

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)	

POST-HEARING BRIEF OF
KENTUCKY PIONEER ENERGY, LLC

* * * * *

Kentucky Pioneer Energy, LLC (“KPE”), for its Post-Hearing Brief, states as follows:

I. BACKGROUND

On November 26, 2002, KPE filed an application with the Kentucky State Board on Electric Generation and Transmission Siting (the “Board”) pursuant to KRS 278.700 *et seq.*, requesting a Construction Certificate for a 540 MW Integrated Gasification Combined Cycle (“IGCC”) electric generating plant located at East Kentucky Power Cooperative’s (“EKPC”) J.K. Smith Generating Site in Clark County, Kentucky. In support of its application for a Construction Certificate, KPE submitted a Final Environmental Impact Statement (“FEIS”) prepared over 33 months by the Department of Energy as its Site Assessment Report pursuant to KRS 278.706(2)(1) and in accordance with KRS 278.708(3). Following the submission of

additional data, the Board determined KPE's application to be administratively complete on December 19, 2002.¹ On February 5, 2003, the Board granted intervention to EKPC.²

The Board engaged two independent consulting firms to review and evaluate KPE's application and the transmission issues associated therewith. On February 6, 2003, Jason Associates Corporation issued its report (the "Jason Report") recommending the Board approve KPE's application for a Construction Certificate subject to certain conditions.³ On March 3, 2003, Commonwealth Associates, Inc. ("Commonwealth Associates") issued its report recommending approval subject to certain conditions.⁴ Following a site inspection by the Board on February 4, 2003, a public hearing on March 4, 2003, an evidentiary hearing by the Board on March 6, 2003, the matter was submitted for decision.

II. OVERVIEW OF THE KPE PROJECT

Almost eight years ago, the Kentucky Coal Council conducted an assessment of advance coal technologies using the University of Kentucky Center for Applied Energy Research. The assessment concluded that IGCC power generation was the most promising for near term deployment and the Kentucky Coal Council initiated programs to encourage deployment of this technology in Kentucky.⁵ Discussions between KPE and the Kentucky Coal Council for implementation of this technology subsequently evolved into the current contractual agreements between EKPC and KPE. Under the contractual agreement presently in effect between KPE and EKPC, one hundred percent of the power generated by KPE will be sold and delivered to EKPC

¹ Kentucky State Board on Electric Generation and Transmission Siting Letter of December 19, 2002.

² Order of February 5, 2003, p. 1.

³ Jason Associates Corporation, *Review and Evaluation of: A Site Assessment Report for Kentucky Pioneer Energy Case Number 2002-00312*, February 6, 2003.

⁴ Commonwealth Associates, Inc., *Transmission System Review, Kentucky Pioneer Energy Project Case No. 2002-00312*, March 3, 2003, Vol. 1.

⁵ David Drake testimony from March 6, 2003 Siting Board Evidentiary Hearing; Transcript of Evidence ("T.E.") p. 116.

pursuant to a long-term contract for EKPC's transmission to its member distribution cooperatives and other wholesale power customers.

IGCC is an advanced form of clean coal technology which converts coal and other organic material into a gas, cleans the gas ("Syngas") and then burns the cleaned gas in a combustion turbine. The IGCC provides power generation from solid fuels with significantly lower emissions than conventional technology. Mr. Lockwood explained the benefits of the IGCC technology when he said:

The most interesting and promising aspect of this technology is its ability to utilize high sulfur coal without the environmental impacts that are commonly associated with this energy resource. Stack emissions from the gas turbine using Syngas are comparable to using natural gas. Additionally, this type of clean coal technology does not have the ash problems associated with current coal fired generators. Currently, over 100 million tons of ash are disposed in landfills annually. The gasification process does not produce any fly ash or bottom ash that require slurry ponds or disposal in landfills. Instead, this clean coal technology produces a vitrified frit (a.k.a. slag) from the gasification chemical conversion process, and is marketable as an aggregate material for asphalt paving or structural fill.⁶

The Kentucky General Assembly has a clearly established policy of fostering and encouraging the use of Kentucky coal by utilities like EKPC and by facilities like KPE. KRS 278.0202(1) and 278.710(2). The KPE project, because it uses high sulfur coal as a principal fuel for the generation of electricity, advances the General Assembly's policy of encouraging the use of Kentucky coal.

Although there are an increasing number of IGCC facilities in operation in the United States, this project will be the first commercial application of the British Gas/Lurgi ("BGL") fixed bed gasification technology. This technology will convert high sulfur coal and refuse-derived fuel ("RDF") into the Syngas. The gasification process is a chemical conversion process

⁶ Direct Testimony of Dwight Lockwood, filed February 28, 2003, p. 3. (Emphasis added).

that operates at extremely high temperatures in a fully enclosed and pressurized reactor that converts its solid organic feedstock (coal and RDF) into a synthesis gas of primarily hydrogen and carbon monoxide. The produced synthesis gas contains over 90 percent of the heating value of the gasifier's feedstock. The raw synthesis gas stream from the gasification process then undergoes various cleanup steps including scrubbing to remove over 99 percent of its sulfur content, as well as other contaminants. The resulting Syngas is then used as a fuel in the gas turbines and performs similarly to natural gas. In this project, the bulk of the synthesis gas will be fed to two gas turbines which, together with a single steam turbine, will deliver approximately 540 megawatts of electrical power to EKPC.⁷

The feed to the IGCC will consist of coal and RDF. The RDF is a dense pelletized fuel product manufactured offsite from municipal solid waste through a process which typically includes sorting, shredding, addition of a binding agent and pelletizing. The RDF will be shipped to the IGCC facility in closed containers and stored to protect it from weather.⁸ On-site feed storage and handling equipment will be designed to mitigate dust while unloading the railcars by holding the material in covered storage and conveying it to the process area for conversion into synthesis gas.⁹ KPE plans to contract the supply of RDF pellets, and will not handle any raw municipal solid waste at the proposed site in Clark County.¹⁰ The IGCC facility will only be receiving, storing and reusing the already processed final fuel product--RDF.¹¹

The proposed IGCC facility will be located in Clark County, Kentucky, on approximately 300 acres within the 3,120 acre J.K. Smith Generation Station ("JK Smith Site"). The J.K Smith

⁷ Application of Kentucky Pioneer Energy, LLC, filed November 26, 2002, p. 2 of tab 1.

⁸ T.E., p. 27.

⁹ *Id.*

¹⁰ *Id.*

¹¹ KPE's Responses to Board Staff's First Data Request Dated January 13, 2002, filed January 21, 2003, Answer 4, p. 5 of 19.

Site is located approximately 21 miles southeast of Lexington, 8 miles southeast of Winchester, and 1 mile west of Trapp, Kentucky. The 300 acre lease site was disturbed by prior construction activities and has previously completed initial grading, primary foundations, fire protection piping and a rail spur access infrastructure. Rail access is bidirectional from the CSX freight rail line adjacent to the property. The EKPC rail facility consists of a 3.1 mile railroad loop around the 300 acre lease site. The J.K Smith Site is accessible via a 1 mile access road and through a gated perimeter fence off of Kentucky Highway 89 and currently operates five natural gas combustion turbines.

III. THE UNCONTRADICTED EVIDENCE IN THE RECORD DEMONSTRATES THAT KPE'S APPLICATION SATISFIES THE TEN STATUTORY CRITERIA FOR A CONSTRUCTION CERTIFICATE

In May of 2002, the General Assembly enacted Senate Bill 257 ("the Siting Act") to establish the Board and delegate to it certain express powers to regulate the siting and construction of electric generating and transmission facilities that are not regulated by the Kentucky Public Service Commission ("PSC") based upon ten statutorily defined criteria. KRS 278.710(1)(a) – (i) and (2). To allow for the orderly development of such projects, the Siting Act allows the applicant to first proceed and obtain the Construction Certificate and then obtain the other regulatory permits necessary for the construction and operation of electric generating facilities (e.g. air, wastewater, water withdrawal, and solid waste disposal permits from the Kentucky Cabinet for Natural Resources and Environmental Protection).¹³

¹² U.S. Department of Energy Kentucky Pioneer Integrated Gasification Combined Cycle Demonstration Project final Environmental Impact Statement, dated November 2002, at S-4.

¹³ This statutory scheme is evidenced by the manner in which the General Assembly defined the period in which the Construction Certificate will remain valid. The statute clearly states that "[t]he construction certificate shall be valid for a period of two (2) years after the issuance date of the last permit required to be obtained from the Natural Resources and Environmental Protection Cabinet" KRS 278.704(1). (Emphasis added).

The application of the ten statutory criteria in KRS 278.710(1)(a) – (i) and (2) to the evidence contained in KPE’s application, the FEIS, the Jason Report, the Commonwealth Associates’ Report and the evidentiary hearing, discussed below, shows KPE should be awarded the requested Certificate of Construction.

A. Impact of the Facility on Scenic Surroundings, Property Values, the Pattern and Type of Development of Adjacent Property, and Surrounding Roads

The November 2002 FEIS performed by the Department of Energy¹⁴ and the Jason Report¹⁵ concluded that the IGCC facility would have no or a negligible impact to the scenic surroundings and are compatible with the aesthetic and scenic surroundings due to the existing generating facilities on the site.

The area outside the J.K. Smith Site is predominately used as cropland, pasture, forest, shrub/brush and rangeland. The FEIS¹⁶ and the Jason Report¹⁷ also concluded there will be no or only negligible impact on the development of the property surrounding the J.K. Smith Generation Station.

The proposed IGCC facility will be located with in EKPC’s 3,120 acre J.K. Smith Site which currently operates five natural gas combustion turbines, a natural gas field with four producing gas wells and two nonproducing gas wells. The facility will have limited visibility from outside the property boundary. The proposed IGCC facility will be located 1 mile from the nearest tract available to a potential buyer (the closest residence). This distance should mitigate the effect on property values.¹⁸ It is therefore reasonable to conclude that to the extent there is

¹⁴ U.S. Department of Energy, *supra* note 10, at 5-12.

¹⁵ Jason Associates Corporation, *supra* note 2, at C-13.

¹⁶ U.S. Department of Energy, *supra* note 10, at 5-12.

¹⁷ Jason Associates Corporation, *supra* note 2, at C-18.

¹⁸ U.S. Department of Energy, *supra* note 10, at 5-6.

any impact on the property values caused by the construction of KPE's facility, the impact is only *de minimis*.

With respect to the impact of KPE's facility on the surrounding roads, the FEIS¹⁹ concluded, and the Jason Report²⁰ agreed, that the location of the proposed IGCC facility is conducive with local traffic patterns. Based upon the traffic patterns analyzed in the area by the Kentucky Department of Transportation, the increase of traffic associated with either the construction phase or operation phase of the IGCC project would flow in opposite directions of existing heavy flows of traffic and would not compound any existing traffic congestion during commuting periods. While the FEIS did conclude that increased traffic would negatively impact the roads in Trapp and at the intersection of Highway 89 and the access road as construction traffic enters and leaves Highway 89, the lack of traffic control at this intersection will likely result in only minor congestion. KPE has committed to fully cooperate with the Kentucky Department of Transportation to mitigate these impacts from the increase in traffic and expects to accept its recommendations.²¹

B. Anticipated Noise Levels Expected as a Result of Construction and Operation of the Proposed Facility

A conservative estimate of construction site noise was developed in the FEIS by assuming an average of 20 heavy equipment operating in the same area over a 10-hour workday, and nighttime construction is not anticipated. The noise levels under this model used in the FEIS are estimated to be 90 to 92 dBA at 100 feet from the worksite, 71 dBA at 1,000 feet, 61 dBA at 2,500 feet, 50 dBA at 1 mile, and approximately 44 dBA at 1.5 miles. Actual levels are anticipated in the FEIS to be less due to terrain and vegetation effects and anticipated to be

¹⁹ U.S. Department of Energy, *supra* note 10, at 5-34.

²⁰ Jason Associates Corporation, *supra* note 2, at C-31

²¹ Direct Testimony of Dwight Lockwood, filed February 28, 2003, p. 5.

similar to or less than background noise levels at locations beyond the EKPC property.²² The Jason report concurs with this assessment.²³

During the operation phase, noise levels immediately adjacent to the turbines and certain areas near the gasifiers are expected to be 155 dBA and 95 dBA respectfully. However, enclosures for this equipment and these areas will provide significant noise reduction. The studies cited in the FEIS show that operational noise levels are anticipated to be approximately 62 dBA at the perimeter of the lease site, 56.5 dBA at the EKPC property boundary, 53.4 dBA at the closest structure outside the EKPC property, and 44.7 dBA in the community of Trapp. The noise levels outside EKPC's property boundary are considered compatible with rural residential land uses.²⁴

Increase rail and vehicle traffic during the operation phase is also anticipated to have minor effects on noise levels. The FEIS and the Jason Report both concluded that the additional rail traffic will not have a significant effect on existing noise levels along the mainline tracks. Vehicle traffic during the operational phase is also not anticipated to have an impact on noise levels along Highway 89. The additional amount of traffic based on the anticipated workforce will be less than 80 vehicles at any shift change period. The FEIS²⁵ and the Jason Report²⁶ concluded that this small increment of additional traffic would have little or no impact on baseline highway traffic noise conditions currently experienced in the area.

²² U.S. Department of Energy, *supra* note 10, at 5-31.

²³ Jason Associates Corporation, *supra* note 2, at C-8.

²⁴ U.S. Department of Energy, *supra* note 23.

²⁵ U.S. Department of Energy, *supra* note 10, at 5-31 and the accompany table of data on 5-32.

²⁶ Jason Associates Corporation, *supra* note 2, at C-8.

C. The Economic Impact of the Facility Upon the Affected Region and the State

During peak construction, the IGCC will employ an average of 600 employees and upwards to 1,000 employees. The FEIS estimates that this employment would also create approximately 690 additional indirect jobs during the construction phase. The construction phase would result in approximately \$56.7 million in direct new income and \$53.2 million in indirect income to the region of interest.²⁷ During the operational phase, the IGCC facility would employ 120 workers onsite in Clark County and would result in approximately \$5.6 million in direct income and \$6.2 million in indirect income on an annual basis going forward.²⁸ Clearly, there is a positive economic impact of KPE's facility for the region of eastern Kentucky and the Commonwealth overall.

D. Whether the Facility is Proposed for a Site Upon Which Existing Generating Facilities, Capable of Generating Ten Megawatts (10mw) or More of Electricity, Are Currently Located

At the J.K. Smith Site, EKPC currently has five gas fired turbine generators capable of generating 80 megawatts each or a total of 400 megawatts. This criteria is clearly met.

E. Whether the Proposed Facility Will Meet All Local Planning and Zoning Requirements that Existed on the Date the Application Was Filed

Both the FEIS²⁹ and the Jason Report³⁰ concluded that the KPE project is exempt from the approval of the Winchester-Clark County Planning Commission³¹ ("Planning Commission").

²⁷ U.S. Department of Energy, *supra* note 10, at 5-6 through 5-8.

²⁸ *Id.*

²⁹ U.S. Department of Energy, *supra* note 10, at 4-2.

³⁰ Jason Associates Corporation, *supra* note 2, at C-4.

³¹ The Winchester-Clark County Planning Commission is a joint city-county planning unit adopted in Article 1, Code of Ordinances, City of Winchester. The Planning Commission was established in accordance with and subject to the Kentucky Planning and Zoning Statutes of KRS Chapter 100.

KPE agrees with these conclusions, but at the request of the Board,³² the legal analysis of the application of this criteria to the record is discussed in further detail below.

1. KPE is not required to obtain the approval of the Planning Commission for the location of its proposed IGCC facility.

The site for the KPE facility is located in Clark County, Kentucky, on approximately 300 acres within the 3,120 acre J.K Smith Site which currently operates five natural gas combustion turbines, a natural gas field with four producing gas wells and two nonproducing gas wells. Although the J.K Smith site is zoned as “agricultural” by the Planning Commission, its use as a power generation site is specifically exempted from the Planning Commission’s approval by KRS 100.324(1). That statute expressly states as follows:

All other provisions of this chapter to the contrary notwithstanding, public utilities operating under the jurisdiction of . . . Federal Energy Regulatory Commission . . . shall not be required to receive the approval of the planning unit for the location or relocation of any of their service facilities. Service facilities include all facilities of such utilities . . . other than office space, garage space, and warehouse space and include office space, garage space, and warehouse space when such space is incidental to a service facility.

KRS 100.324 (1) (emphasis added). See e.g Oldham County Planning and Zoning Commission v. Courier Communications Corp, Ky. App., 722 S.W.2d 904 (1987). (The court determined that neither the Oldham County Planning and Zoning Commission nor the Oldham County Board of Adjustments had jurisdiction over the construction of the transmission tower by virtue of KRS 100.324. Thus, the court found that the utility need not apply for nor obtain any permit approval or variance from either of those agencies for the construction of its tower.)³³ KPE’s IGCC plant clearly meets the definition of a “service facility” because it is not an “office space, garage, or

³²T.E., pp. 129-131.

³³ Since the decision in this case, while the portion of the law subjecting any utility proposing to construct a cell tower to regulation by a planning unit has changed, (KRS 100.987), the application of the statute’s exemption to KPE is not affected.

warehouse space” and to the extent the IGCC facility has office space or warehouse space “such space is incidental to” the IGCC facility. KRS 100.324(1).

KPE also meets the requirement in KRS 100.324(1) of a “public utilit[y] operating under the jurisdiction of . . . Federal Energy Regulatory Commission” because it will be subject to the jurisdiction of the Federal Energy Regulatory Commission (“FERC”) pursuant to § 206 of the Federal Power Act (16 U.S.C.A § 824). The jurisdiction of the FERC to regulate the KPE facility is grounded in 16 U.S.C.A §§ 824 (a) - (d) of the Federal Power Act (“FPA”). It is well established that FERC’s jurisdiction under the FPA applies to dedicated generation facilities like KPE’s project. In Jersey Central Power & Light Company v. Federal Power Commission, 319 U.S. 61 (1943), Jersey Central Power & Light argued that it was not subject to the FPA because all its assets were intrastate and it did not directly transmit across state lines. However, like KPE, Jersey Central Power & Light did connect with and transmit electric energy to another company that in turn transmitted the electric energy across state lines. The Supreme Court held that the sale of locally produced electric energy with the knowledge that the buyer would utilize the energy in another state constituted the transmission of electric energy in interstate commerce. *Id.* at 69. In so holding, the Court noted:

If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired if not rendered futile.

Id. at 71. See also Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515 (1945) and Federal Power Commission v. Southern California Edison Company, 376 U.S. 205 (1964).

Additionally, the decision of Hartford Electric Light Co. v. Federal Power Commission, 131 F.2d 953 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943), is directly on point in this

proceeding. In Hartford, a utility, attempting to escape the FERC's jurisdiction, sold and dissociated itself from all its transmission facilities while maintaining ownership of the generating facilities. The utility entered into a firm power contract with the purchaser of the transmission facilities providing the necessary power for sales to intrastate customers. The utility also sold surplus power to the purchaser of the transmission facilities that was ultimately resold in a neighboring state. In interpreting the language of the FPA, the Court held that:

. . . Section 201 (b) confers jurisdiction over not only facilities (1) for interstate transmission but also—and disjunctively—over facilities (2) for interstate wholesale sales. If the Commission has no jurisdiction under Sec. 201 (b) over generation facilities, then that part of that section conferring jurisdiction over facilities for interstate wholesale sales becomes meaningless—unless there is a third category of facilities, i.e., those used neither for transmission nor for generation. We must, therefore, look for that third category. We find it in petitioner's corporate organization, contracts, accounts, memoranda, papers and other records, in so far as they are utilized in connection with such sales. . . . Congress, we think intended to exempt generation facilities when not used for interstate purposes because, when not so used, they are intrastate facilities; accordingly, when not so used, they are grouped, in the "but" clause, with other non-interstate facilities, i.e., facilities used in local distribution or for interstate transmission. . . . The point is that it is not as such that the generation facilities are subject to the Commission's jurisdiction under Sec. 201 (b), but as facilities used in the business of knowingly selling electric energy wholesale interstate commerce.

Id. at 961 (emphasis added). All sales from the KPE facility will occur under a long term wholesale agreement with EKPC reselling that energy for use in both Kentucky and neighboring states or interstate commerce. As such, under 16 U.S.C.A. 824 (d), the EKPC-KPE transaction is a electric wholesale transaction subject to the jurisdiction of FERC. Additionally, the evidence in the record clearly demonstrates that the energy not required by EKPC to service its native load will be sold off system.³⁴ Because locally produced electric energy will be utilized in another state with the knowledge that the buyer will utilize that energy in another state, the transfer of

³⁴ Testimony of D. Drake From March 6, 2003, T.E., p. 111.

energy by KPE to EKPC constitutes the transmission of wholesale electric energy in interstate commerce under the Federal Power Act. Jersey Central Power & Light Company and Public Utilities Commission v. Attleboro Steam Co., *supra*. Furthermore, under the interpretation of term “facilities” within the FPA as set forth in Hartford Electric Light Co. v. Federal Power Commission, *supra*, the FERC’s jurisdiction extends to KPE’s generating facilities, contracts, etc., and as such, is a “public utility” under 16 U.S.C.A. 824 (e) under the jurisdiction FERC.

In Case No. 2000-075, the PSC recognized that all the electricity produced by KPE will be exclusively sold under a wholesale power contract when it concluded that KPE was not subject to the jurisdiction of the PSC.³⁵ Additionally, in Case No. 2000-079, EKPC and KPE amended their purchase power agreement following the Commission Staff’s recommendation that that agreement should explicitly recognized FERC’s jurisdiction over the purchase power agreement.³⁶ Therefore, pursuant to KRS 100.324(1), KPE is exempt from the Planning Commission’s requirements and approvals because KPE is a public utility operating under the jurisdiction of the FERC.

2. KPE’s project meets all the applicable requirements of the Planning Commission .

Notwithstanding KPE’s exemption from obtaining approval from the Planning Commission for the location of its proposed facility, in determining whether to grant KPE’s requested construction certificate, the Siting Board is required to consider the criteria of “whether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed.” KRS 278.710(1)(e). In reviewing this criteria, it is

³⁵ *In the Matter of: Petition of Kentucky Pioneer Energy, LLC for a Declaratory Order*, Case No. 2000-075, Order, p. 2 (July 13, 2000).

³⁶ *In the Matter of: Application of East Kentucky Power Cooperative, Inc. for Approval of a Power Purchase Agreement with Kentucky Pioneer Energy, LLC*, Case No. 2000-079, Order, p. 4 (July 11, 2000). See KPE’s Response to Siting Board’s First Data Request No. 11 containing Amendment No. 2 to the Power Purchase Agreement (January 21, 2003)

important for the Siting Board to note that there is no conflict between KRS 100.324(1) and KRS 278.710(1)(e). While the Planning Commission does not have jurisdiction over the location of Kentucky Pioneer's proposed facility under KRS 100.324(1)(as a FERC-regulated public utility), the Siting Board does have the authority in determining whether to grant Kentucky Pioneer's request for a construction certificate to consider whether Kentucky Pioneer's proposed facility will meet the Planning Commission's requirements.

As demonstrated below, there are no local zoning requirements in Planning Commission's "Revised Zoning Ordinance, City of Winchester and Revised Zoning Order, Clark County, Kentucky" ("Zoning Order")³⁷ that apply to the project. Further, KPE's proposed project meets the requirements in the Zoning Order for the most similar usage of land. KRS 278.710(1)(e), however, does not and can not expand the jurisdiction of the Planning Commission. Only an amendment by the General Assembly to KRS Chapter 100 could expand a zoning board's jurisdiction (as it did for cell towers in KRS 100.987). Thus, KRS 278.710(1)(e) does not provide a legal basis for the Siting Board to require Kentucky Pioneer to apply for a change in zoning with the Planning Commission. KRS 278.710(1)(e), however, does allow the Siting Board to consider whether the Planning Commission's applicable requirements for potential nuisance factors such as noise and set-back distances are met and to require as a condition of KPE's construction certificate that KPE's project meet such applicable requirements.

A review of the Planning Commission's Zoning Order shows that the Planning Commission does not regulate the construction of a utility's service facilities. Article 6 of the Zoning Order defines the Zoning Districts that fall under the Board's jurisdiction. A utility's

³⁷ See Title 1.2 of the Zoning Order at <http://livepublish.municode.com/v11/lpext.dll/Infobase23/1?f=templates&fn=alt-main-nf.htm&2.0>. (internet address cite).

service facilities do not fall under any of these zoning districts. Section 5.3(A) of the Zoning Order explains that the “Board shall act only within the strict limits of its authority as defined in the Zoning Order. The Board has no authority to vary the use regulations or other regulations not specifically delegated to it. The Board shall not hold hearings on applications or appeals seeking decisions that the Board is not authorized to make.” Thus, there are no requirements of the Planning Commission which apply to Kentucky Pioneer’s project.

To the extent the Siting Board determines to review whether KPE’s facility will meet the Planning Commission’s existing requirements that are most applicable to Kentucky Pioneer project, the Heavy Industrial District (I-2) requirements should be considered because they relate to manufacturing, industrial and related uses which may potentially involve such nuisance factors as noise, air pollution, odor, and vibration. The record shows that KPE’s operation of the IGCC facility falls well below the maximum permitted under the limits established in Article 6.16 of the Zoning Order for these potential nuisances.

Under the most restrictive standard in Article 6.16 of the Zoning Order, noise levels emitted from a Heavy Industrial use shall not exceed 60 dBA during the hours of 7:00 a.m.-9:00 p.m. and 55 dBA during hours of 9:00 p.m.-7:00 a.m. Although the district surrounding the EKPC-KPE area is zoned agricultural and no noise limits are established for agricultural use in the Zoning Order, the FEIS concluded that the noise levels are expected to be 53.4 dBA at the closest structure outside the EKPC area and 44.7 dBA in the community of Trapp (FEIS at 5-31). KPE’s proposed project clearly meets the Zoning Ordinance requirements. Additionally, Article 6.16 establishes a minimum of 300 feet as the set back from adjoining property. The record establishes that KPE’s IGCC facility is set back one mile from the nearest public road and 2500 feet from the nearest point of J.K. Smith’s property boundary. Furthermore, KPE’s activities

will not violate the accessory uses permitted under Article 6.16 or exceed the air pollutants guidelines set up by the Cabinet for Natural Resources and Environmental Protection. Thus, KPE's operation of the IGCC facility meets or exceeds the applicable standards established by the Planning Commission.

In sum, the Siting Board as a matter of law is required do everything possible to interpret and give effect to both KRS 100.324(1) and KRS 278.710(1)(e). It is a well established rule of construction that where there is conflict between statutes or sections thereof (and as shown above, there is none), it is the duty of the court or the agency to attempt to harmonize the interpretation so as to give effect to both sections or statutes, if possible. Ledford v. Faulkner, Ky., 661 S.W.2d 475 (1983). The Siting Board, like the court, must not interpret a statute so as to bring about an absurd or unreasonable result. George v. Alcoholic Beverage Control Board, Ky., 421 S.W.2d 569 (1967). KRS 278.710(1)(e) allows the Siting Board to consider whether KPE's project meets the Planning Commission's applicable requirements in the Zoning Order for potential nuisance factors such as noise and set-back distances and to require as a condition its construction certificate that the project meet the requirements for applicable nuisance factors. KRS 278.710(1)(e) however does not provide a legal basis for the Siting Board to require Kentucky Pioneer to apply for a change in zoning with the Planning Commission. To conclude that KRS 278.710(1)(e) somehow "trumps" KRS 100.324 (1), would make a nullity of KRS 100.324(1) and the absurd result prohibited by George v. Alcoholic Beverage Control Board, Ky., 421 S.W.2d 569 (1967). It is well established that repeals by implication are "never favored and will be sanctioned only when there is such irreconcilable conflict between the two that effect reasonably cannot be given to both acts. The implication of repeal of an act by a later one must be so clear as to be equivalent to an explicit declaration to that effect." Campbell County

Election Commission v. Weber, Ky., 42 S.W.2nd 511, 512 (1931)(and the authorities cited therein). As demonstrated above, because KRS 278.710(1)(e) allows the Siting Board to consider whether KPE's project meets the Planning Commission's applicable requirements in the Zoning Order for potential nuisance factors such as noise and set-back distances and to require as a condition of Kentucky Pioneer's construction certificate that Kentucky Pioneer's project meet the requirements for applicable nuisance factors, there is no irreconcilable conflict between the two statutes such that effect reasonably cannot be given to both KRS 278.710(1)(e) and the exemption provided in KRS 100.324(1).³⁸

F. Whether the Additional Load Imposed Upon the Electric Transmission System by Use of the Merchant Electric Generating Facility Will Adversely Affect the Reliability of Service for Retail Customers of Electric Utilities Regulated by the Public Service Commission

Commonwealth Associates performed an independent review and analysis of the impacts on the reliability of the transmission grid and concluded that the KPE facility will not decrease the reliability of service to retail customers. Commonwealth Associates recommend approval of the Construction Certificate on the condition that future short circuit studies be performed once the in-service date of the project is established.³⁹ EKPC accepted this recommendation.⁴⁰

G. The Exhaust Stack of KPE's Facility is at Least One Thousand (1,000) Feet From the Property Boundary of Any Adjoining Property Owner and Two Thousand (2,000) Feet From Any Residential Neighborhood, School, Hospital, or Nursing Home Facility. . .

The 300-acre lease site for the IGCC facility is entirely enclosed within EKPC's 3,120 acre J.K. Smith Generation Station. The anticipated distance from a proposed exhaust stack to

³⁸ Even if the Siting Board were to find that the proposed facility did not comply with local zoning requirements, it is only one factor of ten that must be considered. While the Siting Board must consider every factor, each individual factor is not determinative of whether the certificate should be granted or denied.

³⁹ Commonwealth Associates, Inc., *Transmission System Review, Kentucky Pioneer Energy Project Case No. 2002-00312*, March 3, 2003, Vol. 1.

⁴⁰ T.E., p. 120

any adjoining property is approximately 2,500 feet. There are no neighborhoods, schools, hospitals or nursing homes within 2,000 feet of the site for the IGCC facility.⁴¹ Thus, KPE's proposed project satisfies the requirements in KRS 278.710(1)(g). The Planning Commission has not established set-back requirements under KRS 278.704(3) for KPE's proposed facility. Even if the existing set-back requirements of the Planning Commission for heavy industrial uses apply to KPE's facility, those requirements would be met. Article 6.161 of the Code of Ordinances for the City of Winchester⁴² requires manufacturing uses to be set-back of 300 feet from any residential land use and 100 feet from any other use except as for light industrial use. KPE's exhaust stack meets the applicable set-back requirements.

H. The Efficiency of Any Proposed Measures to Mitigate Adverse Impacts From the Construction or Operation of the Proposed Facility

The FEIS⁴³ and the Jason Report⁴⁴ identified and recommended several mitigating measures to effectively ameliorate the impact of the IGCC on the region of interest. KPE concurs with these recommendations and accepts and agrees to implement these recommended mitigating measures, as the situation requires.⁴⁵

I. Whether the Applicant Has a Good Environmental Compliance History

KPE has complied and will continue to comply with all applicable environmental regulations and has not received any penalties or fines for environmental compliance violations.⁴⁶

⁴¹ Direct Testimony of Dwight Lockwood, filed February 28, 2003, p. 9.

⁴² Codified through Ordinance No. 10-2002, enacted June 18, 2002 (Supplement No. 47).

⁴³ U.S. Department of Energy, *supra* note 10, at 5-54.

⁴⁴ Jason Associates Corporation, *supra* note 2, at Appendix I-4.

⁴⁵ Direct Testimony of Dwight Lockwood, filed February 28, 2003, p. 9.

⁴⁶ *Id.* at p. 10.

J. The Evidence Shows KPE's Request For a Construction Certificate Satisfies the Nine Criteria Set Forth in KRS 278.710(1)(a) – (g)

In considering KPE's application, the Board also can consider the policy of the General Assembly to encourage the use of coal as a principal fuel for electricity generation.

278.710. The evidence shows that coal will be a principal feedstock for the generation of electricity because the BGL technology cannot create the Syngas without the conversion of both high sulfur coal and RFD. As previously discussed, the Kentucky Coal Council has encouraged the development of this type of clean coal technology for years. (T.E., p. 116).

In sum, the evidence discussed above demonstrates that the Board should award KPE a certificate of construction subject to the conditions rendered by the Board's two consultants and accepted by KPE.

IV. CONCLUSION

The KPE IGCC project will be the first use of this ultra clean coal technology in the United States. It represents the opportunity to provide low cost power to Kentucky customers without the environment impact that is associated with a typical coal fired generating facility and without the associated financial risk. In order to implement this technology, KPE has complied, and will continue to comply, with all applicable permitting and regulatory requirements necessary for the construction and operation of the IGCC facility. Further, KPE has committed to implementing those mitigating factors identified by the FEIS and the Report to reduce the impact of the facility to the local area.

Based upon the uncontroverted conclusions contained in the FEIS, the Jason Report, the Commonwealth Associates report and the evidence presented during the evidentiary hearing of

March 6, 2003, KPE requests that the Board enter an Order granting KPE a Construction Certificate for the IGCC facility located in Clark County, Kentucky.

Dated: March 24, 2003

Respectfully submitted,



Kendrick R. Riggs

Joseph A. Bickett

Ogden Newell & Welch PLLC

1700 PNC Plaza

500 West Jefferson Street

Louisville, KY 40202-2874

Phone: 502-560-4222

COUNSEL FOR KENTUCKY

PIONEER ENERGY, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Post-Hearing Brief was served this 24th day of March 2003, by United States mail, postage prepaid upon:

Robert Blanton
Clark County Planning and Zoning
Post Office Box 40
Winchester, Kentucky

Honorable Drew Graham
Judge/Executive
Clark County Courthouse
Room 103
34 South Main Street
Winchester, Kentucky 40391

Mike Haydon
Office of the Governor
700 Capitol Avenue, Suite 100
Frankfort, Kentucky 40601-3492

James P. Kirby
122 Belmont Avenue
Winchester, Kentucky 40391

Charles A. Lile
Dale W. Henley
East Kentucky Power Cooperative, Inc
Post Office Box 707
Winchester, Kentucky 40392-0707

John Raymond Maruskin
1101 Ironworks Road
Winchester, Kentucky 40391

Hank List
Secretary
Natural Resources and Environmental
Protection Cabinet
Office of Legal Services
Capital Plaza Tower, 5th Floor
500 Mero Street
Frankfort, Kentucky 40601

J.R. Wilhite
Commissioner, Community Development
Economic Development Cabinet
2300 Capital Plaza Tower
500 Mero Street
Frankfort, Kentucky 40601



Counsel for Kentucky Pioneer Energy, LLC