

COMMONWEALTH OF KENTUCKY  
BEFORE THE KENTUCKY STATE BOARD  
ON ELECTRIC GENERATION AND TRANSMISSION SITING  
211 SOWER BOULEVARD  
FRANKFORT, KENTUCKY 40601

In the Matter of:

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

**POST-HEARING BRIEF OF INTERVENOR  
WILL HERRICK**

Comes now the Intervenor, Will Herrick (Herrick), by counsel and submits his Post-Hearing Brief concerning the application of Estill County Energy, LLC (ECEP) for a certificate of construction approval from the Kentucky State Board on Electric Generation and Transmission Siting (Siting Board).

**INTRODUCTION**

Will Herrick is a resident of Lee County, Kentucky who has been granted full intervention rights in this proceeding, and who both submitted direct testimony on the application of ECEP for a siting certificate and was available for cross-examination by all parties at the hearing on this matter on August 24, 2004.

Pursuant to the procedural schedule adopted by the Board as modified at the conclusion of the August 24, 2004 hearing, Intervenor Herrick submits this post-hearing brief concerning the application for a certificate of construction, and in response to the Motion To Dismiss filed by DLX, Inc. and Harry LaViers, Jr. as Trustee of the Maxie LaViers Trust.

## SUMMARY OF ARGUMENT

The application of ECEP for a certificate of construction for a merchant power plant should be denied without prejudice, due to the failure of the applicant to satisfy the applicable statutory criteria necessary to support an application for and issuance of such a certificate.

Initially, irrespective of the title dispute between the various parties, the applicant has failed to demonstrate sufficient indicia of ownership or other possessory property interest in the proposed site of the merchant power plant to support the application for a construction certificate. Absent a legal interest in the property, the applicant lacks standing to proceed with the application.

While the lack of demonstrated interest in the subject property is fatal to the application at this time, and consideration of other matters is unnecessary, several other shortcomings in the application require disapproval of the request for a construction certificate.

The failure to provide a proper survey of the property prevents the applicant from demonstrating compliance with several requirements of the application process, including identification of the legal boundaries and adherence to the setback requirements of the statute.

Concerning the requirement for an evaluation of the economic impacts of the facility on the region and state, the application provided an economic assessment that was limited in scope to the direct and indirect employment impacts, and failed to consider the potential consequences of the additional air pollution on the region and state – matters that this Board has heretofore recognized can be of significant economic consequence.

Regarding the requirement to assess the effects of siting and operation of the facility, the application failed to project and evaluate the impacts of the transportation of coal to the facility after the on-site coal wastes are consumed, despite acknowledging that those reserves will be exhausted well before the facility reaches the end of its projected life.

Finally, the applicant has failed to demonstrate compliance with all applicable setbacks, since the facility holds an active permit to operate a coal processing plant it is not a “former” coal processing plant, to which the property boundary setbacks intended to protect the legitimate expectations of adjoining landowners apply.

For each of these reasons, the ECEP application fails to satisfy the applicable statutory criteria and must be denied.

#### ARGUMENT

#### **I. THE APPLICANT HAS FAILED TO DEMONSTRATE SUFFICIENT INTEREST IN THE PROPERTY UPON WHICH THE FACILITY IS TO BE SITED, AND LACKS STANDING TO APPLY FOR A CONSTRUCTION CERTIFICATE**

That the ECEP application to construct and operate a merchant power plant on the subject property in Estill County, Kentucky has provoked some controversy concerning the ownership of portions of the property, is an understatement. The current controversy, affecting at least 80 acres of the property, part of the fuel supply for the proposed plant, and potentially (depending on which testimony is given weight) the situs of the proposed plant itself, raises significant questions regarding the viability of the project. While those matters will ultimately be determined in the pending Bankruptcy Court proceedings, they represent a contingency that affects the construction certificate process as well.

It is not necessary that this Board reach those issues at this juncture, however, since the ECEP application has failed to demonstrate any possessory or other property interest in the subject property sufficient to support an application for a certificate to construct a merchant plant on the property.

The record clearly reflects that Estill County Energy Partners, LLC lacks any claim of interest in the property. According to the testimony of Gerard B. Mack, Project Manager for Estill County Energy Partners, LLC, Fox Trot Properties, LLC “owns the entire 620 acres” on which the proposed facility is to be sited and where the waste coal and coal wastes to fuel the plant will be obtained, Transcript (hereinafter “T” and the page number) at p. 81, and ECEP holds no lease (T:81) nor option (T:81) nor any other ownership interest in the property. (T:82). While Mr. Mack indicated that ECEP is “affiliated” with the owner of the property in that Ms. Jacquelyn Yates is the sole shareholder of Fox Trot Corporation which in turn is the sole member of Fox Trot Properties, LLC, and Ms. Yates is also sole member of Calla Energy Holding, LLC which in turn is the sole member of Estill County Energy Partners, LLC, neither Ms. Yates nor Fox Trot Properties, LLC or Fox Trot Corporation are parties to this process.

In fact, on August 2, 2004, Fox Trot Properties, LLC, filed a Notice With Respect To Service List specifically disclaiming any involvement in the case, and indicating that “Fox Trot Properties has not sought to intervene, and *is not a party, in this proceeding[.]*” Notice With Respect To Service List, p.1.

In the absence of any interest, as has been persuasively argued by Intervenors in their Motion to Dismiss, ECEP lacks standing to invoke the certificate process. That an applicant would possess *some* legal interest in the property for which a construction

certificate is sought, is implicit in the statute, since the applicant is required to identify and commit to restrictions on the siting of the facility (such as setbacks and submittal of a development plan under KRS 278.708(3)(a)) and to any mitigation measures that will be required, both of which presuppose the authority and ability to control the activities on the subject property. Absent any interest in the land, the applicant is a stranger to the property and the issuance of a construction certificate, which under law is property and site specific, becomes an academic exercise.

Further, the issuance of a construction certificate authorizing construction of a power plant on property not owned, leased, optioned or otherwise under the control of the applicant acts to create a cloud over the property and potentially implicates the Board in a constitutional manner. There is nothing of record indicating that the owner of the property consents to the construction of the facility at the proposed location on the property in question. The Board should not be in a posture of issuing construction certificates to applicants to build on other people's land without at least a colorable (or in this case *any*) claim of title or interest, and the Motion to Dismiss filed by LaViers and DLX is well taken on this point. Unless and until either the applicant possesses a legal interest in the property, or the application is filed by the entity with such interest, the application cannot and should not be entertained.

For the reasons stated herein and on the strength of the cases cited in the Motion by Intervenors DLX, Inc. and LaViers, this application should be dismissed without prejudice.

**2. ECEP HAS FAILED TO SATISFY THE REQUIREMENTS OF KRS  
278.708(3)(a)1 AND (3)(a)7**

Among the requirements for a completed site assessment report are the obligations of the applicant to submit “a proposed site development plan that describes . . . [t]he legal boundaries of the proposed site; [and c]ompliance with applicable setback requirements[.]” KRS 278.708(3)(a)2, 7.

ECEP has failed to provide the legal boundaries of the proposed site.

In response to the requirement of KRS 278.708(3)(a)(2), ECEP’s June 11, 2004 application responded “Please refer to the Site Boundaries attached as Exhibit B.” Exhibit B, a drawing of “Site Boundaries” dated May 4, 2004, contained this “Boundary Disclaimer”:

All property lines illustrated on this document are shown as furnished by Estill County Energy partners LLC and do not necessarily reflect those of an actual survey. No certification is made or implied as to the correctness or authenticity of any information relative to the property boundaries as shown.

In short, the applicant’s engineering firm has disclaimed any representation that the site boundaries on the “Site Boundaries” drawing are accurate.

In order for an applicant to provide on a site development map the legal boundaries of a property, as required by the statute, there must be an accurate representation of those boundaries as would be provided through a valid survey of the property. Unfortunately, the application lacks such a survey, and the applicant has noted in response to Post-Hearing Data Request No. 2 that the “Site survey has not been completed.” Instead, the applicant has provided drawings identified as “Site Boundaries” (one dated 7/01/04, in response to the Staff’s First Data Request 10 and one dated 5/04/04 accompanying the Site Assessment Report in the initial application), which include a specific disclaimer as

to correctness or authenticity of any information relative to the property boundaries. In the absence of a description of the legal boundaries of the property which is reliable, the applicant has failed to satisfy the statutory obligation of KRS 278.708(3)(a)2.

In addition to the lack of accurate description of the “legal boundaries of the proposed site,” which is required in all cases and is of particular importance in this instance where the precise location of the boundaries and the extent and scope of ownership of various lands has been placed in question by certain of the Intervenors, the lack of an accurate platted site survey makes it impossible for the Board to determine whether the applicant has satisfied the setback requirements of the statute. Unless the precise location of the property boundaries can be identified, accurate measurement of the distance between the location of the proposed facility exhaust stack and the “property boundary of any adjoining property owner” as required so as to assure that the setback requirements of KRS 278.704 are respected, cannot be accomplished.

The dismissal of the ECEP application without prejudice is justified on this basis as well, and such a dismissal will allow the applicant both time to complete the needed survey and to resolve the underlying property title disputes.

**3. THE APPLICATION FAILS TO PROVIDE ANY ANALYSIS OF THE PROPOSED FACILITY’S ECONOMIC COSTS TO THE AFFECTED REGION AND THE STATE AS REQUIRED BY KRS 278.706(2)(J)**

Among the requirements for a complete application for a certificate to construct a merchant electric generating facility is the obligation to submit “[a]n analysis of the proposed facility’s economic impact on the affected region and the state[.]” KRC 278.706(2)(j). The “economic impact of the facility upon the affected region and the

state” is one the criteria used by the Board in deciding whether to grant or deny the requested certificate. KRS 278.710(1)(c).

No analysis can be complete unless it assesses both the positive impacts and the social and economic costs of a proposed activity. The limited economic impact estimate provided by the applicant is, by its own terms, an incomplete and insufficient analysis, and does not provide a basis upon which the Board can determine the overall economic impact of the facility on the affected region and state.

*Had* the legislature intended that the Board consider *only* the positive economic impact of a proposed facility, presumably the requirement would have been so limited. Instead, the General Assembly required that the applicant provide “[a]n analysis of the proposed facility’s economic impact on the affected region and the state,” which of necessity includes both positive and negative impacts.

The report, by its own terms, is only a partial assessment of the economic impact of the proposed facility – an assessment of the positive impacts. The report specifically acknowledges this limitation under the caption “Social/Economic Cost”:

This study estimates/reports the positive economic impacts which occur as a result of the construction and operation of a commercial electricity generating facility(s). This report does not account for the cost incurred by the Commonwealth as a result of this industry. These costs may include police and fire department services, public education, public infrastructure (roads, bridges, prisons, airports, sewage treatment, water treatment, trash collection, etc.), social services, health services, environmental impacts, and tax incentives/abatements.

Economic Impact Estimate, Estill County Energy Partners, 9/29/2003, p.3. (Tab K, Application).

Lacking a complete economic assessment that evaluates the costs, the Board is deprived of the statutorily required information necessary to properly consider and weigh



the criteria in KRS 278.710(1)(c). The application must be dismissed without prejudice in order to allow the applicant to resubmit an application if and when there is conducted a complete economic assessment that considers both benefits and costs to the affected region and the state from the proposed merchant power plant.<sup>1</sup>

**4. THE APPLICATION FAILS TO PROJECT AND ASSESS  
THE IMPACTS OF OPERATION OF THE FACILITY ONCE THE  
ON-SITE WASTE COAL AND COAL WASTE FUEL SUPPLY  
IS EXHAUSTED**

KRS 278.708(3) requires that the site assessment report project the impacts of the operation of the proposed facility in terms of “anticipated peak and average noise levels associated with the facility’s construction *and operation*” (emphasis added), and “[t]he impact of the facility’s *operation* on road and rail traffic to and within the facility, including anticipated levels of fugitive dust created by the traffic and any anticipated degradation of roads and lands in the vicinity of the facility[.]” KRS 278.708(3)(d), (e). The assessment is intended both to allow the Board to assess and weigh the decision to issue or deny the construction certificate based on impacts to nearby lands, KRS 278.710(1)(a), (b); and also to enable the Board to determine the efficacy of any proposed mitigation measures. KRS 278.710(1)(h).

---

<sup>1</sup> Among the costs identified by the author of the Economic Impact Estimate as not being evaluated were costs related to environmental impacts. As this Board acknowledged in the December 5, 2003 Board Order in the Thoroughbred Generating Company LLC case, Case No. 2002-00150, the possibility of consumption by a new power plant of air quality increments can create “the very real possibility of potentially severe economic impacts to the region and must be considered when weighing whether [an applicant] should receive a construction certificate.” While efforts to explore these issues and economic costs were met with objection by ECEP both to data requests and at hearing, the study author’s acknowledgment that his study did not consider those impacts and numerous others at all is sufficient to require disapproval of the certificate request for want of a complete economic analysis..

It is apparent that ECEP has *not* evaluated the potential noise, traffic and dust impacts associated with operation of the facility *after* the available on-site waste coal and coal wastes are exhausted.

The assumption concerning the volume of road and rail traffic and the attendant impacts in terms of noise and dust, were generated assuming a blend of on-site to off-site coal at a ratio of between 95:5 and 90:10. (T:97-98). Yet in response to questioning, ECEP's Gerard Mack acknowledged that the on-site reserves were finite (T:98) and that "given the fact that there's a finite amount of material on the site, then I would have to answer that there could be a period of time where that material is exhausted" (T:98) and where the facility would continue to operate. When asked whether he knew how long that period of time would be "after the material is exhausted that you would continue to operate the facility" Mr. Mack indicated in the negative, but did acknowledge at two points that power "plants that are built have design lives that can be extended through maintenance and refurbishment. (T:96, 98).

The amount of outside coal that is brought in, as aptly noted by staff counsel, "will impact noise levels; it will impact traffic level; it will impact a variety of other considerations that the statute required the Board to look at[.]" (T:94). The failure to use upper-bound estimates of traffic in the later years of the facility, once the on-site reserves are exhausted, deprives the Board of information needed to evaluate the impacts of the transportation of coal and attendant noise and dust, on adjoining and nearby property owners and lands, and makes impossible a determination as to the efficacy of proposed mitigation measures.

For want of compliance with KRS 278.708(3), the application for a construction certificate should be denied.

**5. THE APPLICATION FAILS TO SATISFY THE REQUIREMENTS OF KRS 278.704(3)-(5) AND KRS 278.708(3) WITH RESPECT TO SETBACKS**

The applicant has failed to demonstrate compliance with all applicable setback requirements, for two separate and independent reasons.

Initially, the inability to produce a legal description of the property boundaries makes it impossible to determine or verify that the setback requirements that are keyed to the “property boundary of any adjoining property owner” will be respected in the location of the facility and its exhaust stack. While the objection of Intervenors and the pendency of a dispute regarding the location of the boundaries and the ownership of properties within the 620 acre “site” has the effect of heightening the difficulty of proving compliance, the lack of any document identifying those boundaries (disputed or not) on which reliance can be placed, makes the demonstration of compliance and the Board’s finding of same impossible.

Additionally, the applicant has invoked KRS 278.704(5) as an alternative to meeting the 1,000 foot property boundary setback requirement of KRS 278.704(2), presumably because given the proposed location of the exhaust stack, the 1,000-foot requirement cannot be met for all property boundaries.

The waiver of the 1,000-foot requirement in KRS 278.704(5) is limited to those circumstances in which “the merchant electric generating facility is proposed to be located on a site of a former coal processing plant in the Commonwealth where the electric generating facility will utilize on-site waste coal as a fuel source[.]” Since the proposed facility in this instance is proposed to be located on property where an active

surface coal mining and reclamation permit exists authorizing the operation of the coal processing facility, (T:219), and the facility would not need additional regulatory approval to resume operations, (T:219), the facility is not a “former coal processing plant” but is instead a current coal processing plant, and the exemption from the requirement to respect neighboring property owners property boundaries with a 1,000-foot setback is inapplicable.

For these reasons, the application should be denied in order to allow the applicant to resubmit an application demonstrating compliance with all applicable setback requirements.

### **CONCLUSION**

For the reasons stated herein, Intervenor Will Herrick respectfully requests that the application of Estill County Energy Partners LLC for a certificate authorizing construction of a merchant electric generating facility in Estill County, Kentucky be denied, and for all other relief to which Intervenor may appear entitled.

Respectfully submitted,

---

Tom FitzGerald  
Kentucky Resources Council, Inc.  
P.O. Box 1070  
Frankfort, KY 40602  
(502) 875-2428  
(502) 875-2845 (fax)  
[FitzKRC@aol.com](mailto:FitzKRC@aol.com)

Counsel for Intervenor Will Herrick

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Post-Hearing Brief for Intervenor Will Herrick was served this 13th day of September, 2004 electronically and by first-class mail to:

Darrell D. Brock, Jr.  
Commissioner/Assistant to Governor  
Office of Local Government  
1024 Capital Center Drive, Suite 340  
Frankfort, KY 40601  
[darrelld.brockjr@ky.gov](mailto:darrelld.brockjr@ky.gov)

Wayne F. Collier, Esq.  
Kinhead & Stilz, PLLC  
National City Plaza  
301 East Main Street, Suite 800  
Lexington, KY 40507-1520  
[wcollier@ksattorneys.com](mailto:wcollier@ksattorneys.com)

Dell Jagers  
Estill County Energy Partners, LLC  
6000 Sulphur Well Road  
Lexington, KY 40509  
[ecep-siting@earthlink.net](mailto:ecep-siting@earthlink.net)

Gerard B. Mack  
Project Manager  
Estill County Energy Partners, LLC  
121 Hermitage Road  
Charlotte, NC 28207  
[gerardmack@earthlink.net](mailto:gerardmack@earthlink.net)

John M. St. Clair, Jr.  
Board Member  
Citizens Guaranty Bank  
Post Office Box 630  
Irvine, KY 40336  
[john@mycgb.com](mailto:john@mycgb.com)

Judge Wallace Taylor  
Estill County Judge/Executive  
Estill County Courthouse  
130 Main Street, Room 101  
Irvine, KY 40336  
[judgetaylor@irvineonline.net](mailto:judgetaylor@irvineonline.net)

Honorable Lisa E. Underwood  
Attorney  
314 Holiday Road  
Lexington, KY 40502  
lisaunderwood@alltel.net

Honorable LaJuana S. Wilcher  
Secretary  
Environmental and Public Protection  
KY Division of Energy  
Fifth Floor, Capital Plaza Tower  
Frankfort, KY 40601  
lajuana.wilcher@ky.gov

J. R. Wilhite  
Commissioner - Community Development  
Economic Development Cabinet  
2300 Capital Plaza Tower, 23rd Floor  
500 Mero Street  
Frankfort, KY 40601  
jr.wilhite@ky.gov

Danny P. Woods  
Brighton A & E  
201 Brighton Park Boulevard  
Frankfort, KY 40601  
dwoods@brighton-ae.com

Hon. Stephen Watts II  
One James Center  
901 East Cary Street  
Richmond, VA 23219

Hon. Joseph Tirone  
7 St. Paul Street  
Suite 1000  
Baltimore, MD 21202

and that the original was lodged electronically and by mail this 13<sup>th</sup> day of September, 2004, with the offices of the Board, 211 Sower Boulevard, Frankfort, Kentucky 40601.

---

Thomas J. FitzGerald