

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

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ELECTRIC GENERATION AND
TRANSMISSION SITING

In the Matter of:

THE APPLICATION OF KENTUCKY)
PIONEER ENERGY, LLC FOR A)
CONSTRUCTION CERTIFICATE)
PURSUANT TO KRS 278.704(1) TO)
CONSTRUCT A MERCHANT)
ELECTRIC GENERATING FACILITY)

CASE NO. 2002-00312

**POST-HEARING BRIEF OF INTERVENOR
CHARLES T. WALTERS**

Comes Intervenor Charles T. Walters, by counsel, and in accordance with the schedule for submission of post-hearing briefs established by Chairman Huelsmann at the conclusion of the August 22, 2003 Hearing, tenders this brief in opposition to issuance of a construction certificate to applicant Kentucky Pioneer Energy, LLC. (KPE).

For the reasons stated herein, and those contained in the April 16, 2003 Board Order, KPE has failed to demonstrate compliance with the requirements of KRS Chapter 278 for lack of evidence that approval for the proposed merchant energy plant has been granted by the planning and zoning commission with jurisdiction over the geographic area in which the proposed plant is to be located.

STATEMENT OF APPLICABLE LAW

The disposition of this case turns on a question of statutory construction – do the relevant provisions of KRS 278.700 – 278.716 require an applicant for a siting construction certificate to demonstrate that zoning and planning approval has *been* obtained, or is a representation to the Siting Board of *future* intent to comply sufficient.

Throughout the text and structure of the KRS 278.700 to 278.716 there is evidenced an intention by the Kentucky General Assembly to defer to local zoning and planning commission decisions concerning setbacks and compatibility.

In stark contrast to the provisions of KRS 100.324(1) exempting regulated utilities from the requirement to obtain planning unit approval for the location of service facilities, throughout KRS 278.700 - 278.716 there is evidenced a clear legislative intent to subject merchant electric generating facilities to both review *and approval* by local planning and zoning agencies.

This intent is manifest in all aspects of the siting review process, from the Board composition¹, to the criteria for approval of a construction certificate for a merchant electric generating facility².

With respect to setback requirements, KRS 278.706(2) demands that an application, in order to be considered "completed", include, among other things,

(d) A statement certifying that the proposed plan will be in compliance with all local ordinances and regulations concerning noise control and with any local planning and zoning ordinances.

KRS 278.706(2) (2002).

That same subsection continues,

The statement shall also disclose setback requirements established by the planning and zoning commission as provided under KRS 278.704(3).

¹ One of the seven members of the Kentucky State Board on Electric Generation and Transmission Siting is an ad hoc member who is "the chairman of the planning commission with jurisdiction over an area in which a facility subject to board approval is proposed to be located." KRS 278.702(1)(d).

² The Board must grant or deny a construction certificate on a series of criteria, including "[w]hether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed[.]" KRS 278.710(1)(e) and whether the applicant has provided "evidence of compliance" with setback requirements "established" by the planning and zoning commission. KRS 278/710(1)(g).

KRS 278.704(3) provides that if the merchant electric generating facility is proposed to be located in a county or a municipality with planning and zoning,

then the setback requirements from a residential neighborhood, school, hospital or nursing home facility may be established by the planning and zoning commission. Any setback established by a planning and zoning commission for a facility in an area over which it has jurisdiction shall:

(a) Have primacy over the setback requirement in subsections (2) and (5) of this section, and

(b) Not be subject to modification or waiver

KRS 278.704(3) (2002).

One of the key disclosure and analytical requirements of the siting board statute is the "Site Assessment Report," which is prepared by the applicant and submitted to assess the impacts of the proposed facility and to propose mitigation appropriate to those impacts.

In specific, KRS 278.708 requires that the completed site assessment report include:

(a) A description of the proposed facility that shall include a proposed site development plan that describes:

* * *

7. Compliance with applicable setback requirements as provided under KRS 278.704(2), (3) or (5)[.]

KRS 278.708(3)(a)7 (2002).

The issue of current v. future compliance is one that rests on the interpretation of these provisions.

ARGUMENT

1. KRS 278.700 – 278.716 REQUIRES A MERCHANT ELECTRIC GENERATING FACILITY TO COMPLY WITH ZONING AND PLANNING REQUIREMENTS

In the initial phase of this administrative case, KPE argued before this Board that the KPE project **was exempt from the approval of the Winchester-Clark County Planning Commission.** On pages 9 – 13 of KPE's Post-Hearing Brief, the applicant argued that the proposed power plant was a "service facility" within the meaning of KRS 100.324 and that the language of KRS 100.324(1) exempted it from planning and zoning review and approval as a facility that was subject to the jurisdiction of the Federal Energy Regulatory Commission. On pages 13-17 of that same Post-Hearing Brief, the applicant argued alternatively that it met the substantive requirements of the planning and zoning regulations of Clark County, and thus was entitled to a construction certificate.

Appropriately, this Board rejected both arguments, finding that "Kentucky Pioneer ha[d] not demonstrated that the proposed facility will meet all local planning and zoning requirements that existed on the date that the application was filed." Order, April 16, 2003, p. 4. With respect to the argument that the facility was exempt from KRS 278.710(1)(e) zoning requirements by virtue of KRS 100.324, the Board properly found that the requirements of the siting statute supercede the exemption allowed in KRS 100.324. With respect to the second point, the Board properly determined that the proposed facility location is zoned agricultural and that the applicant had not demonstrated that it would be in compliance with applicable zoning and planning.

The April 16, 2003 Order allowed a six-month window in which the Board denial of the application without prejudice could be reconsidered, "[s]hould Kentucky Pioneer comply with existing zoning regulations[.]"

By letter dated May 7 and docketed May 8, 2003, KPE requested a hearing "to present evidence" that it "is in compliance with the requirements of KRS 278.710(1)(e)."

By Motion docketed May 15, 2003, KPE requested a ruling by the Board that the April 16, 2003 Order was not a "final ruling" for purposes of triggering appeal obligations. The Board, by subsequent Order dated May 15, 2003, clarified the earlier ruling and determined that KPE had six months from April 16 to demonstrate compliance with existing zoning regulations, and committed to issue a procedural schedule to "enable Kentucky Pioneer to demonstrate compliance with local planning and zoning regulations."

According to the procedural schedule, the Hearing was conducted on August 22, 2003. While the Procedural Schedule entered on June 30, 2002 called for briefs to be submitted by August 29, 2003, the Chairman, at the conclusion of the August 22, 2003 Hearing, modified that schedule for provide for simultaneous briefing on or before September 19, 2003, with the agreement of all parties present.

Before turning to the question of whether the applicant for a construction certificate must receive actual *approval* from the planning and zoning entity with jurisdiction over the proposed site location *before* the construction certificate application can be processed and approved by the Board, it is necessary to reiterate that KRS 100.324 does not override the zoning compliance requirements of KRS 278.700-278.716. To that end, Intervenor incorporates by reference the reasoning and conclusions of the April 16, 2003

Board Order, and the Direct Testimony of Mr. Walters, a retired Circuit Court Judge, concerning the construction of the applicable provisions of KRS Chapter 278.³

KPE has now repudiated the earlier posture that by virtue of KRS 100.324 the proposed power plant was exempted from zoning review and approval:

Q. . . . Your position before the Board previously had been that, under Chapter 100, your facility is exempt from having to apply for and receive zoning approval. Is that a fair characterization of the position?

A. That was the position put forward.

Q. Okay. Is that still your position?

A. No. As I've stated, as we're here, the misunderstanding that that's created has been one that certainly we regret. We completely withdraw that position and say that we will comply with local planning and zoning.

* * *

Q. Let me clarify my question again. You've previously stated it was your position that you were in compliance with local planning and zoning because you didn't have to comply with it because you were a FERC-regulated facility. Under 100.324, you were exempt from local planning and zoning. Are you now indicating that that argument has been withdrawn completely?

A. Yes.

Q. And that you do believe that your proposed facility is subject to the jurisdiction of the Clark County Planning Commission?

A. Yes.

Transcript of Evidence, August 22, 2003, at pp. 21-2. (Hereafter "TE p. ____").

³ The Board's Order correctly applied the pertinent rules of statutory construction, since if two statutes are irreconcilable, the later and more specific enactment (here, the merchant power plant siting statute) prevails. Travelers Indem. Co. v. Reker, Ky. 100 S.W.3d 756. Additionally, the siting statute, dealing with the subject matter of merchant plant siting in a more specific way, prevails. *Id.*

Elsewhere in the course of the hearing, the representative of KPE clarified that the company withdrew all of its prior testimony and argument that it was exempt from planning and zoning:

Q. . . . You say you've withdrawn the argument that you're exempt. That would include all of your posthearing brief, I assume, arguing that you're exempt?

A. Yes.

TE, p. 54.

This Board should find, consistent with the sworn representations of KPE's representative, that KPE has waived any right to assert an exemption grounded in KRS 100.324 from planning and zoning compliance and review, and is estopped from so asserting in this proceeding, based on the representations made at the supplemental hearing.

2. APPROVAL BY THE PLANNING AND ZONING AGENCY IS A PREREQUISITE TO SITING BOARD REVIEW OF A PROPOSED MERCHANT ELECTRIC GENERATING FACILITY

The Board having concluded in the April 16, 2003 Order, and the applicant having now conceded that KRS 100.324 does not exempt the proposed facility from an obligation to seek approval by the planning and zoning agency for the affected county or municipality, the sole remaining question in dispute is one of law - - does the representation by the applicant in the construction certificate application under KRS 278.706(2)(d) that it will *at some future date* comply with the comprehensive plan and zoning regulations suffice to meet the application requirements of the siting statute and to enable the Board to approve an otherwise complete and compliant application for a construction certificate, or did the General Assembly instead intend that the planning and

zoning review and approval precede Board acceptance of an application as complete and Board action thereon?

If, as Mr. Walters believes and this Siting Board has determined, it is the latter, and planning and zoning review must *precede* Siting Board action, then the Board should reject the application as incomplete and deny the request, for the undisputed testimony in the record at the August 22, 2003 hearing reflects a lack of current planning and zoning compliance by the applicant.

The undisputed testimony of Winchester-Clark County Planning Commission Director Robert Blanton is that the Kentucky Pioneer project, as proposed, "[d]oes not currently meet" the local zoning requirements. TE p.76. Director Blanton further explained that under zoning regulations in effect at the time of the application, the site of the proposed power plant is currently zoned for agricultural use and that the proposed power plant is not a permissible use in an agricultural zone. TE pp. 86-7.

Additionally, KPE has conceded that it does not currently possess necessary planning and zoning approvals to enable construction and operation of the power plant. The company withdrew testimony of current compliance, TE p. 52, and instead acknowledged that the site would have to be rezoned to support the proposed use, TE p. 53, and that the rezoning would require a recommendation by the Planning Commission and Clark County Fiscal Court approval. *Id.* Finally, the company acknowledged that it had not as of the August 22, hearing, filed an application for the rezoning. TE pp. 54-5.

The question before the Siting Board then is a straightforward matter of law: is KPE correct that the earnest representation of its representatives that it *will* in the future comply with applicable zoning and planning, enable the Siting Board to consider the

application complete and enable the Board to approve an otherwise complete and compliant application for a construction certificate?

The answer is no.

KRS 278.706(1)(d) requires that, for an application to be deemed completed and to be accepted for further review, it must include a:

statement certifying that the proposed plant will be in compliance with . . . any local planning and zoning ordinances. *The statement shall also disclose setback requirements established by the planning and zoning commission as provided under KRS 278.704(3).*

Id., emphasis added.

The proposition that Siting Board approval can precede zoning and planning approval cannot be squared with this statutory language, since until the local planning and zoning commission receives, reviews and approves a specific land use proposal and development plan, the applicant will not know what setback requirements have been established by the commission.

KPE, both in its Posthearing Brief before the initial Board determination, and again in the Direct Testimony of Mike Musulin, attempted to demonstrate compliance with regulations for heavy industrial use in Clark County. The flaw in this line of reasoning and argument is that it is the *Planning Commission*, and not KPE, that must determine initially *what* type of zoning is required to support the proposed use, and then the Commission must recommend and the legislative body find, that the threshold statutory standards to support a zone change are met *before* turning to the specific regulatory requirements for that zone and activity. KPE has argued that it meets the requirements for heavy industrial zoning, yet the Planning Director testified, without a detailed development plan, he could not tell whether the proposed project would be in compliance

with the commission's requirements for a heavy industrial district. TE 90. As the Planning Commission has the ability to establish setbacks as a condition of development plan approval in conjunction with a zoning change, TE p. 90, until an application is submitted and approved by the Commission, it is pure speculation as to what setbacks might be established and the requirement to identify setbacks established by the Commission KRS 278.706(1)(d) is not satisfied.⁴

KRS 278.706(1)(d) requires that the applicant disclose the setbacks established by the planning and zoning commission "as provided under KRS 278.704(3)." KRS 278.704(3) provides that if the merchant electric generating facility is proposed to be located in a county or a municipality with planning and zoning, "then the setback requirements . . . may be established by the planning and zoning commission." That same provision guarantees that any setback established by a planning and zoning commission shall have primacy over the default setbacks in the siting law and *cannot* be waived by the Siting Board.

In KRS 278.704(3), the legislature has recognized that the local planning and zoning commission *may* establish setbacks in order to protect neighborhoods, schools, hospitals and nursing homes, and that if established, the General Assembly will and the Siting Board must defer to those setbacks. Again, *absent an actual application*, the local zoning and planning commission cannot exercise its discretion to render a decision on a zoning change and cannot establish setbacks from these structures; an exercise of discretion by the planning commission that KRS 278.706(1)(d) contemplates will occur consistently with KRS 278.704(3) *prior* to siting application submittal. Further support for this

⁴ KPE's witness conceded as much, for when asked "[Y]ou don't know, at this point, sitting here, what conditions the Planning Commission might put on a zone change if they approved a zone change?", the witness responded "I would have to agree with your statement." TE p. 27.

proposition is found in the criteria for siting board approval, which in KRS 278.710(g) contemplates Board review of setback requirements "established" by the planning and zoning commission instead of "that will be established" by that planning agency.

Finally, the General Assembly has authorized the Siting Board to condition the grant of a construction certificate on the applicant subsequently receiving air, waste and water permits within a set period after issuance of the certificate. KRS 278.704(1). Given the expressed intent of the General Assembly that local zoning and planning setback decisions were to be given deference, had the General Assembly intended to allow the Board's certificate to precede local zoning review and approval, the authority of the Board to condition construction certificates based on obtaining subsequent zoning and planning approval would be stated in KRS 278.704. Plainly the zoning review was intended to precede Board review.

There is only one way in which an applicant for a construction certificate can certify that a proposed power plant will be in compliance with zoning and planning requirements and "established" planning commission setbacks, and that is to first obtain planning and zoning agency approval for the project. Compliance with applicable zoning and planning requirements requires more than a comparison by the siting board applicant of the project to what the applicant believes *might be* the applicable local zoning regulations – it requires instead an actual application to and approval of a zone change or other needed approvals from the local planning and zoning agency prior to Siting Board review. The alternative reading of KRS 278.706(1)(d) and KRS 278.710(1)(e) proffered by KPE cannot be squared with the last sentence of KRS 278.706(1)(d) nor with KRS 278.710(1)(g), or KRS 278.704(3) and (1). The obligation of this Siting Board is to

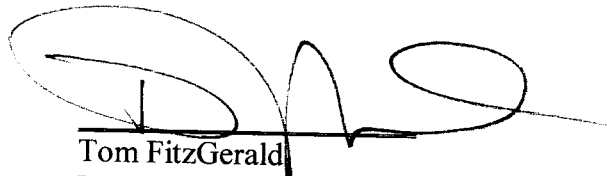
construe the governing statutes to give effect to the intent of the General Assembly to defer to local planning and zoning agencies concerning compatibility and setbacks.

Roland v. Kentucky Retirement Systems, Ky.App., 52 S.W.3d 579 (2001). The KPE approach is at variance with the apparent legislative intent and should be rejected.

CONCLUSION

Wherefore, for the reasons stated above and contained in the Board's April 16, 2003 Order, Intervenor Charles T. Walters respectfully urges that this Board enter an Order denying the application of KPE for a construction certificate, for failure to comply with the requirements of KRS 278.704(3), 278.706(1)(d) and KRS 278/710(1)(e) and (g), and for any other relief to which he may appear entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Direct Testimony of Intervenor Charles T. Walters was served this 19th day of September, 2003 by priority first-class mail to all parties on the service list:

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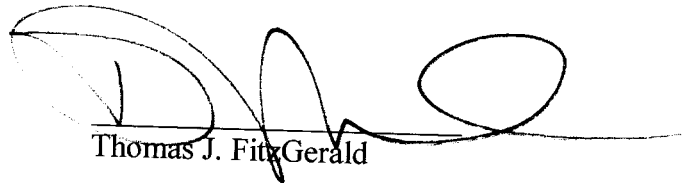
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