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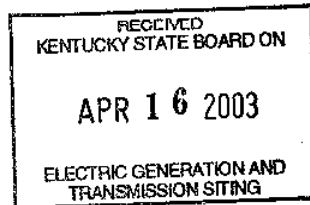
KENDRICK R. RIGGS

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April 15, 2003

Thomas M. Dorman
Executive Director
Kentucky State Board on Electric
Generation and Transmission Siting
211 Sower Boulevard
Frankfort, Kentucky 40601



RE: The Application of Kentucky Pioneer Energy, LLC For a Construction Certificate to Construct a Merchant Electric Generating Facility
Case No. 2002-00312

Dear Mr. Dorman:

I enclose, for the record and for the Kentucky State Board on Electric Generation and Transmission Siting's information, the April 11, 2003 Final Order of the Secretary for the Natural Resources and Environmental Protection Cabinet in File No. DWM-25864-037, *Charles Walters v. Natural Resources and Environmental Protection Cabinet and Kentucky Pioneer Energy, LLC*.

Yours very truly,


Kendrick R. Riggs

KRR/ec
Enclosure

cc: Charles A. Lile (w/ encl.)
Angela Curry (w/ encl.)

274332.01

TENDERED

MAR 05 2003

Office Of Administrative Hearings

CHARLES WALTERS

COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
FILE NO. DWM-25864-037

FILED

APR 11 2003

Office of Administrative Hearings

PETITIONER

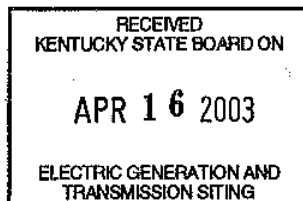
V.

FINAL ORDER

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

and

KENTUCKY PIONEER ENERGY, LLC



RESPONDENTS


THIS MATTER is before the Secretary on the Report and Recommendation of the Hearing Officer. Having considered the Hearing Officer's Report and Recommendation and the Exceptions thereto filed by the parties, and after being otherwise sufficiently advised, it is hereby ORDERED AND ADJUDGED as follows:

1. The Hearing Officer's Report and Recommendation filed on February 20, 2003, 2001 is hereby incorporated by reference as if fully stated herein, EXCEPT as follows:
 - a. Beginning at Section IV, page 12, paragraphs 29-37 of the report are REJECTED.
 - b. Beginning at Section V, page 15, the final paragraph of the report is REJECTED.
2. The Division of Waste Management's June 27, 2002 determination that a local determination and a solid waste permit are not required for the Kentucky Pioneer, LLC facility is supported by the statutes upon which it relied.

3. The Division of Waste Management's June 27, 2002 determination that a local determination and a solid waste permit are not required for the Kentucky Pioneer, LLC facility is AFFIRMED.

4. This is a final and appealable Order.

Entered this the 11th day of April, 2003.



HENRY C. LIST, SECRETARY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

APPEAL RIGHTS

In accordance with the provisions of KRS 224.10-470 and KRS 151.186, appeals may be taken from Final Orders of the Cabinet by filing in Circuit Court a Petition for Review. Such Petition must be filed within thirty (30) days from the entry of the Final Order, and a copy of the petition must be served upon the Cabinet.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2003, a true and accurate copy of the foregoing **FINAL ORDER** was mailed, postage prepaid, to the following:

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and delivered by messenger to:

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DOCKET COORDINATOR

WALTERS.KY.PIONEER.EXCEPTIONS.O

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COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
FILE NO. DWM-25864-037

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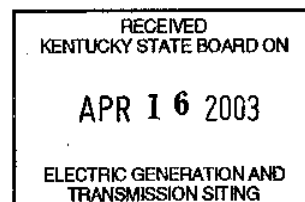
Office of Administrative Hearings

CHARLES WALTERS,

PETITIONER,

VS.

NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
And
KENTUCKY PIONEER ENERGY, LLC,



RESPONDENT.

IN RE: IGCC PLANT

HEARING OFFICER'S REPORT AND RECOMMENDED ORDER

I. STATEMENT OF THE CASE

This matter is before the undersigned on cross motions for summary disposition filed by Petitioner Charles Walters and Respondent Kentucky Pioneer Energy (KPE). The Cabinet joins in KPE's motion.

This case concerns a proposed electric power generation plant in Clark County which will use a synthesis gas derived from thermal treatment of waste-derived pellets and coal to power gas turbines. In structuring its planning for the facility, Global Energy USA (of which KPE is a subsidiary) requested an advance determination that a waste permit would not be required. The Cabinet's Division of Waste Management determined that no waste permit will be needed, based on its determinations that the processed fuel pellets proposed by KPE for use

in the gasification process meet the definition of refuse-derived fuel (RDF), the pellets are recovered material, and the project is a recovered material processing facility.

Petitioner contends that the information included in KPE's submittal of October 9, 2000, was insufficient for the Cabinet to reach an advance determination that no waste permit was required.

Oral arguments were heard on the motions on January 31, 2003. Petitioner was represented by the Hon. Tom Fitzgerald. The Cabinet was represented by the Hon. Jack Bates. KPE was represented by the Hon. Kendrick Riggs.

Based on the following Findings of Fact and Discussion, I conclude that there is no disputed issue as to any material fact and Petitioner is entitled to a summary disposition as a matter of law. Hence, I recommend that Petitioner's motion be granted and KPE's motion be denied.

II. FINDINGS OF FACTS

1. Petitioner Charles Walters is a resident, taxpayer and citizen of Clark County and is an individual within the zone of interests sought to be protected by the solid waste planning laws.
2. The Cabinet's Division of Waste Management (DWM) has the statutory duty of enforcing Kentucky's laws relating to solid waste, as set forth in KRS Chapter 224 and the regulations promulgated pursuant thereto.
3. Kentucky Pioneer Energy LLC, a subsidiary of Global Energy USA, is planning to construct an Integrated Gasification Combined Cycle (IGCC) electric generating plant near the community of Trapp, Clark County, Kentucky. Under contract with East Kentucky Power Cooperative (EKPC), the power generated will be sold and delivered to EKPC for

transmission to its member distribution cooperatives for use in serving their Kentucky customers. KPE anticipates putting the plan into development by June 2003, with start up of the plant anticipated in late 2005 or early 2006.

4. On October 9, 2000, Global Energy sent a letter to DWM requesting concurrence that Kentucky's laws and regulations relating to waste permitting do not apply to the proposed power plant project. The plant will use a clean coal technology which will convert (via a chemical reaction process) high sulfur coal and processed fuel pellets into synthetic gaseous fuel. The processed fuel is a dense pelletized fuel product manufactured offsite out of municipal solid waste (MSW) through a process which typically includes sorting, shredding, addition of a binding agent and pelletizing. The letter explained that the plant would utilize state-of-the-art gasification technology to chemically break down carbon-based feedstock into their basic elemental components.

5. Global's letter presented an analysis of the waste statutes and regulations which it maintained demonstrate that the proposed facility is exempt from waste regulations. In addition, Global provided a six-page analysis of the non-applicability of KRS 224.40 and a one-page schematic of the proposed IGCC process. Global later submitted additional material to DWM consisting of excerpts from two papers regarding the production of dioxin compounds during the process of "gasification" of chlorinated fuels.

6. The project will be the first commercial application of the British Gas/Lurgi fixed bed gasification technology in the United States. KPE explained that extensive separation of the solid waste and production of the processed fuel pellets will occur at the source, near a landfill. At the separate waste facility, the municipal solid waste will be separated by highly

mechanical and automated processes including magnetic removal of iron based metal, electrostatic removal of non-iron (i.e. aluminum) metal, and gravity separation of glass. The remainder, consisting of about 70% paper and 10% plastic, is then shredded and milled into a homogenous mixture that is fairly uniform in size. The shredded material is formed in a mold under pressure to create round fuel pellets about the size of a quarter and one-half inch in thickness.

7. The project will use the equivalent of roughly half of the residential waste generated in Kentucky. In East Kentucky Power Cooperative's responses to questions from the Public Service Commission in its application for approval of a power purchase agreement with Kentucky Pioneer Energy, KPE stated that an estimate of one million tons per year of both coal and RDF would be utilized on an annual basis assuming a 50/50 blend of coal and RDF.

8. In comments made at the public meeting on June 28, 2001, to the federal air permit for the plant¹, KPE explained the process of manufacturing the fuel pellets from MSW, which involves first removing large objects and white goods, then removing recyclable goods such as glass and metal. KPE acknowledged that "(p)lastic components of the MSW have energy content and will be retained in to (sic) RDF."

9. On December 13, 2001, the Kentucky Resources Council filed a response and objection to the position paper offered by Global in its October 9, 2000 submittal. The response stated that the question of whether the proposed coal and waste-fueled facility is subject to the requirements of KRS Chapter 224 as a waste management and waste disposal facility is of significance to the residents of Trapp and of Clark County, since if exempted from the ambit

¹ An Agreed Order was entered on January 3, 2003, in the case initiated by KPE involving the air permit for the plant. File No. DAQ-25321-037.

of the term "municipal solid waste facility," the planned importation of processed municipal solid waste from northeastern states representing the equivalent of "roughly half of the residential waste generated in the entire Commonwealth of Kentucky" will not be subject to scrutiny and a determination by the local governing body of Clark County of the consistency with that county's approved solid waste plan. Kentucky Resources Council made DWM aware that in the air permit KPE acknowledged plastics would be retained in the RDF.

10. On June 27, 2002, in response to Global's letter of October 9, 2000 concerning the applicability of the solid waste statutes and regulations to the proposed gasification of municipal solid waste (MSW) pellets, DWM stated that the finished product as described by Global would be typical for most refuse-derived fuel (RDF). DWM made the following determinations:

- a. the municipal solid waste pellets proposed to be used as feedstock at the proposed IGCC plant would be a refuse derived fuel (RDF);
- b. the RDF would be a recovered material;
- c. the plant would be a recovered material processing facility;
- d. ~~no waste permit is needed for the gasification process.~~

The Cabinet advised KPE that at least 30 days before beginning gasification, it must submit the description of the selected RDF process. The Cabinet stated that it would evaluate if the manufacturing of the fuel meets the statutory definition.²

11. On August 1, 2002, Charles Walters, a resident of Clark County, initiated this case by filing a petition challenging the Cabinet's determination.

² All parties agree that Cabinet's determination of June 27, 2002 is a final determination within the meaning of KRS 224.10-420 even though DWM will make a further evaluation closer to the date when gasification will begin. DWM's determination is referred to by Petitioner as an "advance determination" which KPE sought in order to structure its plans for the plant.

III. DISCUSSION

This case calls for the statutory construction of definitions in KRS 224.01-010 relating to solid waste, the requirements for obtaining a permit, and exemptions. Unless exempted from the definition of "waste site or facility" in KRS 224.01-010(27), the proposed facility would be required to obtain a waste permit. The proposed facility must fall within the definition of "recovered material processing facility" for KPE to avoid the application of the definition of "waste site or facility", with the obligation to obtain a waste permit under KRS 224.40-305.

Applicable Statutes

12. Solid waste is defined as

any garbage, refuse, sludge, and other discarded material ... resulting from industrial, commercial ... and from community activities, **but does not include ... recovered material**
KRS 224:01-010(31)(a).

13. Recovered material is defined as

those materials, including but not limited to compost, which have known current use, reuse, or recycling potential, which can be feasibly used, reused or recycled, and which have been diverted or removed from the solid waste stream for sale, use, reuse, or recycling, whether or not requiring subsequent separation and processing, but does not include materials diverted or removed for purposes of energy recovery or combustion except refuse-derived fuel (RDF)
KRS 224.01-010(20).

14. Refuse-derived fuel is defined as

a sized, processed fuel product derived from the extensive separation of municipal solid waste, which includes the extraction of recoverable materials for recycling and the removal of nonprocessables such as dirt and gravel prior to processing the balance of the municipal solid waste into the refuse-derived fuel product.
KRS 224.01-010(23).

15. Waste site or facility is defined as

any place where waste is managed, processed, or disposed by incineration, landfilling, or any other method, **but does not include** a container located on property where solid waste is generated and which is used solely for the purpose of collection and temporary storage of that solid waste prior to off-site disposal, or a **recovered material processing facility**, or the combustion of processed waste in a utility boiler.

KRS 224.40-010(27).

16. A recovered material processing facility is

a facility engaged solely in the storage, processing, and resale or reuse of recovered material, but does not mean a solid waste management facility if solid waste generated by a recovered material processing facility is managed pursuant to this chapter and administrative regulations adopted by the cabinet.

KRS 224.01-010(21).

17. Municipal solid waste disposal facility is

Any type of waste site or facility where the final deposition of any amount of municipal solid waste occurs, whether or not mixed with or including other waste allowed under subtitle D of the Federal Resource Conservation and Recovery Act of 1976, as amended, **and includes, but is not limited to, incinerators and waste-to-energy facilities that burn municipal solid waste**

...
KRS 224.01-010(15).

Petitioner's Arguments

18. Petitioner contends that the information supplied to DWM in the submittal of October 9, 2000, was insufficient to justify an advance determination that the proposed waste-derived fuel falls within an exemption to the definition of waste. Further, Petitioner urges that KPE's representations in response to the federal air permitting process contradict the Cabinet's conclusion.

19. The crux of Petitioner's argument is that "extensive separation" (a requirement for RDF) as used in KRS 224.01-010(23) means the extraction of recoverable materials for recycling. Thus, Petitioner urges that *all* recoverable materials for recycling must be

extracted. Any processed municipal solid waste stream for which extraction of recoverable materials for recycling has not been complete is, by implication, less than extensive. Petitioner urges that requiring removal of recoverable materials or recycling prior to use of municipal solid waste as a fuel is the only interpretation consistent with both the statutory definition and the priorities established by the General Assembly.

20. There was no evidence, Petitioner points out, before the agency concerning the technological or practical feasibility or infeasibility of complete extraction of recoverable materials for recycling. The extent to which recyclable materials must be separated is set by statute - it is the "recoverable" materials that must be extracted, so that the statute by definition limits the duty to those recyclable materials that are technologically recoverable. Also, the assertion of infeasibility as a defense masks the reality that KPE needs the plastics and paper in the wastes in order to derive the necessary heat values and has no intention of requiring separation of those recyclable papers and plastics whether recoverable or not. Petitioner thus urges that no effort, minimal, extensive, moderate, or otherwise, will be made to remove plastics or paper whether feasible or not.

21. Excluded from the definition of recovered material are "materials diverted or removed for purposes of energy recovery or combustion *unless* the diverted or removed material is refuse-derived fuel (RDF)". Thus, only materials diverted for energy recovery which fall within the definition of "refuse-derived fuel" are considered a "recovered material" under KRS 224.01-010(20). Petitioner urges that the waste-derived fuel is not a "refuse-derived fuel" as defined under KRS 224.01-010(23), and hence, is not a "recovered material". Thus, it is a waste.

22. Petitioner points out that there is nothing in Global's October 9, 2000 submittal that gives a description of the composition of processing of the material into RDF such as would support a conclusion that the municipal solid waste would be subject to extensive separation or that recoverable materials for recycling would be extracted. Leaving 70% paper and 10% plastics may or may not meet the definition, depending on whether those materials were recoverable and recyclable.

23. The Cabinet erred, Petitioner urges, in determining that a waste permit was not needed based on the status of the site as a "recovered material processing facility". Three activities - storage, processing and either reuse or resale - of a recovered material must occur at the facility in order for the facility to be considered a recovered material processing facility. Petitioner urges that KPE acknowledged that no processing will occur at the facility when it stated in the October 9, 2000 submittal that "(t)he proposed site will merely be receiving, storing and reusing the already processed final fuel product, RSD." There is another reason why the facility is not a "recovered material processing facility". "Recovered material" is defined, in the context of the use of diverted materials for energy recovery, only as recovered materials constituting "refuse-derived fuel". So, if the waste feed fails the test to be considered a "refuse-derived fuel", it is not a "recovered material" within the meaning of KRS 224.01-010(20) for purposes of a "recovered material processing facility" in KRS 224.01-010(21).

KPE's Arguments

24. KPE acknowledges that the "linchpin" to Petitioner's argument is that DWM erred in its determination that the processed fuel pellet constitutes RDF.

25. The definition of refuse-derived fuel in KRS 224.01-010(23), KPE argues, does not require the complete elimination of all recoverable material from the processed fuel pellet, but instead requires that "extraction of recoverable materials" must be part of the "extensive separation of municipal solid waste". KPE maintains that the municipal waste will be subjected to extensive or a "considerable amount" (dictionary definition) of separation and thus meets the definition. Indeed, KPE urges that it is technologically and practically infeasible to remove every fiber of plastic or paper once they are intermingled with other waste. Thus, KPE urges that "complete extraction" is an unachievable standard. In addition, KPE explains that a considerable amount of separation of recoverable material will take place, as demonstrated by the affidavit of Dwight Lockwood, Global's vice president of regulatory affairs, explaining the process for separating both iron based and non-iron based metal, and glass. KPE points out that the definition of "recovered material" expressly states that recoverable material is material "which can be feasibly used, reused, or recycled", thus acknowledging that not all paper, plastics or other material can be "feasibly recycled".

26. While acknowledging that plastic components of the MSW have energy content and will be retained in the RDF, KPE says that Petitioner takes its statement out of context by arguing that plastics will be intentionally retained in the municipal solid waste in order to provide needed energy content. Instead, KPE maintains that any plastic remaining in the RDF is extensively commingled in the MSW, compacted, soiled and generally considered to no longer have a use. KPE also argues that because the definition of waste expressly excludes recovered material, and recovered material includes material that has a known use (as well as

material that is defined as RDF), the processed fuel pellets are excluded from the definition of waste.

27. KPE argues that the proposed facility will process (by chemical conversion) or reuse the recovered material to produce synthetic gas. Thus, the facility is processing a recovered material and satisfies the statutory definition for a recovered material processing facility. Because RDF is included in the definition of recovered material, the processing of RDF by the proposed facility clearly satisfies the statutory language defining a recovered material processing facility. KPE urges that since the processing and storage of recovered material in the form of RDF at its proposed IGCC project satisfies the statutory requirements of a recovered material processing facility, DWM did not err in its determination. A recovered material processing facility is specifically excluded from the definition of a waste site.

Cabinet's Arguments

28. The Cabinet joins in the arguments made by KPE and urges that "it does not appear" that the definition of RDF requires 100% removal of recyclables (e.g. plastic) in order for processed material to qualify as RDF. The Cabinet relies on dictionary definitions of the word "extensive". The Cabinet also submits the affidavit of George Gilbert, an environmental engineer consultant with DWM, who evaluated Global's October 9 2000 submittal. He states that DWM did not rely solely on Global's submittal, but in addition, consulted numerous additional sources of information.

IV. CONCLUSIONS OF LAW

29. A hearing officer may grant a motion and render a report and recommended order to the secretary under 401 KAR 100:010 Section 4 if the record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows that:

1. There is no disputed issue as to any material fact; and
2. The moving party is entitled to a summary disposition as a matter of law.

In cross motions for summary disposition, the parties agree there are no material facts in dispute. Based on the following, I conclude that Petitioner is entitled to a summary disposition as a matter of law.

30. A facility handling and disposing of a waste based fuel is required to get a waste permit unless an exemption applies. The waste derived fuel which KPE proposes to use does not meet the statutory definition of RDF because it was not derived from the extensive separation of municipal solid waste.

31. The statutory definition of refuse derived fuel in KRS 22401-010(23) does not allow for *recoverable* materials for recycling to remain in the waste stream. "Extensive separation" is defined by the clause which follows: "which includes the extraction of recoverable materials for recycling...." Thus, before DWM makes a determination that the fuel pellets KPE proposes qualify as RDF it must be assured that any plastics and paper which remain were not recoverable. It cannot simply rely on KPE's self-serving assurances that plastic and paper will have no current use, reuse or recycling value following any separation at the source (e.g. curbside recycling programs) because these materials will have been extensively commingled,

compacted and soiled during the MSW collection activity. Indeed, it was brought to the Cabinet's attention that KPE acknowledged in comments made at the public meeting on the federal air permit that plastic components of the MSW have energy content and will be retained in the processed fuel pellets. However, the Cabinet made no attempt to reconcile KPE's need for the paper and plastic, and intentional retention, with whether in fact they may be recoverable. Based on the information provided, DWM could not determine whether removal of materials leaving 70% paper and 10% plastics meets the definition of extensive separation, because there was no information on whether these materials were in fact recoverable and recyclable.

32. In response to Petitioner's charge that its decision was based on insufficient information, the Cabinet filed the affidavit of George Gilbert stating that DWM consulted information beyond KPE's submittal in reaching its decision. However, this information does not speak to the basic issue in this case, which is reconciling KPE's acknowledgement that paper and plastics are needed and no attempt will be made to recover these materials. There is no competent evidence that the unidentified source of the waste based fuel will remove any plastics and no evidence that the commingled plastics cannot be removed in the same way dirt, metal and glass are removed.

33. If the waste based fuel is not RDF, then it does not qualify as "recovered material" and in turn this proposed facility is not a "recovered material processing facility", but is instead a waste site or facility. The "advance determination" which was sought by KPE so that it could structure its plans for this power plant accordingly gave the Cabinet only a generalized description of the waste stream. However, this generalized description should have alerted the

Cabinet to the fact that paper and plastics will not be removed. In order for the waste derived fuel to qualify as RDF, the Cabinet must require that the process which produces the fuel pellet remove all *recoverable* paper and plastics that are recyclable. KPE is not allowed to pick and choose which parts among the recoverable materials that are recyclable that it will remove. It must remove all recoverable paper and plastics that are recyclable, not just glass and metals.

34. Both KPE and the Cabinet argue that the determination made by DWM, and its construction of the applicable statutes, was reasonable and practical and DWM's expertise, experience and judgment is entitled to deference. While 401 KAR 100:010 Section 3 provides that "(t)he cabinet's experience, technical competence, and specialized knowledge may be utilized by the hearing officer in the evaluation of the evidence," this does not apply here where the facts are agreed upon and the construction of the applicable statutes is a matter of law.

35. It must be remembered that exemptions to KRS Chapter 224 are to be narrowly construed because Chapter 224 is a remedial statute and as such its protections are to be liberally construed. Roland v. Kentucky Retirement Systems, Ky.App., 52 S.W. 3rd 579, 583 (2001). Senate Bill 2, enacted in 1991, revised state and local solid waste management by requiring local communities to plan for the proper management of solid waste generated within their borders and providing that the local governing body responsible for solid waste planning would have the ability to control the manner and extent to which waste generated outside of the boundary of that planning unit would be managed and disposed of within the planning

area. As indicated in KRS 224.43-010(2), it is the policy of the Commonwealth that waste recycling is a higher priority than waste-to-energy facilities.


36. When it should have been clear to DWM that no effort would be made to extract the recoverable recyclable plastics or paper from the waste stream, it was clearly erroneous for DWM to make an advance determination that the waste based fuel was a refuse-derived fuel and the facility would not be required to obtain a waste permit.

37. On remand, it is incumbent on DWM to ascertain the composition of the raw municipal solid waste feedstock. This would enable DWM to make a rational determination as to whether extensive separation (which must include extraction of recoverable materials for recycling) had occurred. The Cabinet erred as a matter of law when it made a determination that the waste derived fuel was RDF based on the information before it (including the representations made by KPE in the federal air permit public meeting).

V. RECOMMENDATIONS

~~Based upon the foregoing Findings of Fact and Conclusions of Law, I recommend that~~
the Secretary enter the attached recommended Order.

So RECOMMENDED this the 20th day of February, 2003.



JANET C. THOMPSON
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OFFICE OF ADMINISTRATIVE HEARINGS
35-36 Fountain Place
Frankfort, Kentucky 40601
Telephone: (502) 564-7312
Fax: (502) 564-4973

EXCEPTION RIGHTS

Pursuant to KRS 224.10-440, any party may file exceptions to this Report and Recommendation within fourteen (14) days of receipt of this Report. The Secretary will then consider this Report, any Exceptions, and the recommended Order and decide this case.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing HEARING OFFICER'S REPORT AND RECOMMENDED ORDER was, on this 20th day of Feb., 2003, mailed by first-class mail, postage prepaid, to:

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And hand delivered to:

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