

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

THE APPLICATION OF KENTUCKY)
PIONEER ENERGY, LLC FOR A)
CONSTRUCTION CERTIFICATE) CASE NO. 2002-00312
PURSUANT TO KRS 278.704(1) TO)
CONSTRUCT A MERCHANT)
ELECTRIC GENERATING FACILITY)

*Before: Martin J. Huelsmann, Chairman,
Gary W. Gillis, Robert E. Spurlin,
Henry List, J.R. Wilhite,
James P. Kirby, and John R. Maruskin*

O R D E R

On December 19, 2002, the application of Kentucky Pioneer Energy, LLC (“Kentucky Pioneer”) for approval to construct a 540 megawatt electric power generation facility in Clark County, Kentucky (the “Facility”) was deemed administratively complete. Since that date, a local public hearing to receive citizen input, as well as two evidentiary hearings, have been held in this case. The first evidentiary hearing, held February 3, 2003, addressed all statutory factors relevant to this proceeding.¹ The second, held August 25, 2003, concerned only one issue:

¹ See KRS 278.710.

whether the proposed Facility would in fact meet local planning and zoning requirements that were in effect on the date the application was filed.²

The second evidentiary hearing was held at the request of Kentucky Pioneer in response to our Order of April 16, 2003 denying the application (the “April 16 Order”). As the April 16 Order explains, Kentucky Pioneer not only planned to construct a merchant generating plant in an area zoned agricultural rather than industrial; it asserted that it was not obliged to comply with Clark County’s zoning requirements because KRS 100.324 provides it with an exemption from planning commission jurisdiction. Our April 16 Order rejected that contention. Since the 1992 passage of the statutes creating this board, KRS 100.324 no longer shields merchant generators from compliance with local planning requirements, even though it places jurisdiction for ascertaining that those requirements are met with this Board rather than with local planning commissions.

The April 16 Order did, however, state that “[s]hould Kentucky Pioneer comply with existing zoning regulations within 6 months of the date of this Order, the Board will reconsider this application.” Subsequently, Kentucky Pioneer requested a hearing stating it would offer evidence of compliance.

At the August 22, 2003 hearing, Kentucky Pioneer repeatedly stated in sworn testimony that it had withdrawn its initial argument that it is not required to comply with planning and zoning ordinances and regulations. Further, it stated that it would not only

² See KRS 278.710(1)(e) (stating that the Board must consider whether local planning and zoning requirements will be met by the applicant); KRS 278.706(2)(d) (requiring for a “completed application” a “statement certifying that the proposed plant will be in compliance with all local ordinances and regulations concerning noise control and with any local planning and zoning ordinances”).

comply with Clark County's planning and zoning ordinances but that it would, in fact, voluntarily subject itself to the entire planning and zoning process described by Clark County Executive Director Robert Blanton. For reasons explained more thoroughly below, we accept these representations, reconsider Kentucky Pioneer's application and, by this Order, conditionally grant a certificate to construct.

BACKGROUND

Kentucky Pioneer is a Kentucky corporation principally located at 312 Walnut Street, Suite 2000, Cincinnati, Ohio. A wholly owned subsidiary of Global Energy, Inc., Kentucky Pioneer proposes to construct and operate a 540 megawatt electric gasification combined cycle generation station in Clark County, Kentucky. Kentucky Pioneer intends to build the Facility within a 300-acre parcel of land that it currently leases from East Kentucky Power Cooperative Corporation ("East Kentucky"), an intervenor in this case. This parcel is wholly contained within a 3200-acre plot owned by East Kentucky at its J.K. Smith site in Trapp, Clark County.³ The site is located approximately 8 miles southeast of Winchester, and 1 mile west of Trapp, Kentucky.⁴

The Facility will be comprised of three generators that will produce electricity and deliver it at 138 kilovolts at a point of interconnection with East Kentucky located at the facility transformers.⁵ Natural gas will be used initially and as a back-up fuel. The primary fuel will be synthesis gas produced by the chemical conversion of solid feedstock. According to Kentucky Pioneer, the solid feedstock will consist of coal and

³ Kentucky Pioneer Application, Section 1.2.

⁴ Testimony of Dwight Lockwood at 4.

⁵ Id.

refuse-derived fuel (“RDF”) pellets. These materials will be received by rail and unloaded and stored in covered storage before processing. East Kentucky will interconnect with the plant via proposed transmission lines that Kentucky Pioneer will construct, own, and operate.

Jason Associates has reviewed siting issues implicated by this application and has furnished to the Board a report on those issues (the “Jason Associates Report”). In addition, CAI has prepared a report on the effects of the proposed Facility on the transmission system (the “CAI Transmission System Review”). Both East Kentucky and Charles Walters requested, and were granted, intervention in this proceeding.

STATUTORY PROVISIONS

Pursuant to KRS 278.706(1), no person shall commence to construct a merchant electrical generating facility until that person has applied for and obtained a construction certificate for the proposed facility from the Board. KRS 278.710(1) directs the Board to consider the following criteria in rendering its decision: impact on scenic surroundings, property values, and surrounding roads; anticipated noise levels; economic impact upon the affected region and the state; the existence on the proposed site of other generation facilities capable of generating at least 10 MW of energy; local planning and zoning requirements; potential impact upon the electricity transmission system; compliance with statutory setback requirements; efficacy of any proposed measures to mitigate adverse impacts; and history of environmental compliance. Each of these statutory criteria will be considered in this Order. However, as KRS 278.710(e)’s requirement -- that the Board consider whether the Facility will meet local planning and zoning

requirements that existed on the date the application was filed – is the pivotal inquiry at this point, we begin our analysis here.

COMPLIANCE WITH LOCAL PLANNING AND ZONING REQUIREMENTS

Following our initial rejection of Kentucky Pioneer’s application, Kentucky Pioneer petitioned for hearing, alleging that it would demonstrate evidence of compliance with planning ordinances as required by the April 16 Order. At the August 22 hearing, however, Kentucky Pioneer offered little evidence that it actually had taken steps to obtain local approval of the zoning change from agricultural to industrial that is a precondition to compliance.⁶ No application for a map change had been filed with the Planning Commission, according to Robert Blanton, director of Planning and Community Development for the Winchester-Clark County Planning Commission. Kentucky Pioneer had not even met with planning officials since April 21.⁷

The evidence presented by Kentucky Pioneer consisted of a promise by its President, Mike Musulin, that it would “comply with all local planning and zoning requirements.”⁸ Mr. Musulin promised, furthermore, that Kentucky Pioneer would “comply with the process, the planning and zoning process,”⁹ by applying for a zoning

⁶ See August TE at 76 (testimony of Mr. Blanton that it cannot be said that the Facility will be in compliance because the site is zoned agricultural); August TE at 78 (testimony of Mr. Blanton that the presence of East Kentucky’s generation facilities on the site does not mean that the further land use changes in the area proposed by Kentucky Pioneer will be approved automatically).

⁷ August TE at 77.

⁸ August TE at 8.

⁹ August TE at 17.

amendment.¹⁰ Mr. Musulin stated that he understands that a land use change is within the discretion of the local authorities.¹¹ Mr. Musulin also represented to the Board that he came to the hearing with "complete authority" to bind both Kentucky Pioneer and its parent, Global Energy.¹²

Mr. Musulin also withdrew President H.H. Graves' statement in his May 7 letter to the Board to the effect that Kentucky Pioneer's alleged existing compliance with planning and zoning regulations would be "reaffirmed." He replaced that statement with his own – that, prior to beginning construction, Kentucky Pioneer *will* be in compliance with planning and zoning regulations.¹³ Mr. Musulin further agreed with a statement from the bench that "whatever is approved by the Fiscal Court, Kentucky Pioneer will comply with in all respects as far as planning and zoning and other requirements that Clark County has."¹⁴

¹⁰ August TE at 19, 27.

¹¹ August TE at 25.

¹² August TE at 33, 51.

¹³ August TE, at 51-52. Here, we believe it is appropriate to offer a word on tense. Considerable confusion has been generated in this proceeding based on the statutes' use of the future tense in reference to compliance with planning regulations. See KRS 278.710 (mandating consideration of whether a plant "*will meet* all local planning and zoning requirements")(emphasis added); KRS 278.706(2)(d) (requiring an application to include a "statement certifying that the proposed plant *will be* in compliance with ... local planning and zoning ordinances") (emphasis added). Confusion on this score has been unnecessary. The statutory language is in the future tense for the simple reason that it refers to a plant which has not yet been certified and which does not yet, therefore, exist. The statute nevertheless contemplates that the offering of proof that the plant *will* be in compliance is an action that takes place prior to certification. In other words, *present* proof of compliance demonstrates that a plant, when it is built, *will* comply with local planning and zoning ordinances.

¹⁴ August TE at 53.

Charles T. Walters, an intervenor in this case and an attorney who lives in Clark County, Kentucky, argues that Kentucky Pioneer's position contains an inherent contradiction: he asserted at hearing, among other things, that compliance must come before obtaining permission to build.¹⁵ In his post-hearing brief, at 9 -10, Mr. Walters argues for denial of the certificate, asserting that this Board's approval cannot precede that of the planning commission because the planning commission has authority to establish setbacks in conjunction with a zoning change, such as Kentucky Pioneer must secure here. Mr. Walters contends that, since setbacks set by a planning commission have primacy over default setbacks in the state siting law, the Board cannot meet its statutory duty, pursuant to KRS 278.706(1)(d) and KRS 278.704(3), to ensure that setbacks set by a planning commission are met, until it knows what those setbacks are.¹⁶ However, Mr. Walters stated at the August 22 hearing that it would be acceptable to him if Kentucky Pioneer would not begin construction without first having obtained the approval of the Clark County Planning and Zoning Commission.¹⁷

Kentucky Pioneer's post-hearing brief restates its request for a construction certificate expressly conditioned upon receipt of full approval of the Facility by the Winchester-Clark County Planning Commission. Kentucky Pioneer argues that a certificate so conditioned is a "reasonably effective measure to mitigate the present concerns over whether the citizens of Clark County will have any 'local control' over the

¹⁵ August TE at 65.

¹⁶ Post-Hearing Brief of Intervenor Charles T. Walters at 9-10.

¹⁷ August TE at 69.

project;”¹⁸ and it again states that it “has unconditionally committed” to seek a zoning change that will enable the Facility to comply with land use regulations.¹⁹

We accept this argument. We must note, however, certain statements in the brief that raise concerns. For example, Kentucky Pioneer expresses a concern that the Board may rule “emotionally” due to local concerns regarding the Facility’s proposed use of refuse derived fuel.²⁰ We find this expression of distrust inappropriate. We hereby assure Kentucky Pioneer that the Board renders this decision without “emotion” and that both this opinion and the April 16 Order are based upon dispassionate assessment of the proper statutory factors.

Of greater concern is Kentucky Pioneer’s assertion that a zoning change from agricultural to heavy industrial is “appropriate” and that, should the planning commission rule otherwise, its decision “would be nothing less than an arbitrary and capricious action by the government.”²¹ This statement may mean that Kentucky Pioneer simply believes, and seeks to convince this Board, that it can currently be considered in “compliance” because it is certain to receive planning commission approval. If the statement indicates Kentucky Pioneer’s belief that the planning commission has no real authority to reject the application, however, it casts an aura of doubt upon the many statements Kentucky Pioneer makes elsewhere that it will, in fact, submit to the planning commission’s processes and decisions.

¹⁸ Post-Hearing Brief of Kentucky Pioneer Energy, L.L.C. at 1-2.

¹⁹ Post Hearing Brief of Kentucky Pioneer Energy, L.L.C. at 2.

²⁰ Post-Hearing Brief of Kentucky Pioneer Energy, L.L.C. at 4.

²¹ Post-Hearing Brief of Kentucky Pioneer Energy, L.L.C. at 12.

Finally, at pages 15 through 16 of its post-hearing brief, Kentucky Pioneer claims that the emphasis on compliance with planning and zoning regulations in our April 16 Order was “contrary to law.” Obviously, we do not agree. We decline, however, to reiterate statements made in that Order. It speaks for itself.

Despite the somewhat jarring statements discussed above, we conclude that the sworn statements made by Mr. Musulin at hearing provide sufficient assurances that Kentucky Pioneer plans to submit fully to the local authorities and to abide by their decisions. We also accept Kentucky Pioneer’s assurances that it has wholly withdrawn its prior insistence that it need not comply with planning and zoning regulations. Based upon these understandings, and upon the findings and conditions described below concerning the remaining statutory criteria, we believe it is appropriate to issue a conditional certificate in this case.

We also state herein that we are not without sympathy for the position of Mr. Walters. Since our April 16 Order, Kentucky Pioneer has done very little to comply with planning and zoning regulations. It has met only once with local officials, and has filed no application for the zoning change it must have before beginning construction. There has, however, been a crucial change since issuance of our April 16 Order: Kentucky Pioneer now says it will comply with local ordinances. That statement, without more, would not be enough. However, we also have a commitment from Kentucky Pioneer that it will submit itself to the processes of the local authorities. Thus, on the record, Kentucky Pioneer has waived any argument that it need not apply to local authorities.

With due respect to Mr. Walters’ arguments, we interpret Kentucky Pioneer’s commitments in this case to mean that it will do what it is told to do by the local

authorities, and that it will not, after it has received this conditional certificate, change its position. In short, we expect Kentucky Pioneer to do precisely what it said it would do: follow the dictates of the local authorities in this matter. Should Kentucky Pioneer fail in any particular to do so, the certificate issued herein shall be void.

Finally, it has been contended that no certificate, conditional or otherwise, should be issued unless and until after Kentucky Pioneer has applied, and received local approval, for the zoning change it needs. The argument is a strong one, and has been carefully considered by this Board. However, given the sworn statements of Kentucky Pioneer's President that it will not build until it has fully met the requirements specified by the local authorities, our only remaining function in regard to the planning and zoning issues presented herein would be the redundant one of overseeing the planning commission and fiscal court processes. We do not believe that such oversight is warranted. There will be a final finding of fact in regard to compliance. The issues are in the capable hands of the local authorities;²² and the intent of Kentucky law – that local requirements be considered in the siting of merchant generators – will be well-satisfied.

REVIEW OF STATUTORY CRITERIA OTHER THAN COMPLIANCE WITH PLANNING AND ZONING REQUIREMENTS

We now outline the evidence that Kentucky Pioneer has presented with regard to criteria other than compliance with planning and zoning regulations that are listed in KRS 278.710(1). Moreover, as KRS 278.708(6) authorizes the Board to condition a

²² The remainder of the application fee submitted by Kentucky Pioneer pursuant to KRS 278.706(3) shall remain in the trust and agency account established for the purpose of holding such fees until review of this case at the planning commission is complete and the time for appeals has been exhausted.

construction certificate upon the implementation of any mitigation measures that the Board deems appropriate, we order mitigation strategies as necessary.

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

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

Kentucky Pioneer proposes to locate the Facility on a 300-acre parcel of land managed and owned by East Kentucky. The Kentucky Pioneer project site is located on the edge of two regions known as the Outer Bluegrass and Knobs Physiographic Regions. While the Knobs region is characterized by subconical hills, the Bluegrass Region is central lowland.²³ There are no residential neighborhoods, schools, hospitals, or nursing home facilities within 2,000 feet of the proposed plant.²⁴

The Board finds that, given the baseline setting of an existing power plant site, the proposed facility would be compatible with the region's existing topography and vegetation. Although visual effects caused by the facility's cooling tower plumes and stack emissions would probably be negligible, as a condition to Board approval of the proposed site, Kentucky Pioneer must select a color that blends well with the typical background conditions and foliage.

²³ Jason Associates Report, Section C at 9.

²⁴ Jason Associates Report, Section B at 2.

With regard to potential changes in the value of adjacent properties, Jason Associates advises that the presence of the proposed facility may negatively influence a potential purchaser of property located near the facility.²⁵ According to its review and evaluation of Kentucky Pioneer's Site Assessment Report, Jason Associates concluded that, while there is no established method for determining the precise impact to property values, the scenic quality of the affected area could be negatively impacted by the gasifier stacks.²⁶ However, the Board notes that the proposed facility would be located approximately 1 mile from the nearest tract available to a potential buyer.²⁷ The configuration of the leasehold, together with the vegetation and topography that surrounds the area contained in the site, would probably minimize most of the negative visual impacts. With regard to the short-term visibility impairments that may result from dust caused by construction activities,²⁸ the Board relies upon Kentucky Pioneer's commitment to minimizing the problem by implementing certain dust control measures consistent with industry standards.

The Board has carefully considered the impact that the proposed plant will have on land-based transportation and surrounding roads. During the construction phase of the proposed project, area vehicular traffic will likely generate an additional 1,000 to 1,200 trips per day on area roads.²⁹ During peak construction, this number could

²⁵ Jason Associates Report, Section C at 12.

²⁶ Id.

²⁷ Id.

²⁸ Jason Associates Report, Section D at 1.

²⁹ Jason Associates Report, Section C at 24.

increase to 2,000 vehicle trips per day.³⁰ In addition to employee vehicles, approximately 30 heavy-duty trucks would enter and exit the site continuously throughout the average workday.³¹ The traffic would probably increase when employees arrive for the beginning of their shift and depart at the end.³² During the operational phase of the proposed project, approximately 120 workers would travel to and from the facility. These workers would likely generate 200 to 240 vehicle trips per day.³³

The additional traffic generated during the construction and operation phases of the Kentucky Pioneer project should not significantly impact the roads surrounding the proposed location. However, the Board notes that the lack of control devices may result in temporary congestion at the intersection of Highway 89 and the site access road, particularly as shifts begin and end.³⁴

Kentucky Pioneer has committed to add turning lanes and traffic signals to regulate traffic flow at this intersection. Kentucky Pioneer will also seek to widen the access road to four lanes. The Board believes that these proposed mitigation strategies will address any negative impact the project may have on surrounding roads.

³⁰ Id.

³¹ Id.

³² Id.

³³ Jason Associates Report, Section C at 26.

³⁴ Id.

Anticipated Noise Levels

KRS 278.710(1)(b) requires the Board to consider the anticipated noise levels expected to result from the construction and operation of the Facility.

The Facility could substantially increase baseline noise levels within the immediate vicinity due to certain activities likely to occur throughout the construction and operation phases. These activities include heavy equipment use, increased vehicular traffic, and facility operations.

The construction phase of the proposed project is expected to last approximately 30 months.³⁵ During this phase, noise from heavy equipment, trucks, and power tools would cause most of the noise. Assuming an average of 20 heavy-equipment items operating in the same general area during a 10-hour workday, the average noise levels 100 feet from the proposed site would reach 90 to 92 dBA.³⁶ Noise levels during the construction phase are expected to reach 71 dBA at 1,000 feet from the site, 61 dBA at 2,500 feet from the site, and 44 dBA at 1.5 miles from the proposed site.³⁷ The Board notes that these noise levels are compatible with the current use and expects the terrain and vegetation at the site to further minimize any potential negative impact.

During the operational phase, the gas turbine and gasifier units are expected to be the major noise contributors. Other contributors include the material unloading facilities, conveyor systems, cooling tower operations, rail traffic, and vehicular traffic.³⁸

³⁵ Lockwood Testimony at 6.

³⁶ Jason Associates Report, Section C at 6.

³⁷ Lockwood Testimony at 7.

³⁸ Jason Associates Report, Section C at 7.

Noise levels during this phase are expected to be 62 dBA at the perimeter of the project site, 56 dBA at the EKPC property boundary, and 44.7 dBA in the Trapp community.³⁹ Although these noise levels are compatible with rural residential uses, the Board requires Kentucky Pioneer to minimize potential negative impact by designing the turbine and gasifier buildings to meet established noise criteria.

Economic Impact on the Affected Region and the Commonwealth

KRS 278.710(1)(c) requires the Board to consider the economic impact that the Facility will have upon the affected region and the Commonwealth.

Kentucky Pioneer will spend an estimated \$414 million to construct the proposed facility.⁴⁰ Kentucky Pioneer predicts that the project will employ between 600 and 1,000 people during the construction phase of the project.⁴¹ According to Jason Associates, the creation of these new positions would indirectly create 690 new jobs, \$56.7 million in direct new income and \$53.2 million in indirect income in the Clark County region.⁴² During the operational phase of the project, the facility would employ 120 workers and result in approximately \$5.6 million in new income and \$53.2 million in indirect income in the Clark County region.⁴³

The Board has every hope that the Facility will result in economic growth for the Clark County region. However, the Board recognizes that any positive economic impact

³⁹ Lockwood Testimony at 7.

⁴⁰ Jason Associates Report, Section C at 13.

⁴¹ Lockwood Testimony at 8.

⁴² Jason Associates Report, Section C at 13.

⁴³ Lockwood Testimony at 8.

greatly depends on the extent to which Kentucky Pioneer employs local workers and utilizes local resources. Thus, in approving the proposed facility, the Board relies heavily upon Kentucky Pioneer's commitment to hire construction and operation workers from the local population and utilize local materials whenever practical and possible.

We note that adverse economic impact on the electricity ratepayers of Kentucky should be avoided by our requirement that Kentucky Pioneer comply with KRS 278.212(2), which requires a person constructing a merchant generating facility to pay all expenses associated with upgrades to the transmission grid that will be caused by the additional load it places on the grid. This certificate is explicitly conditioned upon such compliance.

Our final condition imposed for economic purposes concerns Kentucky Pioneer's source of refuse-derived fuel pellets. We urge local governments in Kentucky to consider whether they should take steps to furnish such pellets, and require Kentucky Pioneer to avoid entering into an exclusive agreement with any out-of-state source for such pellets.

Existence of Other Generation Facilities

KRS 278.710(1)(d) requires the Board to consider whether a merchant power plant is proposed for a site upon which facilities capable of generating 10 MW or more of electricity are already located.

As Kentucky Pioneer points out in its brief filed subsequent to the August 22 hearing,⁴⁴ the Facility will be located at a site that currently contains generation

⁴⁴ Post-Hearing Brief of Kentucky Pioneer Energy, L.L.C. at 3.

capabilities, and thereby is consistent with the General Assembly's policy of encouraging the location of power plants at sites where such plants already exist. East Kentucky Power currently operates five gas turbine generators, each of which has the capacity to generate 80 megawatts, at the proposed site.⁴⁵ Thus, Kentucky Pioneer qualifies for the automatic setback exemption accorded to applicants who propose to construct generating facilities on sites already used for this purpose. However, notwithstanding this exemption, the Board finds that the Facility will comply with the standard setback requirements outlined in KRS 278.710(1)(d).

Potential Impact on the Electricity Transmission System

Before the Board may grant a merchant plant construction certificate, KRS 278.710(1)(f) requires the Board to consider whether the additional load imposed upon the electricity transmission system by the proposed facility will adversely affect the reliability of service for retail customers of electric utilities regulated by the Kentucky Public Service Commission.

On March 3, 2003, CAI submitted to the Board its findings concerning the expected impact of the Facility upon the transmission grid. Based on the transmission studies conducted by East Kentucky, CAI found that the Facility, including its associated transmission system additions and upgrades, would not decrease the reliability of retail service to Kentucky customers.⁴⁶

While the Board accepts the findings submitted by CAI, it also notes that additional transmission studies will be needed to further define and evaluate necessary

⁴⁵ Lockwood Testimony at 8.

⁴⁶ CAI Transmission System Review at 1.

transmission system upgrades and additions. For this reason, the Board conditions its approval of the project on the submission of final transmission interconnection studies.⁴⁷

The Board further conditions this certificate upon Kentucky Pioneer's full compliance with KRS 278.212, which provides as follows:

- (2) Notwithstanding any other provision of law, any costs or expenses associated with upgrading the existing electricity transmission grid, as a result of the additional load caused by a merchant electric generating facility, shall be borne solely by the person constructing the merchant electric generating facility and shall in no way be borne by the retail electric customers of the Commonwealth.

Compliance with Statutory Setback Requirements

Before deciding whether to grant or deny an application, the Board must consider whether the exhaust stack of a proposed merchant plant is at least 1,000 feet from the property boundary of an adjoining property owner and 2,000 feet from any residential neighborhood, school, hospital, or nursing home facility. KRS 278.706(2)(e) requires Kentucky Pioneer to state that the proposed project will maintain these setback requirements unless facilities capable of generating 10 megawatts or more currently exist on the site.

The site of the Facility already contains generation facilities capable of producing 400 megawatts of electric energy.⁴⁸ All land within 2,000 feet of the proposed facility is owned by East Kentucky Power, and there are no residential neighborhoods, schools, hospitals, or nursing homes within the prescribed area.⁴⁹ Thus, notwithstanding the

⁴⁷ Id.

⁴⁸ Jason Associates Report, Section B at 2.

⁴⁹ Kentucky Pioneer Application, Section 5.2.

existing generation at the project site, Kentucky Pioneer meets the requirements outlined in KRS 278.710.

Efficacy of Proposed Mitigation Measures

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

In this Order, we have identified certain measures that will mitigate any negative impacts of the Facility. These measures include dust control during construction; selection of a natural background color for the stack and facility; a design for turbine and gasifier buildings that meets established noise criteria and minimizes offsite noise impacts; and traffic control measures at the intersection of the site access road and Highway KY-89. In addition to these measures, Kentucky Pioneer should implement all access control and security plans in a manner consistent with industry standards.

We also caution Kentucky Pioneer that, as many of its proposed plans and agreements have not been finalized, it must file an annual report to this Board summarizing the status of the project and a summary of its effects on the affected region. We are responsible for ensuring that the Facility is constructed as Kentucky Pioneer has represented throughout this proceeding, and will continue to monitor Kentucky Pioneer's compliance through review of these annual reports.

History of Environmental Compliance

KRS 278.710 directs the Board to consider whether the applicant has a good environmental compliance history.

As no evidence to the contrary has been submitted, the Board accepts Kentucky Pioneer's assertion that both it and Global Energy have complied and will continue to comply with all applicable environmental regulations.⁵⁰

CONCLUSION

After carefully considering the criteria outlined in KRS Chapter 278, the Board finds that, except in regard to compliance with zoning regulations, Kentucky Pioneer has presented sufficient evidence to obtain a certificate to construct the Facility. Accordingly, the Board conditions its approval upon the implementation of the measures described herein and listed in Appendix A to this Order, as well as upon the strictures outlined in this Order in regard to submission to the planning and zoning process.

Further, in order to demonstrate compliance with the commitments and representations it has made to this Board, Kentucky Pioneer must certify to the Board, in writing, proof that the Winchester-Clark County Planning Commission has approved the Facility and that the local authorities have found the Facility to be in compliance with all planning and zoning regulations, prior to beginning construction of the Facility. Unless such written certification is received, the authority granted by this Order is void.

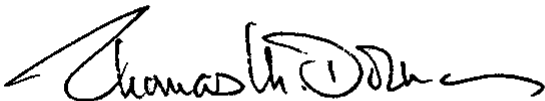
IT IS SO ORDERED.

⁵⁰ Lockwood Testimony at 10.

Done at Frankfort, Kentucky, this 10th day of November, 2003.

By the Board

ATTEST:

A handwritten signature in black ink, appearing to read "Thomas H. Doherty", written over a horizontal line.

Executive Director
Public Service Commission
on behalf of The Kentucky State Board on
Electric Generation and Transmission Siting

DISSENTING OPINION OF JOHN R. MARUSKIN

On April 16, 2003 this Board provisionally denied Kentucky Pioneer's application to build a merchant power plant at Trapp, Kentucky. That Order concluded with the following paragraph:

While Kentucky Pioneer has met some of the criteria outlined in KRS 278.710, the Board ultimately finds as a matter of law that none of the evidence presented with regard to the remaining criteria can compensate for Kentucky Pioneer's failure to comply with local planning and zoning ordinances. The Board also notes with concern Kentucky Pioneer's repudiation of its own certification that it would comply with all planning and zoning regulations. Without that certification, the Board would have been prohibited by law from reviewing Kentucky Pioneer's application. Kentucky Pioneer's certification has now, in essence, been withdrawn. It is extraordinary that Kentucky Pioneer can expect that same application to be approved.

Despite that, the Board gave Kentucky Pioneer 6 months to comply with Clark County Planning and Zoning authority. The Board's instructions to Kentucky Pioneer were explicit:

For the foregoing reasons, the Board denies the application. However, it does so without prejudice. Should Kentucky Pioneer comply with existing zoning regulations within 6 months of the date of this Order, the Board will reconsider this application.

The Board, having reviewed the evidence presented in the record, and having been otherwise sufficiently advised, **HEREBY ORDERS** that Kentucky Pioneer's application for a certificate to construct a 540 MW electric generating facility in Clark County, Kentucky is denied.

In the subsequent 6 months, Kentucky Pioneer failed to meet compliance with Clark County Planning and Zoning and, indeed, did little to try.

Nevertheless, the Board has now decided to grant Kentucky Pioneer a permit to build because Kentucky Pioneer has promised, once again, to comply with Clark County Planning and Zoning.

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY STATE BOARD ON ELECTRIC GENERATION AND TRANSMISSION SITING IN CASE NO. 2002-00312 DATED November 10, 2003

MONITORING PROGRAM AND REPORTING REQUIREMENTS

The following monitoring program is to ensure that a proposed merchant plant is constructed as the applicant has represented throughout the siting process. The following program shall apply to Kentucky Pioneer and its successors, if any, should Kentucky Pioneer receive approval of the Winchester-Clark County Planning Commission and the Clark County Fiscal Court to construct the Facility.

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

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

Overview – Kentucky Pioneer shall provide a short narrative summary of the project's progress or any changes that have occurred since the last report. Kentucky Pioneer shall also identify the primary contractor(s) responsible for the largest portion of the construction effort, if applicable.

Implementation of Site Development Plan – Kentucky Pioneer shall describe:
1) the implementation of access control to the site; 2) any substantive modifications to the proposed buildings, transmission lines and other structures; 3) any substantive modifications to the access ways, internal roads and railways serving the site; and

4) development of utilities to service the site. A map must accompany any change in the above four items.

Local Hiring and Procurement – Kentucky Pioneer shall describe its efforts to encourage the use of local workers and vendors. At a minimum, Kentucky Pioneer shall include a description of the efforts made by it and by contractors and vendors to use local workers and local vendors to build and operate this project. Kentucky Pioneer shall also include, at a minimum, an informed estimate of the proportion of the construction and operational workforce that resided in the region (e.g., 50-mile radius) of the plant site prior to coming to work at the site.

Public Comments and Responses – Kentucky Pioneer shall provide a summary of any oral, telephone, e-mail or other written complaints or comments received from the public during the intervening period since the last report. Kentucky Pioneer shall also summarize the topics of public comments, the number of comments received, and its response to each topic area. Original complaints and comments should be attached in their original form, including telephone transcriptions.

Specific Mitigation Conditions – Kentucky Pioneer shall provide a brief (e.g., 1 to 3 paragraph) narrative response to indicate its progress, any obstacles encountered, and plans to fulfill each condition or mitigation requirement required by the Board.

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

Board were successfully implemented. Kentucky Pioneer shall also submit “as-built” plans in the form of maps that illustrate the implementation of the Site Development Plan.

SPECIFIC CONDITIONS IMPOSED

D. Kentucky Pioneer shall comply with all planning and zoning requirements, as well as all application procedures, of the Winchester-Clark County Planning Commission, and shall not begin construction until it has filed with the Board a written certification that the planning commission has approved the Facility.

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

1. Employees must have approved parking areas.
2. The plant perimeter must be fenced and lighted.
3. Access to waste disposal areas must be locked.
4. Storage buildings with hazardous or dangerous chemicals must be locked.
5. Only personnel who have attended an induction course are permitted to work on-site.
6. All employees and subcontractors working at the site must have a site security pass which must be carried at all times.

7. Entry to the site will be controlled, and only persons approved for work on the site will be allowed access. Access for site personnel will be via a security gate controlled by site security.

8. Commercial vehicle drivers delivering or removing materials to or from the site must first register with Kentucky Pioneer.

9. Documentation of all drivers will be subject to examination and only those holding the necessary documents for the type of vehicle, plant or equipment to be driven will be allowed on the site.

10. All vehicles entering/leaving the site shall be subject to search by Kentucky Pioneer security.

11. Vehicle speeds on site shall not exceed 15 kilometers per hour unless there are signs indicating other limits.

F. Kentucky Pioneer shall ensure that the building contractors responsible for the facility's construction select neutral background colors for the stack and facility that will minimize contrast with existing surroundings. Industry standards for accomplishing this permit condition should be applied.

G. Kentucky Pioneer shall instruct its contractors to design the turbine and gasifier buildings to meet established noise criteria and minimize offsite noise impacts to the extent practicable, following industry standards.

H. Kentucky Pioneer shall encourage and support the Commonwealth of Kentucky, Clark County, and any other parties in their effort to design, construct, operate, and maintain traffic control and highway changes at the intersection of the site access road and Highway 89.

I. Kentucky Pioneer shall make reasonable efforts to hire workers, vendors, and contractors from the local area. A worker hired from the local area is one that can commute daily to the plant site from his or her primary residence that existed prior to employment at the Kentucky Pioneer site. Typically, workers, vendors or contractors living within a 50-mile radius of the site prior to their association with Kentucky Pioneer may be considered local.

J. Kentucky Pioneer shall include language in its contracts, and shall provide training for its hiring agents and purchasing agents, that indicate the preference for such local hiring and local expenditure patterns to the maximum extent practicable. Such provisions would not be considered practicable if they directly threatened the ability to construct or operate the project or to obtain financing.

K. During the construction phase of the proposed project, Kentucky Pioneer shall implement dust control measures consistent with industry standards.

L. Kentucky Pioneer shall comply fully with KRS 278.212 by paying all costs or expenses associated with upgrades to the existing electricity transmission grid that are required as a result of the additional load placed on the grid by its Facility.

M. Kentucky Pioneer shall remain available for negotiations with local authorities in Kentucky who may wish to become providers of refuse-derived pellets for use at the Facility.