privilege, then we're to receive it. If it is, we would like to hear what the privilege is, and we'll make the determination at that point.

MR. WATTS:

Yes, sir. I would like to state my objection for the record.

CHAIRMAN GOSS:

Certainly. Certainly.

1 MR. WATTS:

2 Thank you.

3 Q. Okay. Since you provided the materials that were
4 furnished in connection with this application by DLX
5 and the Trust, have you gone back and overlain any of
6 the maps or reviewed the boundary situation?

7 A. I have not.

8 Q. Do you deem it important to do so?

9 A. Do I deem it important?

10 Q. Yes.

11 A. Quite honestly, this has been going on for some time, I
12 guess, and we've done that and understand that there's
13 a dispute of the boundaries, and so, to do it again, I
14 guess I didn't feel the need to do it over again; no.

15 Q. Then why did you give them the additional material if
16 they're not going to use it?

17 MR. WATTS:

18 I'm going to object to that, which clearly is
19 getting into the - when he said this has been
20 going on for a long time, he's talking about the
21 dispute, and so he's asking a question about
22 motivation for action that a litigant either took
23 or didn't take, and I object to that as, first,
24 beyond the scope of this, and, second, part of
25 that dispute may well be privileged also.

1 CHAIRMAN GOSS:

2 Well, I'll tell you folks, I think we've about
3 beat this hoss to death.

4 MR. WATTS:

5 I have to agree with you about that, sir.

6 CHAIRMAN GOSS:

7 I think we need to move on, Mr. Collier.

8 MR. COLLIER:

9 That's my last question in that area and if I
10 could look at this matter here.

11 Q. Have you been asked to prepare a survey in connection
12 with the closing, the anticipated closing?

13 A. Yes.

14 Q. Have you been informed that a survey will be required
15 in connection with title insurance?

16 A. Yes.

17 Q. Have you been asked to certify - has your firm, not you
18 personally but your firm, whoever signs off, been asked
19 to certify at any particular title insurance company or
20 lending institution?

21 A. No. Could you rephrase that again? Let me back up.
22 Ask me that question again to make sure I understood
23 what you're saying.

24 Q. In connection with that, has your firm, and that being
25 whoever signs off on the survey, been asked to certify

1 a survey to any particular title insurance company or
2 body that will lend money in connection with this
3 transaction?

4 MR. WATTS:

5 Sir, I'm going to object on the grounds that the
6 financing of this project is beyond the scope of
7 this proceeding.

8 CHAIRMAN GOSS:

9 I'm going to overrule the objection. I think he
10 can answer as to whether or not he intends to do a
11 survey for title insurance purposes.

12 A. At this point in time, we have not been asked to
13 certify any map for purposes of financing.

14 MR. COLLIER:

15 If I could just review some of my notes here, I
16 believe I may be done.

17 Q. In connection with the engineering services that your
18 firm has provided, has it done - you heard earlier
19 questions about the calorific content. Did you all
20 perform any of those tests?

21 CHAIRMAN GOSS:

22 He's not asking you what they are. He's asking
23 you if you performed them. I'm not going to let
24 him get into what they were.

25 A. Did we perform the calorific tests?

1 Q. Yes.

2 A. No, we did not.

3 Q. Have you performed any tests as to the relative
4 usefulness, BTU, or otherwise, of the coal on the
5 property?

6 A. We had the property drilled. Our firm itself did not
7 do the testing.

8 Q. Oh! So whoever you hired or subcontracted has reported
9 to you?

10 A. Yes.

11 Q. And Mr. Mack stated earlier that there were areas on
12 the property that have higher BTU content refuse than
13 others?

14 A. Yes.

15 Q. Is his testimony correct, that the highest BTU content
16 coal refuse is on the coal refuse tract that DLX
17 claims?

18 A. No, he's not correct.

19 Q. And where is it?

20 A. It's in the Charlie (sp.) Pond and Calmes Pond.
21 They're both higher BTUs than the refuse pile.

22 Q. Is the refuse pile one of the highest?

23 A. The areas we tested, it would fall probably third.

24 Q. Did you also perform estimates as to tonnage relative
25 to the various areas so you would have an idea what

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tonnage you had on various BTU coal refuse?

A. We took samples, drill samples, and had them tested and analyzed; yes.

Q. Okay. In terms of all the - I guess you're going to measure it by tons of coal refuse on the property. Do you have an idea as to what percentage of it is on the coal refuse, the refuse pile tract?

MR. WATTS:

I'm going to object to that.

CHAIRMAN GOSS:

Sustained.

MR. WATTS:

Thank you.

MR. COLLIER:

The percentage?

CHAIRMAN GOSS:

Yes.

MR. COLLIER:

I have no further questions.

CHAIRMAN GOSS:

Thank you. Mr. FitzGerald?

MR. FITZGERALD:

Thank you, Mr. Chairman.

CROSS EXAMINATION

BY MR. FITZGERALD:

Q. Mr. Jagers, the same point I made with Mr. Mack, if there's anything that I ask that's unclear, tell me it's unclear. Don't try to answer a question that you don't fully understand. If there's anything that you don't know, don't try to guess at it. Just say, "I'm not familiar with that." Okay? I just have a relative handful of questions. Do you know how much of the property - by "the property," I mean the 620 acres that are roughly identified on the Exhibit B site boundary depiction - do you know how much of that area is currently under a surface mining and reclamation operations permit?

A. Yes.

Q. Could you tell me how much area it is?

A. There are two permits: one 375.18 acres; one 46.73.

Q. 46.73?

A. Correct.

Q. Okay, and do you know who holds those permits?

A. Those permits are presently held by Kentucky Processing . . .

Q. Okay. Are they . . .

A. . . . with the exception of - yes, they are both held by KPC.

1 Q. Okay, and do you know who is the principal in Kentucky
2 Processing? Do you know who are the owners?

3 A. There is . . .

4 MR. WATTS:

5 I'm going to object to the relevancy of this
6 question. I wanted to see where it was going, but
7 this line of questions is, . . .

8 CHAIRMAN GOSS:

9 Well, I . . .

10 MR. WATTS:

11 . . . in my view, beyond the scope of the
12 proceeding.

13 CHAIRMAN GOSS:

14 I'm not too sure what, at this point, Mr.
15 FitzGerald, who the principals of Kentucky
16 Processing are relative to the application filed
17 by ECEP.

18 MR. FITZGERALD:

19 Your Honor, Kentucky Processing currently has
20 these areas under a mining permit. First of all,
21 it is not a former coal processing site; it is a
22 current coal processing site. Second, the
23 representation that a public benefit will be
24 gained by the reclamation of this site from use as
25 a coal-fired power plant, when it's already under,

1 at least 421.91 acres are already under, the
2 reclamation obligation has relevance. The fact
3 that Kentucky Processing is or at one time was
4 managed as one of Mr. Chuck Yates' companies, and
5 Chuck Yates, for two months, was CEO and Vice
6 President of ECEP, I think has direct relevance
7 when it comes to his environmental compliance
8 history. So I would like to be able to at least
9 identify or get on record who the principals in
10 Kentucky Processing are, because it may have
11 relevance with respect to the environmental
12 disclosure.

13 CHAIRMAN GOSS:

14 These are permits that are currently still in
15 force?

16 A. Let me clarify. It's going to be a little difficult to
17 explain to you on one of them, but the larger of the
18 two permits is currently in force. The second one, the
19 Puckett impoundment, actually the renewal had lapsed.
20 So the applicant is in the process of overlapping that
21 permit at this point in time.

22 CHAIRMAN GOSS:

23 And these are permits, I assume, that will have to
24 be dealt with by ECEP if this project goes
25 forward?

1 A. Yes, they will.

2 CHAIRMAN GOSS:

3 I think the questions then are relevant. Go

4 ahead. Go ahead, Mr. FitzGerald.

5 Q. Do you know who the principals are of Kentucky

6 Processing?

7 A. The best I can tell, there are no officers and

8 directors for Kentucky Processing.

9 Q. Now, is that based on a review of the Secretary of

10 State's records, or is that based on other documents?

11 A. Based upon the fact that, on the record, there are no

12 officers and directors for KPC. When we went to get

13 signatures, there were none.

14 Q. Okay. Well, there is a document in here that you

15 provided which is a deed to or from KPC, and I assume

16 there is an officer or director identified in the file

17 that you - in the application on that deed for Kentucky

18 Processing.

19 A. You're asking me a question who are the officers and

20 directors today, . . .

21 Q. Yeah.

22 A. . . . and I'm telling you that, in our search today, I

23 don't believe there are any officers and directors for

24 KPC.

25 Q. Has the corporation been dissolved, to your knowledge?

1 A. I know it's in bankruptcy, . . .

2 Q. Okay, but do know whether it's been dissolved?

3 A. . . . but I do not know the exact status of the

4 bankruptcy.

5 Q. Okay. That's fine. Then I won't go any further on

6 that. Do you know whether these areas are still under

7 reclamation bond, the acreage that you identified?

8 A. Yes.

9 Q. Okay. The fact that a permit has lapsed for purposes

10 of renewal does not prevent it from being reactivated?

11 A. That's correct.

12 Q. Okay. They simply cannot operate during the meantime?

13 A. That's correct.

14 Q. Okay, and they don't need a permit for reclamation any

15 longer under the mining program, do they?

16 A. They don't need a permit for what?

17 Q. To conduct reclamation. You don't have to keep a

18 permit in . . .

19 A. In an active status.

20 Q. . . . an active status for reclamation?

21 A. That's correct.

22 Q. Okay. So, out of the 620 acres, there are some 421.91,

23 if my calculations are correct, that are currently

24 under mining permit or bond. Of the acreage that is

25 not under permit right now, do you know which acreage -

1 have you plotted on a map which acreage is or isn't
2 under permit currently?

3 A. Yes.

4 Q. Okay. The area that is not under permit, is that area,
5 area where coal waste and coal fines that ECEP has
6 identified as potential resources exist?

7 A. As best I understand your question, there are some coal
8 waste resources that fall outside of the boundaries of
9 what is currently permitted.

10 Q. Okay.

11 A. That's correct.

12 Q. Do you intend to recover those areas, the ones that are
13 beyond the current permit?

14 A. Yes.

15 Q. Okay. You had indicated you're in the process of over-
16 lapping. Now, for the Board's understanding, over-
17 lapping, am I correct that that is when a subsequent
18 permittee comes in and will file a new permit and
19 assume responsibility for a currently permitted site?

20 A. What I meant by that, on the smaller of the two
21 permits, . . .

22 Q. Okay.

23 A. . . . there's a current permit in the works to overlap
24 that one in its entirety.

25 Q. Okay, and who, to your knowledge, has applied for that

1 new permit to overlap the . . .

2 A. Kentucky Processing.

3 Q. Okay. So Kentucky Processing is in the process

4 currently? They've applied for an overlap?

5 A. Yes.

6 Q. Okay. The company, ECEP, had indicated that it planned

7 to file for a mining permit in order to recover the

8 waste coal and the coal fines. Do you know how much of

9 the area ECEP intends to permit?

10 A. I don't know the exact acreage at this point.

11 Q. Roughly?

12 A. I mean, I could make a guess, . . .

13 Q. No. Don't guess.

14 A. . . . but I just . . .

15 Q. Don't guess.

16 A. I don't have it down.

17 Q. Is it fair to say that you're not going to permit the

18 entire 620 acres?

19 A. Yes.

20 Q. Okay. Is it fair to say that there will be areas where

21 the coal fines or waste coal are of a quality that you

22 will not seek to recover them for use in the combustion

23 process?

24 A. No.

25 Q. So you intend to get it all?

1 A. Let me caveat that. There will be probably some of it
2 that has been oxidized near the surface that you won't
3 be able to use, but, in terms of recovering the waste
4 coal that's on the site, the intentions are to try to
5 recover all of it.

6 Q. Okay. The last couple of questions deal with the
7 property boundary, but I'm not going to get into any of
8 the questions that you all have discussed so far. To
9 your knowledge, will the proposed exhaust stack be
10 1,000 feet or more from all of the adjoining property
11 boundaries?

12 A. No.

13 Q. Okay. Which boundaries will it be closer to and what
14 will the distance be?

15 A. The closest boundary that's adverse is CSX Railroad.

16 Q. Okay, and how close is CSX?

17 A. Not too darn far.

18 Q. Okay.

19 A. You know, a few hundred feet.

20 Q. Are there properties that are currently occupied for
21 residential purposes where you are not at least 1,000
22 feet away from the property boundaries?

23 A. The nearest residence is 2,100 feet.

24 Q. Right, but where is the nearest residence's property
25 line?

1 A. I don't know exactly what the distance is from the
2 stack.
3 Q. Is it less than 1,000 feet?
4 A. I would say it is; yes.
5 Q. Okay. The last question I have deals with how the
6 property lines that are depicted on the site boundary
7 or I guess the adjacent property owners map which was
8 supplied, . . .
9 A. Uh-huh.
10 Q. . . which I believe is one of the ones also that's on
11 the wall there. How were the - in order to certify
12 compliance with the 2,000 foot requirements regarding
13 dwellings and their relation to the exhaust stack and
14 also the property lines, how were those property lines
15 determined? We know you didn't do a survey of the
16 property boundaries, but what did you use to identify
17 where those lines were for purposes of certifying that
18 they were a certain distance away from . . .
19 A. Are you asking me how we identified adjacent property
20 owner boundaries?
21 Q. Yeah. Yeah.
22 A. Okay.
23 Q. In an unartful way, that's exactly what I was asking.
24 A. Okay. Good. Okay. Most of the boundaries that we've
25 got up there that are marked in red, those boundaries

1 were taken from the PVA map in the courthouse.

2 Q. From the tax map?

3 A. The PVA, yeah, the Property Valuation Administration;

4 yes.

5 Q. Do you know whether that map is based on surveyed

6 boundaries?

7 A. Typically, that is not.

8 Q. Okay.

9 A. Let me back up and just say . . .

10 Q. Sure.

11 A. . . . the boundary itself that's on there, though, we

12 did more work on that. The adjacent - the red lines on

13 there were done from the PVA maps.

14 Q. Okay, but you're saying that the purple boundary, the

15 site boundary that was around the outside of it, was

16 done based on more work?

17 A. Yes.

18 Q. Okay, but short . . .

19 CHAIRMAN GOSS:

20 Which map are we referring to, gentlemen?

21 MR. FITZGERALD:

22 I'm sorry. There's two maps. One is the adjacent

23 property owners map and that is the red-lined map

24 that I was asking how those lines were derived.

25 Q. And I believe you were referring to the site boundary

1 map, which is identified as Exhibit B and dated . . .

2 A. There are two maps. One of them shows adjacent
3 property owners as well as the site boundary.

4 Q. Okay.

5 A. The site boundary map, I believe, is B, and then
6 there's an additional map that's been added that also
7 shows adjoining property owners.

8 Q. That's the revised map that was done to add CSX; is
9 that correct?

10 A. I . . .

11 Q. Well, don't worry about it. It's not important.

12 A. Okay.

13 Q. Just going back to the permitting issue, the current
14 status of the smaller of the two permitted areas is
15 that the permit has lapsed, but do you know are the
16 bonds in forfeiture?

17 A. No, they're not.

18 Q. Okay, and is the structure, the facility, the coal
19 processing plant that's on site now, is it still
20 operational?

21 A. At this present day, it is not operational.

22 Q. Okay. What would it take to make it operational?

23 A. You would have to go in and do some retrofit work to
24 get it operational again.

25 Q. Okay. So it could not be operated for crushing,

1 loading, or wet processing of coal?

2 A. Now, let's back up. There's part of it that could be
3 utilized, and we intend to utilize a portion of the
4 facility on a going-forward basis with the power plant.

5 Q. Okay. So it could be used for coal processing?

6 A. There are some portions of it that could be.

7 Q. Okay.

8 A. Yes.

9 MR. FITZGERALD:

10 Okay. That's all I have. Thank you very much,
11 Mr. Jagers. Thank you, Chairman.

12 CHAIRMAN GOSS:

13 One question before I forget, before I turn it to
14 Mr. Turner.

15 EXAMINATION

16 BY CHAIRMAN GOSS:

17 Q. You indicated that the bonds were not in forfeiture.
18 Who are the sureties on those bonds, those reclamation
19 bonds, if you know?

20 A. They are - and I'm not sure whether they are bonded
21 with Linden or directly with Cumberland Surety, but
22 Cumberland Surety has been involved.

23 Q. Okay.

24 A. I would like to back up . . .

25 Q. What are the . . .

1 A. . . . and address the last question that Tom asked me.
2 Q. Before you back up, what are the amounts of those
3 bonds, if you know?
4 A. The smaller permit is \$137,500.
5 Q. What about the other one?
6 A. The larger one is somewhere around \$800,000.
7 Q. Okay. You wanted to back up?
8 A. Yeah. In terms of processing, that plant is not in a
9 position to process any coal. It is in a position to
10 be revamped to process coal, but you could not process
11 any coal in that plant today.

12 CROSS EXAMINATION CONTINUED

13 BY MR. FITZGERALD:

14 Q. Okay. By way of clarification, when you say
15 "processing," are you referring to processing as
16 distinct from crushing and loading which is defined as
17 preparation?
18 A. I'm saying those facilities, even for crushing and
19 loading, are not available for use today. They're just
20 not operational. They've been sitting idle, and it
21 would take a good deal of work to get them back into
22 shape to operate.
23 Q. Okay, but the equipment hasn't been removed?
24 A. Well, I can't say that none of the equipment, but most
25 of the equipment is still intact.

1 Q. Okay, and it's still under an active permit?

2 A. It is still under an active permit.

3 Q. And Kentucky Processing would not need additional
4 regulatory approval to resume operations?

5 A. That's correct.

6 MR. FITZGERALD:

7 Okay. Thank you very much. I appreciate that
8 clarification.

9 CHAIRMAN GOSS:

10 Mr. Turner?

11 CROSS EXAMINATION

12 BY MR. TURNER:

13 Q. Mr. Jagers, I think I'm going to rehash some ground,
14 but I want to make sure we're talking about the same
15 thing. Mr. Mack ducked some questions for you, and are
16 those the same questions that Mr. FitzGerald was just
17 asking you about? The question that I asked him was,
18 when was the facility last used for coal processing,
19 and I believe Mr. Mack's testimony thought that
20 Brighton was in error in saying it was the early '90s
21 and said that it was '98 and '99.

22 A. I believe that it was '98 and '99.

23 Q. Okay. Are we talking about the same operation that Mr.
24 FitzGerald was just asking you about?

25 A. I'm not following your question.

1 Q. Okay. You say the facility was last used for coal
2 processing in '98 and '99, and is the permit that
3 allowed that processing, is it still viable?
4 A. Yes, it is.
5 Q. And is that the same permit that Mr. FitzGerald was
6 just asking you about?
7 A. Yes, it is.
8 Q. Okay. So was it Kentucky Processing that did the
9 processing in '98 and '99?
10 A. I don't know who actually operated the plant. The
11 permit was, at that time, Kentucky Processing.
12 Q. Okay, and one of those permits, now, you said is still
13 active, and the other one Kentucky Processing is
14 attempting to revive through an overlap process; is
15 that right?
16 A. That's correct.
17 Q. Okay. Okay. I have to take you, unfortunately,
18 through the Brighton report and ask you questions about
19 the various and sundry disagreements that you have with
20 the Brighton recommendations. So that's where we're
21 going next. This is . . .
22 A. So you're going to be looking at which document?
23 Q. I'm going to be looking both at the Brighton report and
24 at your testimony, and, as I did with Mr. Mack, I'll
25 try to go through your testimony in the same order that

1 you presented your testimony. Okay?

2 A. Okay.

3 Q. First, sort of as a preliminary question, a lot of the

4 objections that you have to the Brighton recom-

5 mendations relate to your objection to the Board having

6 a sort of continuing jurisdiction after construction is

7 completed and after operation of the plant has begun;

8 is that a fair statement?

9 A. Yes, sir.

10 Q. Okay. I have the statute in front of me. Do you have

11 a copy? Can your counsel provide you a copy, or may I

12 just read you a particular provision?

13 A. You may read it to me. I do not have one in front of

14 me.

15 Q. Okay. In particular, I'm reading 278.708, which is

16 what is included in the Site Assessment Report, (3)(d).

17 Okay?

18 CHAIRMAN GOSS:

19 Mr. Turner, let's be fair to the witness.

20 MR. TURNER:

21 I thought it would . . .

22 CHAIRMAN GOSS:

23 Go ahead.

24 Q. 278.708(3)(d). Okay? If you'll notice (3) says, "A

25 completed site assessment report shall include:" and,

1 if we drop down to (d), it reads, "An evaluation of
2 anticipated peak and average noise levels associated
3 with the facility's construction and operation at the
4 property boundary." Have I read that correctly, Mr.
5 Jagers?
6 A. Yes.
7 Q. Okay. Does that not explicitly give the Commission
8 jurisdiction over operations?
9 MR. WATTS:
10 I'm going to object to that on the grounds it
11 calls for a legal conclusion.
12 CHAIRMAN GOSS:
13 I'm going to sustain the objection.
14 MR. TURNER:
15 May I be heard on that, Your Honor?
16 CHAIRMAN GOSS:
17 Certainly. Uh-huh.
18 MR. TURNER:
19 If you will look at Mr. Jagers' testimony, and,
20 in particular, I am looking at Page 3, Lines 8
21 through 10, "Such a condition would exceed the
22 Board's jurisdiction and would be inconsistent
23 with the conditions established for prior
24 developers . . ." He's opened the door, because
25 he has explicitly said you don't have

1 jurisdiction.

2 CHAIRMAN GOSS:

3 I think I ruled too quickly. I think you're
4 correct. He did open the door. Go ahead and
5 answer.

6 A. As I read this, it's asked to evaluate the anticipated
7 peak and average noise levels during construction and
8 operation and not what's going on after the con-
9 struction has been completed. So we're to anticipate
10 what we believe the noise levels will be during
11 construction and operation and evaluate those during
12 the siting report and not follow up with noise
13 monitoring and further work afterwards. That's the way
14 I read this and that's the way we approached it.

15 Q. Mr. Jagers, do you believe that you could put in place
16 some sort of noise dampering equipment, and then, as
17 soon as you file your last report with the Siting Board
18 indicating that construction is finished and that
19 you're starting operations, you can remove the dampers?

20 A. I don't understand why we would want to do that.

21 Q. I understand. Let's take a different plant, some
22 operator of a plant; not you. Do you believe that they
23 could simply remove the dampers and suffer no
24 consequences whatsoever from the Siting Board?

25 A. I'm going to respond to you again and say, if they've

1 spent the money and the capital to put them in place, I
2 don't know why anyone would want to take them out of
3 operation. Could they? Yes.

4 Q. You believe they could?

5 A. Sure. I don't know why they would want to after
6 spending the money to put them in place, is my answer
7 to you.

8 Q. What if they broke; would they have to replace them or
9 not?

10 A. Would they have to replace them or not?

11 Q. Yes, sir. If the Siting Board conditioned the
12 construction and operation of the plant on the use of
13 noise dampers, if the dampers subsequently broke a year
14 after operation, would they be under any obligation to
15 replace them?

16 A. I don't know of any obligation that's provided by this
17 Board or by anybody else that would require them to do
18 so.

19 Q. Mr. Jagers, have you reviewed the prior Orders of the
20 Siting Board, for instance, the Thoroughbred case, the
21 Kentucky Pioneer case, and the Kentucky Mountain Power
22 case?

23 A. Let me say to you I have done some limited review.

24 Q. Okay, and are you aware that numerous Orders in each of
25 those deals with operations of the plant? For

1 instance, I'm reading from the Thoroughbred, the last
2 requirement, "Thoroughbred shall utilize Kentucky coal
3 as represented in its application." Does that sound
4 like something for construction or operation?
5 A. That would be during operation.
6 Q. Okay. Do you believe that the Board did not have
7 jurisdiction to require that?
8 A. What I did was to simply read what was put before me in
9 the statute and evaluate that for myself and go on that
10 basis, and that's what we tried to do, is literally
11 read what was put before us, and it said ". . .
12 anticipated peak and average noise levels . . ."
13 Q. Okay. Let's move on to the specific recommendations.
14 The first one that you disagree with begins on Page 2,
15 Line 19, is that correct, Recommendation Number 11?
16 A. Okay.
17 Q. And that's the noise requirement, is it not?
18 A. I'm not sure.
19 Q. Okay. Do you have the Brighton report there in front
20 of you?
21 A. Okay. Are you talking about the First Data Request?
22 Q. No, sir. I'm talking about the Brighton consultant's
23 report.
24 A. Okay.
25 Q. Uh-huh.

1 A. I do now.

2 Q. And the recommendations are very near the end. It's in
3 a section marked "Section D."

4 A. Okay.

5 Q. And Recommendation 11 is on Section D, Page 4.

6 A. Okay.

7 Q. And it's dealing with steam blows.

8 A. Okay.

9 Q. If the recommendation about how the plant operates is
10 not acceptable to you because of your belief about the
11 Board's jurisdiction, then how does the company intend
12 to ensure that it continues to comply with the noise
13 commitments that you made after operation if this Board
14 has no jurisdiction?

15 A. I guess we've agreed to do it.

16 Q. Yes, sir.

17 A. My word is good.

18 Q. Okay. Let's assume you're not around in two years or
19 five years and neither am I.

20 A. Okay.

21 Q. How does the company intend to comply with the
22 commitments?

23 A. Other than it has agreed to honor them, I don't know of
24 another way.

25 Q. Thank you. Okay. On the next page of your testimony,

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Page 3, you're addressing Recommendation Number 12, and, if you'll look at that very same page in the Brighton report again - I told you we were going to be going back and forth between the two documents - Recommendation . . .

A. Yes.

Q. . . . 12 is also a noise monitoring recommendation, is it not?

A. Yes, it is.

Q. Okay. Now, on Line 21 of your testimony, you used the phrase "arbitrary and unsupported." Do you see that?

A. Yes.

Q. "No basis has been shown for adopting an arbitrary and unsupported noise standard . . ." I assume that's the 65 decibel level that . . .

A. Yes. Yes.

Q. . . . is discussed at length in the Brighton report and is based on an EPA study; is that right?

A. What's based on an EPA study?

Q. The 65 decibel level as being bothersome.

A. I don't know exactly why Brighton chose that particular decibel level to establish as a criteria.

Q. It's not based on a federal standard?

A. I don't know why they chose 65 decibel. I don't understand why they did.

1 Q. Okay. Okay. What does the company intend to do during
2 operations if the noise level reaches a stage that it
3 generates complaints?
4 A. I think what we've - I don't think - what we have tried
5 to do is to demonstrate, based on information provided
6 by previous monitoring at other sites and by a model by
7 a company that constructs power plants, studies that
8 would indicate what they are, and then correlate those
9 to the nearest residences to demonstrate, in fact, that
10 those would not be in a high decibel level.
11 Q. This plant that you used was in Burbank, California; is
12 that correct?
13 A. One of the plants we used was in Burbank, California.
14 Q. Okay. Was it in a valley, a river valley, similar to
15 the geography that's at this plant?
16 A. No.
17 Q. Okay. On Page 4 of your testimony - and this is where
18 we have some double numbering. We have two Recom-
19 mendation 13s and two Recommendation 15s. So the first
20 of the two 13s is shown on the bottom of Section D,
21 Page 4, in the Brighton report, and it's addressed in
22 your testimony on Page 4, beginning at Line 4. Do you
23 see that?
24 A. Yes.
25 Q. Okay. In your testimony, at Lines 16 and 17, you seem

1 to indicate that, if you wind up making local truck
2 deliveries, if there are appropriate conditions, that
3 you could develop them with Estill County officials.
4 Do you see that?
5 A. What line are you referring to?
6 Q. It's Lines 16 and 17 of your testimony on Page 4.
7 A. Yes, I see that.
8 Q. Okay. Have you reached an agreement with Estill County
9 on those?
10 A. No, sir.
11 Q. Okay, and we don't know whether you ultimately would or
12 not; is that correct?
13 A. I guess . . .
14 Q. Okay.
15 A. . . . make your own judgment about that.
16 Q. I understand, and you don't believe that the Board
17 would have any jurisdiction once construction is
18 finished and operation has begun?
19 A. Not the way I read the statute.
20 Q. Okay.
21 A. No, I don't.
22 Q. Okay. You refer in your testimony on this part to a
23 solid waste disposal facility. Do you know how many
24 truck deliveries that solid waste disposal facility
25 makes and when they occur?

1 A. No, I do not.

2 Q. Okay, and do you know if they occur during peak hours
3 for school bus traffic or not?

4 A. No, I do not know that.

5 Q. Okay. So how does the company intend to deal with
6 potential peak hour traffic problems if the Board has
7 no jurisdiction?

8 A. Work with the County.

9 Q. The second Recommendation Number 13 you address on that
10 same page of your testimony, Page 4, Line 20, and it is
11 on Section D, Page 5 of the Brighton report. Do you
12 see that?

13 A. Yes.

14 Q. Okay. Now, this one is going to apply only if you
15 dispose of ash off site; is that correct?

16 A. That's correct.

17 Q. Okay, and the recommendation simply is that, if you
18 decide to dispose of it off site, that you do a study,
19 an analysis. Is that the recommendation?

20 A. Yes.

21 Q. Okay, but you don't believe that you ought to have to
22 do that analysis; is that correct?

23 A. I believe that what the statute asked us to do we've
24 done.

25 Q. Okay. How do you determine if those deliveries are

1 going to create traffic problems if you don't do the
2 analysis?

3 A. Well, let me specify to you at first; there is not
4 anticipated that we're going to be disposing of ash off
5 site.

6 Q. I understand.

7 A. So that's not anticipated or planned.

8 Q. I understand. If you do and you don't do the analysis,
9 how will you know the extent, if any, of traffic
10 problems that it creates?

11 A. You would not.

12 Q. Okay. Now, we're to the first of two Recommendation
13 15s, and it's addressed in your testimony on Page 5,
14 beginning at Line 8, and it's on the same page that
15 we're already on in the Brighton report.

16 A. At the beginning of Page 5, Line 8 . . .

17 Q. Yes, sir.

18 A. . . . or Line 10?

19 Q. Let's see. On your testimony, on my copy, it's Page 5,
20 Line 8, where the question that's posed to you is, "Do
21 you have any comments on Brighton's first Recom-
22 mendation Number 15?"

23 A. Okay. In mine, it's on Line 10. So I just wanted to
24 clarify that.

25 Q. Okay.

1 A. Okay, but that's exactly what it says on my Line 10.
2 Q. Super. Okay?
3 A. Okay.
4 Q. Do you still have the statute that your lawyer gave you
5 a moment ago?
6 A. Yes.
7 Q. Wonderful. Would you look at - we're at the same
8 statute - 278.708(3)(e)? I'll read that to you, and
9 you tell me if I've read it correctly. This is another
10 thing that has to be in the completed Site Assessment
11 Report, and it says, "The impact of the facility's
12 operation on road and rail traffic to and within the
13 facility, including anticipated levels of fugitive dust
14 created by the traffic . . ." Do you see that?
15 A. Yes.
16 Q. Okay. Have I read that correctly, except for leaving
17 out the last part?
18 A. Right.
19 Q. Okay.
20 A. And the last part. Okay?
21 Q. Uh-huh. Once again, doesn't the statute explicitly
22 address fugitive dust created during plant operation
23 and give the Board jurisdiction over that?
24 A. Again, you know, I'll go back to my interpretation of
25 that and what it says is "anticipated levels of

1 fugitive dust," such that we're expected to predict and
2 plan for what might happen at the site.

3 Q. Okay, and, once again, and we already discussed this,
4 if you mispredict, then you don't believe the Board has
5 any jurisdiction to try to correct the problem?

6 A. If I mispredict what?

7 Q. The fugitive dust.

8 A. To be honest with you, the fugitive dust standards will
9 be addressed both by the Division of Air Pollution and
10 by the Department for Surface Mining Reclamation and
11 Enforcement.

12 Q. Okay. The last recommendation that you disagree with,
13 Mr. Jagers, I believe is the second Recommendation
14 Number 15, and that's where Brighton has said, "To the
15 extent that it is financially feasible, Estill County
16 Energy Partners, LLC should utilize rail delivery of
17 coal, lime, and limestone." Do you see that?

18 A. Yes.

19 Q. Okay. If rail is cheaper, wouldn't the company want to
20 use rail?

21 A. If the rail is cheaper, . . .

22 Q. Uh-huh.

23 A. . . . would the company want to use rail? I'll clarify
24 this for you. In terms of cheaper, there are different
25 types of product that would be delivered, . . .

1 Q. I understand.

2 A. . . . and some would go to who's supplying it, how
3 good - you know, are they going to be a reputable
4 supplier; can we count on them. So will we necessarily
5 go with the cheapest supplier just because it's by
6 rail, no, not necessarily, but, all economically
7 speaking, probably, - you know, there's quality of
8 lime; there's quality of coal, and all that - then,
9 yes, we would probably want to use rail.

10 Q. And the use of rail would reduce truck traffic on the
11 roads used by the school buses and commuters, would it
12 not?

13 A. Well, let me back up and say to you that, you know, on
14 the one hand, we're being asked to try to use local
15 suppliers for fuel and for limestone, and, on the other
16 hand, you want us to use rail and, quite honestly,
17 those don't go hand in hand. So, you know, I'm not
18 exactly sure where you might be trying to push me, but
19 I can tell you that we're going to try to find the best
20 product we can, and we would like to use local as best
21 we possibly could to the extent that we're able to do
22 that, but we also have to find people who are
23 reputable, and, to narrow ourselves down at this point
24 to say we would or would not use rail over truck simply
25 on the basis of economics, from my standpoint, we're

1 limiting ourselves both on the local supplier
2 standpoint, reputability, and quality, all of which are
3 very important things that we've got to focus on in
4 terms of supplying fuel and limestone to that plant.

5 Q. Thank you, sir.

6 A. Okay.

7 MR. TURNER:

8 No more questions.

9 CHAIRMAN GOSS:

10 Redirect, Mr. Watts?

11 MR. WATTS:

12 Yes, I do have some. I hope you'll permit me to
13 approach the witness with something that I need
14 for him to read.

15 CHAIRMAN GOSS:

16 Yes, sir. Yes, sir.

17 REDIRECT EXAMINATION

18 BY MR. WATTS:

19 Q. Mr. Jagers, I'm going to hand you a copy of the
20 Board's Order in the Kentucky Pioneer case and ask you
21 to read for me Condition No. 3 with respect to noise.

22 A. "KMP shall instruct its contractors to include
23 enclosures and baffling for the boiler pumps and the
24 water pumps to reduce noise impacts to the extent
25 practicable, following industry standards."

1 Q. Thanks. Now, . . .

2 MR. TURNER:

3 Your Honor, may I ask what page we were reading

4 from?

5 MR. WATTS:

6 Yeah. Actually it's from the Lexis version of it.

7 So it may not be - it's the noise standard that

8 was adopted by the Board.

9 Q. Now, let me refer you to Kentucky - I'm sorry. That

10 was Kentucky Mountain. Forgive me.

11 MR. TURNER:

12 Oh!

13 A. Kentucky Mountain Power.

14 MR. WATTS:

15 It was Kentucky Mountain Power; not Kentucky

16 Pioneer.

17 A. KMP.

18 Q. I'm now referring to Kentucky Pioneer, and I would ask

19 you to read Condition G. with respect to noise.

20 A. "Kentucky Pioneer shall instruct its contractors to

21 design the turbine and gasifier buildings to meet

22 established noise criteria and minimize offsite noise

23 impacts to the extent practicable, following industry

24 standards."

25 Q. Okay. Could you read Condition K. regarding dust?

1 A. "During the construction phase of the proposed project,
2 Kentucky Pioneer shall implement dust control measures
3 consistent with industry standards."
4 Q. And now Thoroughbred, would you read Condition F.?
5 A. "Thoroughbred shall instruct its contractors to design
6 the relevant facilities to meet established noise
7 criteria and minimize offsite noise impacts to the
8 extent practicable, following industry standards."
9 Q. And then, finally, Condition J. with respect to dust.
10 A. "During the construction phase of the proposed project,
11 Thoroughbred shall implement dust control measures
12 consistent with industry standards."
13 Q. Thank you. If there were noise issues with respect to
14 the project after it's constructed, that is, during
15 operation, would those who complained about the noise
16 have access to the government of Estill County?
17 A. Yes.
18 Q. Okay, and I think - did you testify - I just want to be
19 sure I'm correct. Did you testify that there is state
20 level regulation of - what state level regulation is
21 there with respect to dust?
22 A. In terms of a level, not a level, but there will be two
23 agencies who, in fact, are regulating this site from
24 the standpoint of fugitive dust, and that would be the
25 Department of Surface Mining Reclamation and

1 Enforcement and the Division of Air Quality.

2 Q. Okay. Now, Mr. Jagers, were you overseeing the effort
3 to assure compliance of the project with the applicable
4 statutory setbacks?

5 A. Yes.

6 Q. Okay, and, based on that review and the analysis and
7 including the maps that have been associated or
8 provided by the company, are you confident that those
9 setbacks, to the extent they're applicable, have been
10 complied with?

11 A. Yes.

12 Q. And why do you say that?

13 A. Because the statute has a provision that is for former
14 coal processing facilities and, based upon that, then
15 this site meets all the applicable setback require-
16 ments.

17 Q. All right. As you heard, Mr. Collier's clients have
18 claimed that a portion of the project on which the
19 proposed facility would be built - they've claimed that
20 they have an ownership in the property on which the
21 facility would be built; do you understand that?

22 A. Yes.

23 Q. And is it your understanding that that - or do you
24 understand that claim to be before the bankruptcy
25 court?

1 A. Yes, I do.

2 Q. You do? The claim that the portion of the property on
3 which the facility would be located?

4 A. Oh, no.

5 Q. Thank you.

6 A. No, I do not.

7 Q. All right. In order to restart the former coal washing
8 operations which have been discontinued at the
9 facility, would Kentucky Processing be required to
10 obtain a water permit to do that, that it does not
11 currently have?

12 A. No.

13 Q. Okay. All right. Let me refine my last question. How
14 about a water intake permit? I don't think I was clear
15 enough in my question.

16 A. It would have to go back and get a water intake permit,
17 a water withdrawal permit is what it's called; yes. It
18 would have to go back and do that. It's not presently
19 permitted for water withdrawal.

20 Q. All right.

21 MR. WATTS:
22 May I have just a moment, sir?

23 CHAIRMAN GOSS:
24 Certainly.
25

1 MR. TURNER:

2 Your Honor, while he's pondering, may I inquire
3 when we will be taking our next break?

4 CHAIRMAN GOSS:

5 As soon as we get finished with Mr. Jagers.

6 MR. TURNER:

7 Thank you.

8 CHAIRMAN GOSS:

9 Is that a hint, Mr. Turner?

10 MR. COLLIER:

11 Pardon?

12 CHAIRMAN GOSS:

13 I asked Mr. Turner if that was a hint.

14 MR. COLLIER:

15 Oh!

16 MR. TURNER:

17 Well, it's quitting time for some of us, and we
18 need to make arrangements.

19 CHAIRMAN GOSS:

20 Okay.

21 Q. Mr. Jagers, are you familiar with a finding by the
22 Staff of this Board that the application met the filing
23 requirements of its regulations and the statutes?

24 A. Say that again.

25 Q. Are you familiar with a letter that was filed on

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handling the overlay permitting for KPC?

MR. WATTS:

I don't believe that was covered by the direct examination - excuse me - the cross examination. I'm sorry, by my redirect. I know it wasn't covered by my redirect.

CHAIRMAN GOSS:

I agree with that unless you tell me differently. I don't remember that. I'm going to sustain the objection.

REXCROSS EXAMINATION

BY MR. FITZGERALD:

Q. In response to a question on redirect, you indicated that, yes, citizens would have access to the government of Estill County if there was a noise complaint during the operation of the facility?

A. Yes.

Q. Okay. Do you recall the data request answer that Mr. Mack filed in response to my question concerning ordinances? I asked specifically, "Are there any ordinances dealing with noise control," and the answer was, "Estill County indicates that there are not." I then indicated, "Are there any general nuisance ordinances that presumably could be used to address nuisance noise?"

1 A. Uh-huh.

2 Q. Your client objected but then indicated that there are
3 no general nuisance ordinances.

4 A. Uh-huh.

5 Q. So, lacking a noise control ordinance and a general
6 nuisance ordinance, access to Estill County government
7 to address noise grievances would not seem to be a very
8 effective remedy; would it?

9 A. Well, I think you made the statement. That may be the
10 way you feel. The local government is there to hear
11 people of the citizenry. I would agree that there are
12 no local ordinances regarding noise.

13 Q. And nuisance?

14 A. As far as I know, nuisance as well.

15 Q. Okay. Let me ask the last question. I believe this is
16 within the scope of redirect. Is it your client's
17 position and you as an agent for ECEP that the Board
18 lacks the authority to impose mitigating measures
19 controlling dust and noise and the ability to enforce
20 those orders after construction and during operation of
21 this facility?

22 A. It is my opinion that what I read out of the statute is
23 for us to predict the anticipated levels of noise. I
24 do not read anything in the statute, from an engineer's
25 perspective, that would grant authority on a going-

1 forward basis.

2 Q. Including the language that specifically says that they
3 have the authority to impose mitigating measures to
4 address operation of the facility? I'm sorry. I don't
5 mean to badger you.

6 MR. FITZGERALD:
7 These are matters of law and not a matter of . . .

8 MR. WATTS:
9 Yeah.

10 MR. FITZGERALD:
11 We will address them in the posthearing brief.

12 A. Tom, it wouldn't be the first time you badgered me
13 but . . .

14 MR. FITZGERALD:
15 So I'll strike that one myself.

16 A. Okay.

17 MR. WATTS:
18 Sir, I have just - well, I'm sorry.

19 MR. FITZGERALD:
20 That's the last question I have. Thank you, Mr.
21 Jagers.

22 CHAIRMAN GOSS:
23 Anything else, Mr. Turner?

24 MR. TURNER:
25 No questions.

1 MR. WATTS:

2 One very brief redirect, if I might.

3 REDIRECT EXAMINATION

4 BY MR. WATTS:

5 Q. Your previous answer to me, Mr. Jagers, with respect
6 to access to Estill County, did you mean to include or
7 did you contemplate in your answer the prospect of
8 getting ordinances or laws passed within Estill County
9 that could address noise?

10 A. I think there's one that - potentially two things could
11 happen; one is access to have something worked out
12 where reasonable people meet and discuss the
13 opportunity to be responsible neighbors, one which is
14 usually the best way to handle those matters. That
15 would be the first opportunity for those things to be
16 corrected. Secondly, there could be something adopted
17 on a local basis if that, in fact, were a problem.
18 There are other communities in the United States who
19 have adopted standards for noise and nuisance; yes.

20 MR. WATTS:

21 Thank you. That's all I have.

22 CHAIRMAN GOSS:

23 All right. Let's take a break of six minutes.
24 We'll come back at twenty minutes till. That will
25 give everyone an opportunity to go to the rest-

1 room and get a drink of water, and we'll be right
2 back.

3 OFF THE RECORD

4 CHAIRMAN GOSS:

5 Okay. We'll be back on the record. All right.
6 Mr. Watts, from what I can tell, sir, that
7 completes your client's proof.

8 MR. WATTS:

9 That's correct.

10 CHAIRMAN GOSS:

11 All right. Thank you, sir, very much. Mr.
12 Collier, would you like to call around one of the
13 Messrs. LaViers?

14 MR. COLLIER:

15 Yes, I would. I would like to call Donald
16 LaViers, please.

17 WITNESS SWORN

18 CHAIRMAN GOSS:

19 Okay. Mr. Collier?

20 The witness, DONALD GREGORY LAVIERS, after having
21 been first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. COLLIER:

24 Q. Please state your name, address, and occupation?

25 A. My name is Donald Gregory LaViers and I am an engineer

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by trade.

Q. What is your connection with DLX, Inc.?

A. I am the President of DLX, and I started DLX, and I'm President and owner of DLX.

Q. All right. Have you previously filed direct testimony in this matter?

A. Yes, I have.

Q. At that time, prior to filing, did you have an opportunity to either prepare it or direct its preparation?

A. Yes, I did.

Q. So that you reviewed what has been filed?

A. Yes, I've reviewed what's been filed.

Q. Do you have any corrections, or additions, modifications to make with respect to that testimony?

A. Not that I'm aware of.

Q. And, if I were to ask you those questions again, would you give the same or substantially the same answers?

A. I would try to; yes.

Q. You would agree to its being used as evidence in this proceeding?

A. Yes, I do.

MR. COLLIER:

If you please, there is the matter of a small amount of rebuttal that I would like to present

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various people, and DLX, as far as I know right now, own some surface in various counties in the state and own some mineral in various counties in the state, and that's about it, that I know of.

Q. Okay, and were you always, you and your wife, always the only owners of DLX?

A. Yes, sir.

Q. Okay. From the beginning?

A. Yes, sir.

Q. Okay. On Page 3, Lines 2 to 4, you state that you were employed by South-East Coal for many years; correct?

A. Yes, sir. I was employed with South-East Coal Company from approximately 1976 through whenever it shut its doors. I think it was in January of '93.

Q. And were you ever an owner of South-East Coal?

A. My grandfather had a Trust for me and I owned, in the Trust, 10.1 percent of South-East Coal Company. Whether I was ever the owner, or shares or that, I do not know, but I do know that there was a Trust formed by my grandfather in which that Trust owned 10.1 percent of South-East Coal Company.

Q. Okay, and were you ever an officer of it?

A. I do not believe I was ever an officer of South-East Coal Company.

1 MR. WATTS:

2 That's all I have.

3 CHAIRMAN GOSS:

4 Thank you. Mr. FitzGerald?

5 MR. FITZGERALD:

6 Nothing, Mr. Chairman.

7 CHAIRMAN GOSS:

8 Mr. Turner?

9 CROSS EXAMINATION

10 BY MR. TURNER:

11 Q. Mr. LaViers, I do have one question, and I don't want
12 to get into the property questions deeply here. I
13 think it's clear both that you challenge ownership of
14 the 80 acres of waste coal area but also the 28 acres
15 on which the plant is going to be built even though the
16 28 acres is not part of the bankruptcy litigation, but
17 I think it's clear that you challenge the ownership of
18 that on other grounds. The question I have is, assume,
19 for the sake of argument, that it's ultimately
20 determined that you do not own the 28 acres, any part
21 of the 28 acres, on which the plant is going to be
22 constructed but that you do own the 80 acres of the
23 waste coal area. Okay?

24 A. Yes, sir.

25 Q. How would you have access to that waste coal area? Do

1 you have access other than a road that, I believe,
2 currently runs through the 28 acres, or would your
3 access have to be through the 28 acre tract?
4 A. Well, in bankruptcy court, we've asked for that access,
5 but the access can be granted, I guess, basically
6 anywhere they want to grant it. I mean, I don't know
7 that it has to be through the 28 acres. I don't know,
8 you know. It is - I think the 80 acres is approxi-
9 mately 3,400 feet long. So, as long as you have access
10 to that 3,400 feet somewhere, either the south end,
11 north end, or whatever, as long as access is granted, I
12 don't have any problem with it.

13 Q. Okay. Thank you.

14 MR. TURNER:

15 No further questions.

16 CHAIRMAN GOSS:

17 Okay. Let me ask the Board. Does the Board have
18 any questions of Mr. LaViers? All right, Mr.
19 Collier.

20 REDIRECT EXAMINATION

21 BY MR. COLLIER:

22 Q. We've heard some testimony earlier about whether the
23 28 acres, as it's come to be known, is the site for the
24 proposed merchant power plant, and the questions have
25 been, "No, we don't understand that that is an issue

1 within the bankruptcy action that's pending before
2 Judge Lee." What is your understanding?

3 A. My understanding is, if you go to the courthouse this
4 day, DLX owns, has the deeds, doesn't claim, it owns
5 the property outlined in those deeds, and, if you plot
6 those deeds, as Richard Hall did on his survey, there
7 is a survey map, if you plot those deeds according to
8 the way the deeds read, the plant site lies on property
9 that I currently own a deed for.

10 Q. Have you undertaken to compare some of the maps
11 prepared by ECEP with the Hall survey to see where the
12 boundaries are?

13 A. Yes, I have.

14 MR. WATTS:

15 Your Honor, I'm going to rise to object to getting
16 into what is clearly the property dispute in this
17 case.

18 MR. COLLIER:

19 All I'm going to do is ask him if he's done it,
20 the fact, of course, he has, and I have two
21 exhibits that he's prepared and I intend to
22 introduce them, and that's the extent of it.

23 CHAIRMAN GOSS:

24 Well, what are the exhibits?
25

1 MR. COLLIER:

2 They just show - there's a delineation to show an
3 overlay between the Hall survey, which has been
4 introduced as part of his testimony, and the maps
5 that have been supplied by the applicant. The
6 applicant has stated, "No, it's not in there."
7 He's a party to the bankruptcy action, and all
8 he's saying is, "Yes, it is, and here's just an
9 overlay." That's it.

10 CHAIRMAN GOSS:

11 Go ahead and ask him. I think we need to reserve
12 ruling on the exhibits until we see them.

13 MR. COLLIER:

14 That will be fine. First, if I may approach him,
15 I'll ask him if these are the ones he prepared.

16 CHAIRMAN GOSS:

17 Has Mr. Watts seen these maps?

18 MR. COLLIER:

19 No, but I've got copies that I can hand out,
20 if you'd like.

21 CHAIRMAN GOSS:

22 Well, let's let Mr. Watts take a look at them
23 while you're - and Mr. FitzGerald and Mr. Turner
24 too, if you'd be so kind.

25

1 CHAIRMAN GOSS:
2 Have you got these marked for identification?
3 MR. COLLIER:
4 Yes. The one that says "B" is No. 1, and the
5 one marked "G" is No. 2, or DLX 1 and DLX 2.
6 CHAIRMAN GOSS:
7 For identification, Connie.
8 MR. TURNER:
9 Your Honor, which one is DLX 1 and which is DLX 2?
10 MR. COLLIER:
11 "B" is DLX 1. "G" is DLX 2.
12 CHAIRMAN GOSS:
13 Okay.
14 A. Which one do you want me to open up?
15 Q. Start with "B." That's been marked as No. 1.
16 A. Okay.
17 Q. I just want you to explain to the Board what you did.
18 A. You want me to explain what?
19 Q. What you did to . . .
20 A. To prepare this map?
21 Q. Yes. How you overlaid this, yes.
22 MR. WATTS:
23 Before the witness answers, I'd just like to state
24 for the record this is precisely where we did not
25 want to be and where I thought we were not going,

1 which is to have maps showing claims and somebody
2 saying, "I own that"; "No, you don't. You own
3 that." That's what I thought the Board had ruled
4 it was not going to do.

5 CHAIRMAN GOSS:

6 Well,

7 MR. FITZGERALD:

8 Mr. Chairman, if I could wade in the middle of
9 this, if I recall, the Order of the Board was that
10 you're not going to adjudicate the title dispute,
11 but the statement had been made that Fox Trot
12 Properties, LLC owns the entire property, the
13 620 acres, and that the parties were entitled to
14 demonstrate that the title was in dispute, and, to
15 the extent that all they're doing is identifying
16 the extent to which there is a dispute, I think
17 that that is relevant, because, you know, one of
18 the contingencies that the applicant has to
19 address is, if they can't access these reserves,
20 how is that going to change, as we've already seen
21 in testimony, the truck traffic, the rail traffic,
22 how might it change the impact that this facility
23 will have on the adjacent properties, as well as
24 the economic impact of it, potentially. So it
25 seems to me that, if all they're doing is docu-

1 menting the extent rather than arguing the merits,
2 you know, clearly, who has stronger claim of title
3 is something that gets beyond the scope of this
4 proceeding, but the extent of the dispute, if
5 that's all they're documenting, we certainly have
6 no objection and think it is relevant.

7 CHAIRMAN GOSS:

8 Okay.

9 MR. WATTS:

10 Well, I must say, sir, if this goes the way I
11 believe it's going to go, I'm going to have to put
12 a witness on to refute what this witness says
13 about what the disputed areas are.

14 CHAIRMAN GOSS:

15 Well, your client has offered maps of various
16 kinds, various descriptions, and various dates
17 as to boundaries, and certainly it's been
18 established that those boundaries are not
19 boundaries that were arrived by virtue of a survey
20 of a registered land surveyor, and I'm not saying
21 that the statute requires that. All I'm saying is
22 that that's been established, and I think it's
23 certainly appropriate, since your client has
24 offered maps of record that tend to establish, in
25 your client's opinion, where boundaries are, and

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who owns what, and who the adjoining boundary owners are, and that sort of thing, that it is, at the very least, only fair to permit the intervenors to do the same thing. Now, certainly the Board will take these various maps that have been placed of record and give them the weight, if any, they are entitled to. It doesn't appear that this is a survey by a registered land surveyor either. So the Board may not give any of these maps any weight. I can't tell you that. That's something that we'll have to consider in our deliberations. I think that Mr. FitzGerald is probably correct that the July Order that we entered indicated that this Board will not consider or will not render a decision with regard to title because we simply don't have jurisdiction, but it is appropriate, I think, for the parties to at least set out before the Board what their claims are, especially in light of the maps which the applicant has already filed with its application and in response to the data requests, and so I'm going to permit Mr. Collier to ask Mr. LaViers what he wants to ask him about how he arrived at whatever he arrived at in this exhibit, and certainly, Mr. Watts, if you think that you

1 need to call another witness to address what Mr.
2 LaViers has said, I'll permit you to do that.

3 MR. WATTS:

4 Thank you, sir. I just wanted to state my
5 objection for the record.

6 CHAIRMAN GOSS:

7 Yes, sir. Thank you very much. Okay. All
8 right. Go ahead, Mr. Collier.

9 Q. Mr. LaViers, would you please explain what you did and
10 how you prepared this exhibit?

11 A. Okay. The first thing I did was I hired a registered
12 land surveyor. By the Order of the bankruptcy court,
13 the bankruptcy court gave me permission to hire a land
14 surveyor, enter the property and survey the land. We
15 did that. His name is Richard Hall, and I'm also a
16 registered engineer in the state of Kentucky and my
17 registration number is 14521. So I do know a little
18 bit about what I'm doing here. We went and we surveyed
19 the property in 2001, I believe, and, for the court,
20 there's actually two maps back there on the PSC wall
21 that's almost identical to this map except they use an
22 aerial photograph and I use a map, but I went to
23 Whitesburg where Richard Hall lives. We got on his
24 computer. We plotted our map, our survey, in the same
25 scale that this map is in, one inch equals 400 feet.

1 After we plotted that, I brought that drawing to Lynn
2 Blueprint. They ran me a clear copy of it, a clear
3 copy of it. I cut it off to where it would fit on this
4 map. I lined it up with the railroad, the river, the
5 rail marker 230 that's on this map - it's also on my
6 map - and it fits extremely well. I then had Lynn
7 Blueprint run me copies of this map. Wayne told me to
8 get 20 copies, so I had 20 copies, and then, after we
9 ran the copies, the yellow line here, all the yellow
10 line is is the way the deed is written today. The deed
11 is in front of the bankruptcy court. I asked for
12 reformation of the deed. In other words, the deed, in
13 my personal opinion, could have been written wrong, and
14 that is one of the lines - that line is not on this
15 map. That reformation line is not on this map, because
16 it is not legally in existence yet. The Judge has not
17 said that is what it is, but, the way it is right now
18 today, these deeds are owned by DLX. We don't claim
19 them; they're ours. I have a court Order from the
20 Honorable Judge Lee saying that this property is mine,
21 and those deeds, to the best of my ability, our
22 outlined on this map. I did the exact same thing for
23 the Calla Subdivision or the - or my dad's Trust. I
24 took a map that was one inch equals 100. It wasn't as
25 good a map. I had it shrunk down to one inch equals

1 400, and I lined it up the best I could on this map,
2 and then I had Lynn Blueprint run me copies of the
3 clear map, and I have those with me. I still have them
4 taped onto the map that Lynn Blueprint had them, and I
5 have my work copy that I produced these copies with,
6 and I will tell you that those two maps back there on
7 the wall that I was looking at are virtually identical
8 to this map. It has the lines on it. It has
9 everything that I've done, and on this map is one inch
10 equals 400, and, on the other map that Mr. Collier has,
11 I had it blown up, which had to be blown up 800 per-
12 cent, and that's why the line is kind of wide on that
13 map.

14 Q. All right. Mr. LaViers, as to DLX Exhibit 2, which is
15 also marked as - it says "G" on that map in the lower
16 right-hand corner - did you employ the same procedure
17 but at a different scale for this map?

18 A. Yes. I took the line right here, and I went to Lynn
19 Blueprint. They scanned in onto their computer and,
20 because I had to blow it up 800 percent, it wouldn't
21 fit on that map. So we had to pick out a portion that
22 would fit on that map, and I tried to pick out the most
23 important portion, but the line on Exhibit G is a
24 portion of this line that is on Exhibit B.

25 Q. All right.

1 A. And it was blown up to one inch equals 50 feet.

2 Q. Thank you.

3 MR. COLLIER:

4 I would move for the introduction of DLX
5 Exhibit 1.

6 CHAIRMAN GOSS:

7 I'm sorry?

8 MR. COLLIER:

9 I move for the introduction of DLX Exhibits 1
10 and 2.

11 MR. WATTS:

12 I absolutely object to the entry into the record
13 of these two documents. They are intended to
14 present to you the merits of the real estate
15 dispute, which the Board previously ruled was not
16 going to be considered in this proceeding, and
17 it's beyond the scope of the proceeding and it's
18 improper.

19 MR. COLLIER:

20 If I might, Your Honor, . . .

21 CHAIRMAN GOSS:

22 Mr. FitzGerald, do you have a response to that?

23 MR. FITZGERALD:

24 We don't object to the introduction. They don't
25 speak to the merits; they speak to the extent of

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it, which I think is consistent with the Board's earlier Order concerning this. So we have no objection.

CHAIRMAN GOSS:
Mr. Turner?

MR. TURNER:
It's been my impression all along, Your Honor, that what the Board needed was not to rule on the merits but simply to be aware of the extent of the controversy, and, to the extent that this map simply defines the extent of the controversy, I believe it's appropriate for that purpose.

CHAIRMAN GOSS:
All right. The Board will sustain the motion to admit DLX 1 and DLX 2 and make those an exhibit in the record to be given the weight to which they are entitled . . .

MR. WATTS:
Note my objection.

CHAIRMAN GOSS:
. . . over the applicant's objection. Thank you, Mr. Watts.

DLX EXHIBITS 1 and 2
INTRODUCED

1 CHAIRMAN GOSS:
2 Anything further, Mr. Collier?
3 MR. COLLIER:
4 No.
5 CHAIRMAN GOSS:
6 Anything further of this witness by anybody?
7 Okay . . .
8 MR. WATTS:
9 Just one second, sir.
10 MR. COLLIER:
11 I have additional - do I need to file more with
12 the Board?
13 CHAIRMAN GOSS:
14 Does she have one already?
15 MR. COLLIER:
16 She has one.
17 CHAIRMAN GOSS:
18 That's all we need.
19 MR. WATTS:
20 I'm going to reserve the right to introduce a
21 witness rather than cross examine this witness.
22 CHAIRMAN GOSS:
23 That's fine.
24 MR. WATTS:
25 Thank you.

EXAMINATION

BY CHAIRMAN GOSS:

Q. I do have one question of you, Mr. LaViers. As I understand it, sir, the 28 acres that DLX claims it owns is not subject to the bankruptcy proceeding?

A. It absolutely is subject to the bankruptcy proceeding.

Q. It is subject? It's the 80 acres that's not?

A. If the Judge does not reform the deeds and leaves them as they are printed today in the courthouse, the 28 acres will be owned by DLX.

Q. Okay. What about the 80 acres?

A. The 80 acres will be owned . . .

Q. No. Is it subject to the bankruptcy, is my question.

A. Yes, it is.

Q. Both of them are?

A. Both these pieces are subject to . . .

Q. All right. All right. That's all I want to know.

A. Okay.

Q. Okay. Thank you.

CHAIRMAN GOSS:

You may step down. Okay, Mr. Collier.

MR. COLLIER:

The Trust calls Harry LaViers, Jr.

WITNESS SWORN

1 give the same or substantially the same answers in
2 response?

3 A. Yes.

4 MR. COLLIER:

5 I move for the introduction.

6 CHAIRMAN GOSS:

7 Thank you, Mr. Collier. Mr. Watts?

8 MR. WATTS:

9 Thank you, sir.

10 CROSS EXAMINATION

11 BY MR. WATTS:

12 Q. Mr. LaViers, are you testifying for DLX or the LaViers
13 Trust?

14 A. The LaViers Trust.

15 Q. And were you the owner of South-East Coal?

16 A. I was the majority owner.

17 Q. And who were the other owners?

18 A. My children and Consolidation Coal Company.

19 Q. Just harking back to your son's testimony, when you say
20 your children, do you mean the Trust on their behalf?

21 A. No, no. They individually own stock in South-East Coal
22 Company. The Trust is on real estate.

23 Q. Okay. You son testified that the Trust owned 10.1 per-
24 cent, if I recall, of South-East Coal. Did I misunder-
25 stand him?

1 A. I think he owned it directly.

2 Q. Is there any litigation pending regarding the claims
3 that you have asserted in this case to the Calla
4 Subdivision?

5 A. Yes. It's an ongoing case before the bankruptcy court.

6 Q. Involving the Calla Subdivision?

7 A. Not just the Calla Subdivision, but the other
8 properties that are properties of the Trust.

9 Q. Well, I'm specifically asking about the Calla
10 Subdivision.

11 A. Yes.

12 Q. Is the Trust a party to the bankruptcy proceeding?

13 A. No.

14 Q. Well, how could it then have asserted claims in the
15 bankruptcy proceeding with respect to the Calla
16 Subdivision?

17 A. It didn't.

18 Q. You just testified that it did, that they're pending.

19 A. I said that . . .

20 CHAIRMAN GOSS:

21 I think he said they were in dispute. I don't
22 know that he said the Trust . . .

23 A. I couldn't hear you.

24 MR. WATTS:

25 My question was specifically in pending

1 litigation.

2 CHAIRMAN GOSS:

3 Why don't you rephrase it.

4 A. It's not a party - the Trust is not a party to the
5 bankruptcy proceedings.

6 Q. Okay. Is it a party to any other proceedings asserting
7 claims with respect to the Calla Subdivision?

8 A. Yes. It is a party, the same as DLX is. Some of the
9 property belongs to DLX; some of it belongs to the
10 Trust.

11 Q. Sir, I'm asking you really a pretty simple question.
12 The question is, is the Trust a party to any litigation
13 asserting a claim to ownership of the Calla
14 Subdivision?

15 A. No.

16 Q. Thank you. How about the Sandhill property? Is the
17 Trust a party to any litigation asserting a claim to
18 ownership of the Sandhill property?

19 A. No.

20 Q. Thank you. Now, did South-East Coal own and operate
21 the coal washing facility at the site of the proposed
22 ECEP project?

23 A. Yes, it did.

24 Q. Okay, and what years did it operate?

25 A. Construction started in '78 but probably didn't reach

1 completion until around '81, and it operated up until
2 the bankruptcy action in Fayette Circuit Court with
3 South-East Coal Company and Kentucky Utilities.
4 Q. When was the bankruptcy resolved?
5 A. I can't pull a date out of my hand, but it's a matter
6 of record.
7 Q. Okay, and South-East Coal declared bankruptcy; correct?
8 A. South-East Coal declared bankruptcy when we lost our
9 lawsuit with KU.
10 Q. And was the coal washing plant and the real estate of
11 South-East Coal sold in the bankruptcy to DLX?
12 A. Yes, it was.
13 Q. So your company was - were you the majority owner of
14 South-East Coal?
15 A. Yes, I was the majority owner.
16 Q. So your company was bankrupted and its assets were
17 acquired out of the bankruptcy by DLX, which was owned
18 by your son; is that correct?
19 A. That's correct.
20 MR. WATTS:
21 That's all.
22 CHAIRMAN GOSS:
23 Thank you, Mr. Watts. Mr. FitzGerald?
24 MR. FITZGERALD:
25 Just a couple of questions.

1 CROSS EXAMINATION

2 BY MR. FITZGERALD:

3 Q. Mr. LaViers, to your knowledge, after the sale of the
4 coal processing plant, was it operated by Kentucky
5 Processing Company for a period of time?

6 A. Yes, for awhile.

7 Q. Okay. Do you recall, roughly, when they ceased active
8 coal processing operations on the facility?

9 A. Again, I can't pull that out of my hand, but it's a
10 matter of record.

11 Q. Okay.

12 MR. FITZGERALD:

13 I have no further questions. Thank you.

14 CHAIRMAN GOSS:

15 Mr. Turner?

16 MR. TURNER:

17 No questions.

18 CHAIRMAN GOSS:

19 Redirect, Mr. Collier?

20 MR. COLLIER:

21 I only had rebuttal with respect to the one
22 exhibit that has the yellow outline of the
23 property. That's all I have.
24
25

1 REDIRECT EXAMINATION

2 BY MR. COLLIER:

3 Q. Mr. LaViers, if you would, look at what's been marked
4 as DLX Exhibit 1. I believe the Court Reporter . . .

5 A. I don't have a copy of it.

6 CHAIRMAN GOSS:

7 Did he have any hand in preparing this?

8 MR. COLLIER:

9 He was present with his son, Mr. LaViers, Donald
10 LaViers, and . . .

11 CHAIRMAN GOSS:

12 Is it basically going to be the same . . .

13 MR. COLLIER:

14 It's going to be the same.

15 CHAIRMAN GOSS:

16 Same testimony?

17 MR. COLLIER:

18 Yes, and if that's . . .

19 CHAIRMAN GOSS:

20 Well, I mean, we can . . .

21 MR. COLLIER:

22 I can ask him.

23 Q. Mr. LaViers, you were present when your son testified
24 about the preparation of that map, weren't you?

25 A. Yes.

1 Q. Do you agree with his testimony?
2 A. Yes, I do. I was present when all this was done.
3 Q. Did he locate the Calla Subdivision property,
4 approximately, at your direction?
5 A. He did.
6 MR. COLLIER:
7 That's all, Your Honor.
8 CHAIRMAN GOSS:
9 Okay. Thank you. Re . . .
10 MR. WATTS:
11 We'll offer a witness on this point.
12 CHAIRMAN GOSS:
13 Okay. All right. Does the Board have any
14 questions of Mr. LaViers? Okay. Mr. LaViers,
15 thank you very much, sir. You may step aside.
16 Okay. Mr. Collier, I presume that that completes
17 your proof.
18 MR. COLLIER:
19 Yes.
20 CHAIRMAN GOSS:
21 Okay. Mr. FitzGerald, you're at the plate; not
22 on deck, you're at the plate.
23 MR. FITZGERALD:
24 I'd like to call Will Herrick to the stand,
25 please.

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WITNESS SWORN

The witness, WILLIAM STUYVESANT HERRICK, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FITZGERALD:

Q. Would you state your full name and address, please?

A. William Stuyvesant Herrick, 4859 Flat Mary Road, Campton, Kentucky.

Q. Mr. Herrick, did you cause eight pages of prefilled direct testimony to be prepared and filed in this matter?

A. Yes, I did.

Q. Were I to ask you those questions, would you give the same or substantially the same answers today?

A. Precisely, with the single exception of Line 5, which says, "No, the actual property is located in Lee County." Ninety-five percent of the property is in Lee County and five percent is in Wolfe County.

Q. Okay. Thank you for that clarification. Do you have any other changes or additions?

A. No, sir.

Q. Do you affirm and adopt this testimony as your own today?

A. Yes, I do.

1 MR. FITZGERALD:

2 Mr. Chairman, I would move admission of the
3 testimony. He's available for cross examination.

4 CHAIRMAN GOSS:

5 Thank you, Mr. FitzGerald. Mr. Watts, do you
6 have questions, sir?

7 MR. WATTS:

8 Yes, sir, I do. Just one moment.

9 CROSS EXAMINATION

10 BY MR. WATTS:

11 Q. Now, on Page 3 of your testimony, there's an answer
12 beginning on Line 17 that goes over to the top of the
13 next page in which you offer an opinion about whether
14 the site for the proposed project is a former coal
15 processing facility. Do you see that?

16 A. I do, sir.

17 Q. I want to ask you to read something. Well, do you have
18 a copy of the Staff's . . .

19 A. I do, not in front of me.

20 Q. Okay. Would you mind if I just showed you this and
21 asked you to read something from it? And I'll just let
22 you confirm that what I'm showing you is from ECEP's
23 Responses to the Staff's First Data Request, and I'm
24 specifically referring to materials that under Tab 10.

25 A. The bankruptcy, yes.

1 Q. Yes. This is in response to the Staff's No. 10.
2 A. Uh-huh.
3 Q. Okay, and I'm specifically referring, under that tab,
4 to the Corrected Amended Disclosure Statement to
5 Accompany Debtor's Amended Plan of Orderly Liquidation
6 and Distribution which is in the Kentucky Processing
7 Company bankruptcy. Do you see that?
8 A. Yes, I do.
9 Q. Have you reviewed this?
10 A. I have scanned this document, yes.
11 Q. Okay. I'm turning to Page 18 of the plan, and I would
12 ask you to read the two sentences that are listed
13 there. They're highlighted in yellow under the heading
14 "C. Future Operations." Would you read out loud the
15 first sentence?
16 A. "The Debtor is now closed, does not anticipate
17 reactivation and will have no future operations."
18 Q. And the second sentence, which is the second full
19 paragraph on that page.
20 A. "Under either scenario, the Debtor will never conduct
21 any future operations, but will be construed to be
22 defunct."
23 Q. Thank you. Just one more thing. On the first page of
24 that document, I'd ask you to confirm for me that the
25 Debtor is defined as Kentucky Processing Company.

1 A. The text on this page does say "KENTUCKY PROCESSING
2 COMPANY ('the Debtor')."
3 Q. Thank you. And this is a minor thing, but I just
4 thought I would ask. In both your motion to intervene
5 and your direct testimony, you state that your water
6 supply, as an individual property owner, is from a lake
7 on your property; is that correct?
8 A. Yes, sir.
9 Q. You get your potable water from a lake?
10 A. Yes, sir, and I do a fair amount of treatment to it,
11 you might can just guess.
12 Q. Okay. Thanks.
13 MR. WATTS:
14 That's all I have.
15 CHAIRMAN GOSS:
16 Thank you, Mr. Watts. Mr. Collier?
17 MR. COLLIER:
18 No questions.
19 CHAIRMAN GOSS:
20 Mr. Turner?
21 MR. TURNER:
22 No questions.
23 CHAIRMAN GOSS:
24 Does the Board have any questions of Mr. Herrick?
25 Redirect, Mr. FitzGerald?

1 MR. FITZGERALD:
2 No, Mr. Chairman.
3 CHAIRMAN GOSS:
4 Okay. Thank you, Mr. Herrick.
5 MR. COLLIER:
6 If Your Honor please, I may have neglected to
7 move for the admission of Mr. LaViers, Jr.'s
8 testimony.
9 CHAIRMAN GOSS:
10 Well, that's fine. I appreciate that. It's . . .
11 MR. COLLIER:
12 I can't recall if I did or didn't.
13 CHAIRMAN GOSS:
14 It's already filed of record and does not need
15 to be formally introduced, but thank you for that.
16 MR. COLLIER:
17 All right.
18 CHAIRMAN GOSS:
19 Mr. FitzGerald, that's your only witness, isn't
20 it?
21 MR. FITZGERALD:
22 Mr. Chairman, yes. I would like to just ask
23 a clarifying question. The entirety of the
24 document that Mr. Watts had Mr. Herrick read from
25 is already of record, I assume.

1 CHAIRMAN GOSS:
2 Yes.
3 MR. FITZGERALD:
4 Okay.
5 MR. WATTS:
6 Yes, it is.
7 MR. FITZGERALD:
8 All right. That's fine. That's all I needed to
9 know. Thank you, Mr. Chairman. That concludes
10 our case in chief.
11 CHAIRMAN GOSS:
12 Thank you. Do any of the parties wish to cross
13 examine a representative of Brighton A & E, Inc.,
14 the Board's consultant?
15 MR. FITZGERALD:
16 Mr. Chairman, we don't.
17 CHAIRMAN GOSS:
18 Mr. Watts, do you?
19 MR. WATTS:
20 No, sir, unless somebody else wants to cross and
21 raises questions that we have to respond to.
22 CHAIRMAN GOSS:
23 Okay. No, Mr. FitzGerald and Mr. Collier. I
24 presume you don't, Mr. Turner.
25

1 MR. TURNER:
2 No, sir, and I assume their report is already
3 in the record so I don't need to move its
4 admission.
5 CHAIRMAN GOSS:
6 Yes, it is of record.
7 MR. TURNER:
8 Thank you, sir.
9 CHAIRMAN GOSS:
10 If not, it will be accepted, but I think it
11 already is of record. Does any member of
12 the Board wish to question anyone from Brighton?
13 Okay. All right. Now, that concludes, I think,
14 all the evidence in chief. Now, you had, I
15 believe, a witness on rebuttal . . .
16 MR. WATTS:
17 Yes.
18 CHAIRMAN GOSS:
19 . . . with regard to the LaViers . . .
20 MR. FITZGERALD:
21 Could I approach to give her a copy of Mr.
22 Herrick's testimony?
23 CHAIRMAN GOSS:
24 Yes.
25

1 MR. WATTS:
2 May I have just a moment?
3 CHAIRMAN GOSS:
4 Yes.
5 MR. WATTS:
6 The last thing I want to do is extend this, but
7 I would appreciate it if we had just a moment to
8 confer.
9 CHAIRMAN GOSS:
10 That's fine.
11 MR. WATTS:
12 Thank you.
13 CHAIRMAN GOSS:
14 Sure.
15 MR. WATTS:
16 May we leave the courtroom just for . . .
17 CHAIRMAN GOSS:
18 Yeah. Let's take about five minutes to stand
19 up and stretch.
20 MR. WATTS:
21 Okay. Thank you.
22 CHAIRMAN GOSS:
23 We'll be off the record.
24 MR. WATTS:
25 Thanks.

1 OFF THE RECORD

2 CHAIRMAN GOSS:

3 Okay. We'll be back on the record. Mr. Watts?

4 MR. WATTS:

5 Yes. Thank you. We'd call Dell Jagers back
6 to the stand, please.

7 CHAIRMAN GOSS:

8 Please understand, Mr. Jagers, that you're still
9 under oath.

10 MR. JAGGERS:

11 Yes, sir.

12 MR. WATTS:

13 Thank you.

14 WITNESS PREVIOUSLY SWORN

15 The witness, DELL JAGGERS, after having been
16 previously duly sworn, testified as follows:

17 REBUTTAL EXAMINATION

18 BY MR. WATTS:

19 Q. I'm going to refer you to what I believe is DLX
20 Exhibit 1, which is the original version filed with -
21 or purports to be the original version of Exhibit B to
22 ECEP's application, which was dated, the map was dated,
23 5-04-04; correct?

24 A. Correct.

25 Q. Okay. Is it, in fact, the map that the company filed,

1 that ECEP filed, with its application?
2 A. Absolutely not.
3 Q. All right, and why do you say that?
4 A. Because, upon closer reflection, there's a lot more
5 added to this map than just some yellow boundaries on
6 here.
7 Q. Well, let's talk about that. Looking at the property
8 along the river, there's a site, the first site there
9 from the - the second quadrant from the right . . .
10 MR. COLLIER:
11 Which one is he referring to?
12 MR. WATTS:
13 I'm referring to DLX Exhibit 1.
14 MR. COLLIER:
15 All right.
16 Q. Now, go over two quadrants from the upper left-hand
17 corner and one down.
18 A. Yes.
19 Q. And there is some language there about Kentucky
20 Processing and a Deed Book reference; is that correct?
21 A. That's correct.
22 Q. Okay. Was that on the ECEP map?
23 A. No, it was not, and, by the way, my name is - our name,
24 the company's name, is still on the corner of this,
25 CBC Engineers & Affiliates, LLC.

1 Q. And why is that significant?

2 A. Because I did not prepare this map nor was it prepared
3 under my direction.

4 Q. Okay. Now, moving down towards the southwest, there's
5 a reference to South-East Coal and a Deed Book
6 reference. Did you put that there?

7 A. No, I did not.

8 Q. So that's been added?

9 A. Yes.

10 Q. Now, below that to the left, there's a number that's
11 supposed to, I guess, represent square footage and
12 acreage. Did you put that on the map?

13 A. No, I did not.

14 Q. Okay. So that's been added?

15 A. Yes, it has.

16 Q. Thank you. Now, below that to the left, there's a
17 reference to South-East Coal and a Deed Book reference.
18 Did you put that there?

19 A. No, I did not.

20 Q. I see. So that's been added?

21 A. Correct.

22 Q. All right. Now, if you go below the reference to
23 "Power Plant" there with the squiggly arrow, there's a
24 reference to - there's a black circle and some language
25 there. Do you see that?

1 A. Yes.

2 Q. What is that? Well, first of all, did you put that
3 there?

4 A. No.

5 Q. All right. So that's been added?

6 A. Yes.

7 Q. All right. Now, move to the right. Move up to the
8 northeast of that, I guess, into the area where the
9 power plant is proposed to be located. Do you see
10 that?

11 A. Yes.

12 Q. Do you see the language that says "South-East" there
13 and there's kind of a black area?

14 A. Yes.

15 Q. Did you put that there?

16 A. No.

17 Q. All right. So that's been added?

18 A. Yes.

19 Q. Move down below that to the right. Do you see the
20 reference to Kentucky Processing and another Deed Book
21 reference?

22 A. Yes.

23 Q. Did you put that there?

24 A. No, sir.

25 Q. Has that been added?

1 A. Yes.

2 Q. All right. Move over to the right, and there's a
3 reference to a railroad mile marker. Do you see that?

4 A. Yes.

5 Q. Did you put that there?

6 A. No.

7 Q. Move above that. Do you see where it says - I can't
8 quite read it - "Point" either "5" or "3"? Do you see
9 that?

10 A. A triangle.

11 Q. There's a triangle - sorry - a black triangle.

12 A. Yes. I don't know what it says, "Point" something.

13 Q. Did you put that there?

14 A. No.

15 Q. All right. Now, moving up towards the area up sort of
16 right center of the page from the right-hand corner,
17 move over two quadrants and then down one quadrant.
18 Do you see where it says "Fox Trot Properties, LLC"?

19 A. Yes.

20 Q. Okay, and, under that, there's some yellow lines.

21 A. Yes.

22 Q. Now, there are some markings there that look like lot
23 lines. Do you see that?

24 A. Yes.

25 Q. Okay. Did you put that there?

1 A. No.

2 Q. So that's been added?

3 A. Yes.

4 Q. And that would be on both sides of Witt Road over to
5 Coal Wash Road?

6 A. Correct.

7 Q. All right, and, above that, there's a road indicated,
8 moving up to the left, and then some other lines up
9 there. Do you see that?

10 A. Yes.

11 Q. Did you put that in?

12 A. No.

13 Q. That's been added?

14 A. Yes.

15 Q. And then all around that area up there is lines which
16 appear to be some sort of a rectangle or rectangular-
17 looking structure - excuse me - figure. Do you see
18 that?

19 A. Yes.

20 Q. Is any of that there by your direction?

21 A. No, it is not.

22 Q. Okay. Do you have a copy of Exhibit B with you?

23 A. I can get one.

24 MR. TIRONE:
25 May I approach?

1 CHAIRMAN GOSS:

2 Certainly.

3 MR. WATTS:

4 May I approach? I need to just look at this
5 a second.

6 CHAIRMAN GOSS:

7 Certainly.

8 Q. Okay. The area to the right - well, let's go down
9 three quadrants from the top, from the top right, and
10 there's a quadrant that, on Exhibit B, shows a number
11 of lots or houses and roads, and so forth. Has some of
12 that been removed?

13 A. Yes, it has.

14 Q. Okay. Did you do that?

15 A. No, I did not.

16 Q. All right, and that goes all the way up Kentucky 89,
17 does it not, the removal of the things that were on
18 your map?

19 A. It looks like, and, of course, I haven't had a chance
20 to review all this map, because this just came today,
21 but it appears that all of the houses up along 89 and
22 Stump Road and Witt Road and all of those have been
23 removed.

24 Q. All right . . .

25

1 MR. FITZGERALD:

2 I'm sorry. Can we clarify which map you are
3 alleging - I'm looking at the original that
4 you all supplied me, and there are no houses and
5 things, and I'm looking at the map that he
6 supplied today and there are. So I'd love to know
7 which map we're talking about. The one that I
8 have is the one that you supplied to the - filed
9 with the Board, dated 7-01-04, which is marked as
10 Exhibit B.

11 OFF THE RECORD

12 MR. WATTS:

13 The difference is this, Mr. FitzGerald. The map
14 we've been referring to as the company's Exhibit B
15 is dated May 4, 2004, which was filed as Exhibit B
16 with the application.

17 MR. FITZGERALD:

18 Okay. You also supplied an Exhibit B dated
19 7-01-04 . . .

20 MR. WATTS:

21 Correct.

22 MR. FITZGERALD:

23 . . . which is the site boundaries.

24 MR. WATTS:

25 Which was in response to Staff Data Request

1 No. 10.

2 MR. FITZGERALD:

3 So you're using the more dated version or the

4 more accurate version? Which version are you

5 referring to?

6 MR. WATTS:

7 If you look at DLX Exhibit 1, the date that is

8 shown down there is May 4, 2004.

9 MR. FITZGERALD:

10 Okay. So they used the older exhibit, and that's

11 what you're referring to?

12 MR. WATTS:

13 That's correct.

14 MR. FITZGERALD:

15 Okay. I'm sorry.

16 CHAIRMAN GOSS:

17 That's as clear as mud to me.

18 MR. FITZGERALD:

19 Mr. Chairman, I don't mean to cut this short at

20 ten to six in the evening, but I think everyone

21 will stipulate that there's some additions that

22 were - I mean, the testimony was they put an

23 overlay on them and they marked where the South-

24 East properties were. So obviously there's going

25 to be differences between what they supplied.

1 We're all quite capable of taking the maps and
2 overlaying them and see what the differences are.
3 CHAIRMAN GOSS:
4 Well, I
5 MR. FITZGERALD:
6 And so I don't mean to cut short your rebuttal
7 witness, but
8 MR. WATTS:
9 Well, actually, you won't do that.
10 MR. FITZGERALD:
11 Good. I mean, I'd love to know where it's going,
12 though, because we can obviously compare the two
13 maps and see that there are differences, and I
14 think everyone will stipulate that.
15 MR. WATTS:
16 Well, I wanted to point out for the record
17 the things that have been added to this map by Mr.
18 Collier's clients, because the map has been
19 changed significantly. It is not the map that the
20 company filed - excuse me - that ECEP filed with
21 the application, and I want the record to be
22 absolutely clear about that.
23 CHAIRMAN GOSS:
24 And I think
25

1 MR. FITZGERALD:
2 Well, Mr. Chairman, I think the record reflects
3 the two documents are there, and I do not see a
4 whit of difference - no offense to Witt Road -
5 between the boundaries of the different
6 properties. There obviously have been some
7 additional things regarding where South-East
8 believes they own property or DLX does, and those
9 are of record. So I don't understand why we're
10 going through this exhaustive . . .
11 MR. WATTS:
12 Mr. Chairman, I'm entitled to put my witness on,
13 am I not?
14 CHAIRMAN GOSS:
15 You are.
16 MR. WATTS:
17 I argued throughout this hearing against exactly
18 this development, exactly where we are.
19 CHAIRMAN GOSS:
20 Well, I think probably you need to stand down
21 just a little bit, Mr. Watts. The Board is
22 entirely aware of what your argument has been and,
23 as presiding officer of the Board, I've tried my
24 best to be as fair as a I possibly could and issue
25 rulings in a fair manner, and, if the parties

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don't agree with that, that's certainly your right, and that's the reason that we have leave to go to Circuit Court. With regard to Mr. Fitzgerald's objection, I think his objection merely goes to the fact that everyone recognizes that there are changes. Certainly, if you want to go over those changes, I'm going to permit you to do that . . .

MR. WATTS:

Thank you.

CHAIRMAN GOSS:

I would ask you to do it in as speedy a manner as you can without - and I don't want to cut you off. I want to give you as much due process as you think you need, but certainly we can look at the maps and tell that there are substantial differences with regard to what's been offered by Mr. LaViers and what your client offered previously in support of the application, and so, if you would, just go on and put your witness on, but let's try to move on, if we can.

MR. WATTS:

Thank you. I'd like to state for the record that what we've established is a series of changes that go far beyond what Mr. LaViers said were made to

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the map. That's important from my perspective. I also am going to state an objection to the counsel who just spoke to you attempting to testify as to what this map means. He can do that on brief. That's fine. He can make legal arguments. It's not appropriate at this time.

CHAIRMAN GOSS:

Yes, sir.

MR. FITZGERALD:

Mr. Chairman, just to preserve the record, I was merely pointing out that everyone can read the maps and see the changes . . .

CHAIRMAN GOSS:

I understand.

MR. FITZGERALD:

. . . without going through the changes seriatim in a very plodding manner. So I apologize if I apologize if I appeared to be testifying. I was not intending to do so.

CHAIRMAN GOSS:

I understand. I didn't take it that, but certainly Mr. Watts is correct in pointing that out to me. Go ahead, Mr. Watts.

MR. WATTS:

Thank you.

1 Q. Now, referring to the property that's primarily in the
2 second quadrant down . . .
3 A. Which map are we on now?
4 Q. I'm on DLX 1.
5 A. Okay.
6 Q. And I'm looking - do you see the yellow lines that are
7 around Witt Road there?
8 A. Yes.
9 Q. All right, and it's my understanding that the LaViers
10 interests are claiming title to those or ownership
11 interest of some kind in those, and they call that the
12 Calla Subdivision. Do you understand that?
13 A. Yes.
14 Q. Now, did you make an investigation or you or CBC make
15 an investigation of the deeds in the Estill County
16 Clerk's Office to determine whether or not the LaViers
17 Trust, in fact, owns that property?
18 A. Yes.
19 Q. And what did you find?
20 MR. COLLIER:
21 Objection. Your Honor, they testified previously
22 they just looked at these but not for the purpose
23 of determining title, and I was not permitted to
24 go into that, and now he's . . .
25

1 CHAIRMAN GOSS:
2 Well, reask the question.
3 Q. What did you find in the Clerk's Office with respect to
4 the ownership of this property?
5 MR. COLLIER:
6 Objection as to an opinion as to ownership.
7 CHAIRMAN GOSS:
8 Well, I'm going to sustain the objection. I
9 think it's - he indicated that he didn't go into
10 the deed room and search the title, and that's not
11 an issue in this case. This Board is not going to
12 consider who has title to this property, plain and
13 simple.
14 MR. WATTS:
15 Thank you, sir.
16 Q. What does the PVA map show with respect to this
17 property?
18 A. It does not show that as - ownership is shown on this
19 map.
20 Q. What does it show?
21 A. I'd have to pull out the other map with the adjacent
22 property owners shown on it. It shows as Kentucky
23 Processing.
24 Q. Okay. Now, I understood Mr. Donnie LaViers to testify
25 that the yellow lines - well, to testify that the

1 yellow lines shown in the portion of the property - I'm
2 on DLX Exhibit 1 - represent property that they have
3 claimed an ownership in in the bankruptcy court. Did
4 you understand that?
5 A. Say that again for me, please.
6 Q. Sure. I'm referring not to the Calla Subdivision but
7 to the yellow lines in the bend of the river of the
8 Kentucky River.
9 A. Yes.
10 Q. Do you see that?
11 A. Yes.
12 Q. Now, I understood Mr. Donnie LaViers to testify that
13 those yellow lines refer to property that DLX claims in
14 the bankruptcy proceeding is owned by DLX. Do you
15 understand that?
16 A. That's what I heard him say.
17 Q. Is that correct?
18 MR. COLLIER:
19 Objection if he's going to legal title again.
20 CHAIRMAN GOSS:
21 Well, I think your client has indicated that he
22 believes that DLX owns it. I'm going to permit
23 this witness to testify as to what he believes,
24 but we're not going to go any further than that.
25 A. And the problem I had earlier with the questioning when

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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 under 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, and 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 it going to the east of the line that you understand to be the right line?

MR. COLLIER:

Your Honor, if I might, I don't know if it's an objection, but I had gotten into this, and I wasn't intending to get into something that was attorney/client, but it occurred to me that his testimony was he was told by a lawyer, and, if they open the door, then I want to ask questions about it, and they may not intend to get into something that counsel said . . .

1 CHAIRMAN GOSS:

2 Well, . . .

3 MR. COLLIER:

4 . . . and I hadn't intended to go there either,
5 but . . .

6 MR. WATTS:

7 I certainly don't intend to do that.

8 MR. COLLIER:

9 Okay.

10 CHAIRMAN GOSS:

11 Go ahead and answer the question.

12 Q. Can you answer the question without referring to
13 counsel?

14 A. And your question again?

15 Q. The question was, you testified just a moment ago that
16 the boundary goes substantially to the east of where
17 you understood the boundary to be. By "boundary," I
18 mean the disputed boundary, the boundary that's in
19 dispute in the bankruptcy case.

20 A. It goes beyond that on two things. Any of the maps
21 that I have previously seen and also the map that they
22 represent as the Richard Hall boundary, survey
23 boundary, are not the same as this one that's plotted
24 on this map at all.

25 Q. And does the effect of that include on - or how does

1 the difference between the yellow line, this boundary
2 on this map, and the Hall boundary, how does that
3 relate to the location of where the proposed power
4 generation facility would be?
5 A. The one that's on the disputed boundary or the Hall
6 survey tract follows the refuse pile. This one extends
7 all the way out into where Kentucky Processing operated
8 their coal preparation facility for years and where the
9 proposed power plant is actually purported or planned
10 to be constructed.
11 Q. And if it, in fact, followed the Hall survey, would the
12 area include the proposed site for the power generation
13 facility?
14 A. No.
15 Q. I'm sorry?
16 A. No, it would not.
17 Q. Do you have any comment about including the name block
18 of your company on this map, DLX 1?
19 A. Yes, I do.
20 Q. What is it?
21 A. That I want it at least known for sure by the Board
22 that we did not have - CBC Engineers & Affiliates was
23 not associated with the preparation of this map and,
24 without having the chance to look at it in detail, you
25 know, I'm not even sure that the lengthy process we

1 went through a minute ago covered all of the areas of
2 discrepancy.
3 Q. Thank you.
4 MR. WATTS:
5 That's all.
6 CHAIRMAN GOSS:
7 Thank you, Mr. Watts. Okay. Mr. FitzGerald?
8 MR. FITZGERALD:
9 Nothing, Mr. Chairman. Thank you.
10 CHAIRMAN GOSS:
11 Okay. Mr. Collier?
12 MR. COLLIER:
13 No questions.
14 CHAIRMAN GOSS:
15 Mr. Turner?
16 MR. TURNER:
17 No questions.
18 CHAIRMAN GOSS:
19 All right. Does the Board have any questions of
20 Mr. Jagers? Okay. Thank you, Mr. Jagers.
21 Thank you very much, sir. Anything further to
22 take up before we get into a couple of house-
23 keeping matters with regard to briefs and
24 transcripts? Okay. Let me fold this up, and
25 let's talk about that issue, and then we'll

1 adjourn. Speaking to the Court Reporter, Ms.
2 Sewell, during the break, she indicated that she
3 thought that she could have the transcript
4 completed by a week from tomorrow or possibly the
5 day after that, which would put us to the 1st of
6 September, 1st or 2nd of September, and we have
7 data requests that are due also the 2nd of
8 September, seven days from today. Is that right,
9 Mr. Turner?

10 MR. TURNER:
11 Well, did you say five days earlier?

12 CHAIRMAN GOSS:
13 I think I said seven.

14 MR. TURNER:
15 Okay. That's fine.

16 CHAIRMAN GOSS:
17 Is that the 2nd, September 2nd? Is that the date
18 I gave you folks, or did I give you a date on data
19 requests?

20 MR. FITZGERALD:
21 It was August.

22 CHAIRMAN GOSS:
23 Oh, August 31st. So I did say five days.

24 MR. TURNER:
25 Seven days would be August 31.

1 CHAIRMAN GOSS:

2 Okay. Does anybody foresee having a problem
3 getting responses to data requests by August 31st?
4 I said that at the beginning of the hearing
5 and now we're eight hours later, and I just wonder
6 if - okay, I don't hear any objection. So we'll
7 say data requests due by August 31st. We think we
8 can get the transcript by the 1st or 2nd of
9 September. Let's say the 2nd, and you folks will
10 need to work out your arrangements with Ms. Sewell
11 with regard to having that Fed-Exed to you or
12 whatever the quickest method is. We then
13 discussed briefs being due on the 13th of
14 September, which gets us beyond the Labor Day
15 weekend, and, in fact, past the next weekend, and
16 the 13th falls on a Monday. So that gives you
17 approximately 10 or 11 days following receipt of
18 the transcript to write the brief.

19 MR. FITZGERALD:

20 Simultaneous briefs, Mr. Chairman?

21 CHAIRMAN GOSS:

22 Simultaneous briefs, yes, sir.

23 MR. FITZGERALD:

24 Certainly.
25

1 MR. TURNER:

2 And one round.

3 CHAIRMAN GOSS:

4 And one round. No reply briefs or responsive
5 briefs.

6 MR. FITZGERALD:

7 Absolutely.

8 CHAIRMAN GOSS:

9 Does anybody have a problem with briefs due
10 September 13th?

11 MR. COLLIER:

12 No.

13 CHAIRMAN GOSS:

14 So I'm changing that from the 7th of September to
15 the 13th of September in light of the length of
16 the hearing and the necessity to get the
17 transcript out to you, and then we have a
18 statutory deadline of the 12th of October?

19 MR. TURNER:

20 Yes, sir.

21 CHAIRMAN GOSS:

22 So that gives the Board a little less than a month
23 to meet, decide the case, and issue a written
24 decision. All right. Does anybody have any
25 objections or any problems that you anticipate

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with any of these dates that I've given you? All right. Very good. Hearing none, we'll assume those dates are okay with everyone. Are there any other matters to take up before we conclude? I want to thank everybody for representing their clients zealously. I appreciate very much your attention and your consideration to the Board, and, if there's nothing further, we'll go off the record.

OFF THE RECORD
HEARING ADJOURNED
FURTHER THE WITNESSES SAITH NOT

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STATE OF KENTUCKY
COUNTY OF FRANKLIN

I, Connie Sewell, the undersigned Notary Public, in and for the State of Kentucky at Large, do hereby certify the foregoing transcript is a complete and accurate transcript, to the best of my ability, of the hearing taken down by me in this matter, as styled on the first page of this transcript; that said hearing was first taken down by me in shorthand and mechanically recorded and later transcribed by me and under my supervision; that the witnesses were first duly sworn before testifying.

My commission will expire November 19, 2005.

Given under my hand at Frankfort, Kentucky, this the 30th day of August 30, 2004.

Connie Sewell

Connie Sewell, Notary Public
State of Kentucky at Large
1705 South Benson Road
Frankfort, Kentucky 40601
Phone: (502) 875-4272