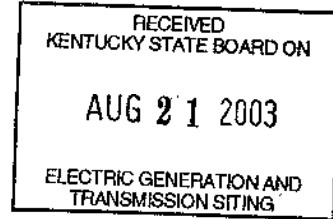


Kentucky Resources Council, Inc.

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(502) 875-2428 phone (502) 875-2845 fax
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www.kyrc.org

August 20, 2003



Docket Coordinator
Kentucky State Siting Board on
Electric Generation and Transmission Siting
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40602

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

Dear Docket Coordinator:

Please find enclosed, for filing, the original and ten (10) copies of the Direct Testimony of Intervenor Charles T. Walters for intervention in the above-captioned case. Mr. Walters is out of state and will return Thursday, and all parties will be hand-served or mailed a copy of the signed version of his testimony prior to the Friday hearing.

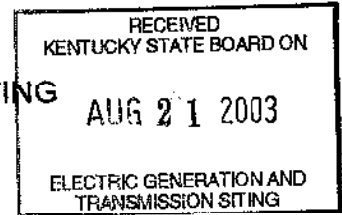
Thank you for your assistance in filing this. All parties of record have been served by mail and those with e-mail on the service list, electronically as well.

Cordially,

A handwritten signature in black ink, appearing to read "Tom FitzGerald". The signature is written over the typed name and title.

Tom FitzGerald
Counsel for Movant

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) IO)
CONSTRUCT A MERCHANT)
ELECTRIC GENERATING FACILITY)

**DIRECT TESTIMONY OF INTERVENOR
CHARLES T. WALTERS**

1 **Please state your name, address, and your occupation.**

2 My name is Charles T. Walters, and I reside at 286 Log Lick Road,
3 Winchester, Kentucky 40391. My mailing address is P.O. Box 553,
4 Winchester, Kentucky, 40392. I am an attorney.

5 **From whom do you purchase your electricity?**

6 I am a member and ratepayer of the Clark County Rural Electric
7 Cooperative, which I understand is a member cooperative of the
8 East Kentucky Power Cooperative.

9 **To your knowledge, does the East Kentucky Power
10 Cooperative have any relationship to the proposed Kentucky
11 Pioneer Energy (KPE) facility for which a construction
12 certificate was denied by the Board in this case.**

13 It is my understanding that the Cooperative has entered into a contract
14 to purchase the output of that facility. I believe that the Public Service

1 Commission has opened a case on whether the Cooperative needs that
2 power and whether it should continue the contract.

3 **Are you currently involved in any litigation concerning the Kentucky
4 Pioneer electricity generating facility? If so, please describe.**

5 Yes, I am Petitioner in a case challenging the determination by the state
6 Natural Resources and Environmental Protection Cabinet that the
7 receipt, handling and disposal of processed municipal waste by the
8 proposed facility would not need a state-issued solid waste permit nor
9 a determination by the county solid waste governing body that the
10 proposed importation of waste was consistent with the local solid waste
11 plan. The Cabinet's Hearing Officer agreed with my position that KRS
12 Chapter 224 does not exempt this waste and that the Cabinet erred;
13 however the Secretary rejected the Hearing Officer's recommendation and
14 held for the Cabinet. The case is on appeal to the Franklin Circuit Court
15 and the opening brief has been filed. Briefing is expected to be completed
16 in November. The case style is Walters v. Natural Resources and
17 Environmental Protection Cabinet and Kentucky Pioneer Energy LLC,
18 Franklin Circuit Court, Division II, Civ. No. 03-CI-561.

19 I have also moved for intervention in the PSC case concerning the EKPC
20 and Kentucky Pioneer contract.

21 **Please summarize your concerns about the proposed plant siting.**

22 While many aspects of this proposed siting concern me, I understand that
23 my intervention in this proceeding is limited to the issue before this Siting

1 Board – that of whether the facility has complied with applicable planning
2 and zoning requirements. I will limit my comments to that issue.

3 I believe that the Siting Board was correct in rejecting the application
4 of Kentucky Pioneer for a construction certificate, because the law,
5 KRS 278.700 through 278.216, requires that before a construction certifi-
6 cate is issued, the approval of the local zoning and planning commission
7 must have already been received.

8 The proposition that this Board can issue a construction certificate before
9 the local planning commission has reviewed and approved the proposed
10 land use as being consistent with the applicable zoning and planning,
11 ignores the plain language of the statute.

12 KRS 278.706(d) demands that the application for a construction
13 certificate, *in order to be deemed complete and ready for review*, must
14 include "a statement certifying that the proposed plant will be in
15 compliance with . . . any local planning and zoning ordinances."

16 Now *if* that is where the statute ended, you might be able to argue that a
17 certification by the applicant that it *will* comply with zoning and planning
18 in the future by applying for zoning approval after the Board issues its
19 certificate is sufficient. But that isn't where the statute ends. The next
20 sentence makes clear that zoning approval must come first, since the
21 statute requires the applicant to disclose "setback requirements
22 established by the planning and zoning commission as provided under
23 KRS 278.704(3)" as part of a completed application to the Board.

1 Obviously, the planning and zoning commission can't establish the
2 setbacks for the proposed facility until it reviews the application.
3 Also, the General Assembly allows the Board to condition the grant of a
4 construction certificate on receiving air, waste and water permits. Had the
5 General Assembly intended the Board's certificate to precede the local
6 zoning approval, given the acknowledgment of the General Assembly that
7 local zoning and planning decisions were to be given deference, one
8 would assume that the ability to condition construction certificates based
9 on obtaining zoning and planning approval would be stated in KRS
10 278.704. Plainly the zoning review was intended to precede Board review.

11 **Do you have other concerns regarding the Kentucky Pioneer request**
12 **that the Board give it approval before proving that it has received**
13 **approval from the Planning Commission as being in compliance**
14 **with local zoning and planning requirements?**

15 Yes. Kentucky Pioneer argued in its post-hearing brief that it is
16 exempt from planning and zoning requirements under KRS Chapter 100,
17 and has not repudiated that position or actually acknowledged the
18 jurisdiction of the Clark County Fiscal Court and the Planning
19 Commission. Nor has Kentucky Pioneer acknowledged that it is subject to
20 planning and zoning regulations and must apply for a zoning map
21 amendment for the proposed use. Instead it has argued that it is exempt
22 under Chapter 100 from obtaining local zoning and planning approval

1 and therefore *in* compliance because there are no applicable zoning
2 regulations. I am concerned that Kentucky Pioneer will receive the
3 construction certificate from the Board based on the representation that it
4 "will comply with all the local planning and zoning requirements of the
5 Planning Commission that existed on December 19, 2002" but that it will
6 not actually apply for zoning approval to the planning commission.

7 In Mr. Musulin's Direct Testimony, he indicates that he believes that
8 the facility complies with local zoning requirements, and that they will
9 "resume discussions" with the Planning Commission, but nowhere does
10 KPE commit that it will apply for the zoning map amendment that the
11 Planning Commission has already indicated it will need.

12 KPE suggests that the "Planning Commission and not the Board should
13 determine whether the proposed use of the property . . . requires a
14 change in the zoning map." That is precisely what the General Assembly
15 intended, which is why the construction certificate must await that deter-
16 mination of compliance by the Planning Commission. It is not up to
17 the applicant to pick and which zoning regulations it believes applicable
18 and to "demonstrate compliance" through testimony to this Board;
19 instead the Planning Commission must supply that answer after proper
20 application for approval, and that action must precede this Board's
21 approval. The Direct Testimony of Mr. Musulin, on page 6, never
22 commits the company to actually apply for the zoning map amendment
23 that the County legislative body and Planning Commission have

1 determined to be needed. Even if the Board had the authority to
2 provisionally approve a construction certificate on a future promise to
3 receive zoning approval, it does not appear to be wise in this case, given
4 the lack of commitment by the company to apply for local zoning approval.

5 **What is your recommendation to the Board?**

6 My recommendation is that the Board deny the construction certificate
7 application as being incomplete, failing to comply with KRS
8 278.706(d), and failing to demonstrate that the proposed activity
9 satisfies the criteria in KRS 278.710(e). The Siting Act does not allow
10 applicants such as Kentucky Pioneer to receive the construction
11 certificate without first obtaining zoning and planning approval for the
12 construction and operation of merchant electric generating facilities such
13 as this plant.

14 **Does this complete your testimony?**

15 Yes.

AFFIDAVIT

Charles T. Walters

Subscribed and sworn to before me, a notary public in the Commonwealth of
Kentucky, by Charles T. Walters, this ____ day of August, 2003.

Notary Public
My commission expires _____

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2 provisionally approve a construction certificate on a future promise to
3 receive zoning approval, it does not appear to be wise in this case, given
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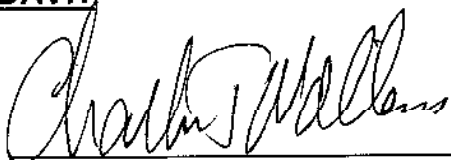
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10 applicants such as Kentucky Pioneer to receive the construction
11 certificate without first obtaining zoning and planning approval for the
12 construction and operation of merchant electric generating facilities such
13 as this plant.

14 **Does this complete your testimony?**

15 Yes.

AFFIDAVIT


Charles T. Walters

Subscribed and sworn to before me, a notary public in the Commonwealth of
Kentucky, by Charles T. Walters, this 29th day of August, 2003.


Notary Public

My commission expires 11/30/04

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Direct Testimony of Intervenor Charles T. Walters was served this 20th day of August, 2002 by priority first-class mail to all parties on the service list and has been e-mailed to all parties whose e-mail was listed on the Service List. A signed and notarized copy of this same Direct Testimony will be supplied at the August 22, 2003 hearing to all parties present and will be mailed to those not then present:

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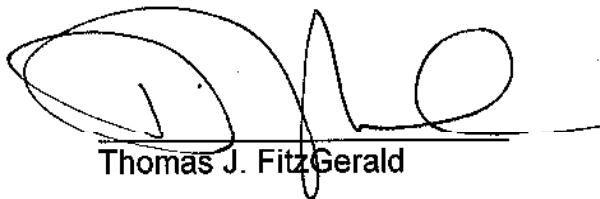
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