COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

APPLICATION OF ECOPOWER GENERATION-HAZARD, LLC FOR A CERTIFICATE TO CONSTRUCT AND OPERATE A MERCHANT ELECTRIC GENERATING FACILITY AND A 69 KV TRANSMISSION LINE IN PERRY COUNTY, KENTUCKY	)	CASE NO. 2009-00530

ORDER

On April 8, 2010, the Applicant in the above-styled case, ecoPower Generation, LLC ("ecoPower"), filed a motion for deviation from the 1,000-foot setback requirement in KRS 278.704(2) ("motion for deviation"). KRS 278.704(2) provides that:

> Except as provided in subsections (3), (4), and (5) of this section, no person shall commence to construct a merchant electric generating facility unless the exhaust stack of the proposed 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.

Pursuant to KRS 278.704(4), the Kentucky State Board on Electric Generation and Transmission Siting ("Siting Board") may grant an applicant's request for a deviation from the 1,000-foot setback requirement in KRS 278.704(2) if "the proposed facility is designed and located to meet the goals of KRS 224.10-280, 278.010, 278.212, 278.214, 278.216, 278.218, and 278.700 to 278.716 at a distance closer than those

provided in subsection (2) of this section." However, ecoPower does not demonstrate in its motion for deviation that its facility has been designed and located to meet the goals of the statutes listed in KRS 278.704(4).

In its motion for deviation, ecoPower argues that "the statutory language and legislative history suggest that the primary purpose of the setback requirement is to protect the expectations of property owners who had no reason to expect the construction of a merchant power plant near their property." In support of this motion, ecoPower provides copies of letters from the two property owners whose properties would be closer than 1,000 feet to the exhaust stack of the proposed facility once it is constructed. In both letters, the property owners state that they are aware of the 1,000-foot setback requirement and that they are aware that the exhaust stack will be closer than 1,000 feet to their properties once the facility is constructed. Both of the property owners state that they support the location of the proposed facility and exhaust stack despite the fact that the facility will not be in compliance with the 1,000-foot setback requirement.

The Siting Board finds that ecoPower's motion for deviation from the setback requirements of KRS 278.704(2) does not provide sufficient support for the Siting Board to make a finding that the goals of KRS 224.10-280, 278.010, 278.212, 278.214, 278.216, 278.218, and 278.700 to 278.716 have been met by the design and location of the proposed facility. In reviewing the language of the statutes listed in KRS 278.704(4), it is not entirely clear how ecoPower has met the "goals" of each of the statutes by the design and location choice of its proposed facility.

For example, KRS 224.10-280 (one of the statutes listed in KRS 278.704(4)) requires that any person wishing to construct a facility for the generation of electric power must submit a cumulative environmental assessment to the Energy and Environment Cabinet, along with a fee for processing the assessment. In its motion for deviation, ecoPower did not explain how its facility has been designed and located to meet the environmental goals of KRS 224.10-280 (which appear to be the identification and mitigation of air and water pollutants, the management of solid wastes, and the management of water withdrawal and usage) despite not being in compliance with the 1,000-foot setback requirement. Absent such information regarding KRS 224.10-280 and the other statutes listed in KRS 278.704(4), it is not possible for the Siting Board to find that the requirements of KRS 278.704(4) have been met.

Based on ecoPower's motion for deviation and being otherwise sufficiently advised, the Siting Board will deny the motion without prejudice. This decision does not preclude ecoPower from submitting either: (a) a revised application showing that the stack location has been moved to accommodate the 1,000-foot setback requirement; or (b) a revised motion for deviation which explains in detail how ecoPower's proposed facility has been designed and located to meet the goals of each statute listed in KRS 278.704(4).

IT IS THEREFORE ORDERED that:

EcoPower's motion for deviation from the setback requirements of KRS 278.704(2) is HEREBY DENIED without prejudice.

By the Kentucky State Board on
Electric Generation and
Transmission Siting

ENTERED
APR 22 2010
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

Executive Director
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on behalf of The Kentucky State Board on
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