

1 AN ACT relating to merchant electric generating facilities.

2 ***Be it enacted by the General Assembly of the Commonwealth of Kentucky:***

3 ➔Section 1. KRS 278.702 is amended to read as follows:

4 (1) There is hereby established the Kentucky State Board on Electric Generation and  
5 Transmission Siting. The board shall be composed of seven (7) members as  
6 follows:

7 (a) The three (3) members of the Kentucky Public Service Commission;

8 (b) The secretary of the Energy and Environment Cabinet or the secretary's  
9 designee;

10 (c) The secretary of the Cabinet for Economic Development or the secretary's  
11 designee;

12 (d) 1. If the facility subject to board approval is proposed to be located in one  
13 (1) county, two (2) ad hoc public members to be appointed by the  
14 Governor from a county where a facility subject to board approval is  
15 proposed to be located:

16 a. One (1) of the ad hoc public members shall be the chairman of the  
17 planning commission with jurisdiction over an area in which a  
18 facility subject to board approval is proposed to be located. If the  
19 proposed location is not within a jurisdiction with a planning  
20 commission, then the Governor shall appoint either the county  
21 judge/executive of a county that contains the proposed location of  
22 the facility or the mayor of a city, if the facility is proposed to be  
23 within a city; and

24 b. One (1) of the ad hoc public members shall be appointed by the  
25 Governor and shall be a resident of the county in which the facility  
26 is proposed to be located.

27 2. If the facility subject to board approval is proposed to be located in more

1 than one (1) county, two (2) ad hoc public members to be chosen as  
2 follows:

3 a. One (1) ad hoc public member shall be the county judge/executive  
4 of a county in which the facility is proposed to be located, to be  
5 chosen by majority vote of the county judge/executives of the  
6 counties in which the facility is proposed to be located; and

7 b. One (1) ad hoc public member shall be a resident of a county in  
8 which the facility is proposed to be located, and shall be appointed  
9 by the Governor.

10 If a member has not been chosen by majority vote, as provided in  
11 subdivision a. of this subparagraph, by thirty (30) days after the filing of  
12 the application, the Governor shall directly appoint the member.

13 3. Ad hoc public members appointed to the board shall have no direct  
14 financial interest in the facility proposed to be constructed.

15 (2) The term of service for the ad hoc members of the board shall continue until the  
16 merchant electric generating facility ~~board issues a final determination in the~~  
17 ~~proceeding~~ for which they were appointed has been constructed and begins  
18 generating electricity for sale. The remaining members of the board shall be  
19 permanent members.

20 (3) The board shall be attached to the Public Service Commission for administrative  
21 purposes. The commission staff shall serve as permanent administrative staff for the  
22 board. The members of the board identified in subsection (1)(a) to (d) of this section  
23 shall promulgate administrative regulations in accordance with KRS Chapter 13A to  
24 implement KRS 278.700 to 278.716.

25 (4) No member of the board shall receive any salary or fee for service on the board or  
26 shall have any financial interest in any facility the application for which comes  
27 before the board, but each member shall be reimbursed for actual travel and

1 expenses directly related to service on the board.

2 (5) The chairman of the Public Service Commission shall be the chairman of the board.  
3 The chairman shall designate one (1) member of the board as vice chairman. A  
4 majority of the members of the board shall constitute a quorum for the transaction  
5 of business. No vacancy on the board shall impair the right of the remaining  
6 members to exercise all of the powers of the board. The board shall convene upon  
7 the call of the chairman.

8 ➔Section 2. KRS 278.704 is amended to read as follows:

9 (1) No person shall commence to construct a merchant electric generating facility until  
10 that person has applied for and obtained a construction certificate for the facility  
11 from the board. The construction certificate shall be valid for a period of two (2)  
12 years after the issuance date of the last permit required to be obtained from the  
13 Energy and Environment Cabinet after which the certificate shall be void. The  
14 certificate shall be conditioned upon the applicant obtaining necessary air, water,  
15 and waste permits. If an applicant has not obtained all necessary permits and has not  
16 commenced to construct prior to the expiration date of the certificate, the applicant  
17 shall be required to obtain a valid certificate from the board.

18 (2) Except as provided in subsections (3), (4), and (5) of this section, no construction  
19 certificate shall be issued to construct a merchant electric generating facility unless  
20 the exhaust stack of the proposed facility and any wind turbine is at least one  
21 thousand (1,000) feet from the property boundary of any adjoining property owner  
22 and all proposed structures or facilities used for generation of electricity are two  
23 thousand (2,000) feet from any residential neighborhood, school, hospital, or  
24 nursing home facility. For purposes of applications for site compatibility certificates  
25 pursuant to KRS 278.216, only the exhaust stack of the proposed facility to be  
26 actually used for coal or gas-fired generation or, beginning with applications for site  
27 compatibility certificates filed on or after January 1, 2015, the proposed structure or

1 facility to be actually used for solar or wind generation shall be required to be at  
2 least one thousand (1,000) feet from the property boundary of any adjoining  
3 property owner and two thousand (2,000) feet from any residential neighborhood,  
4 school, hospital, or nursing home facility.

5 (3) If the merchant electric generating facility is proposed to be located in a county or a  
6 municipality with planning and zoning, then decommissioning and setback  
7 requirements from a property boundary, residential neighborhood, school, hospital,  
8 or nursing home facility may be established by the planning and zoning  
9 commission. Any decommissioning requirement or setback established by a  
10 planning and zoning commission for a facility in an area over which it has  
11 jurisdiction shall:

12 (a) Have primacy over the decommissioning requirements in subsection (2)(m)  
13 of Section 3 of this Act and the setback requirement in subsections (2) and (5)  
14 of this section; and

15 (b) Not be subject to modification or waiver by the board through a request for  
16 deviation by the applicant, as provided in subsection (4) of this section or  
17 otherwise.

18 (4) The board may grant a deviation from the requirements of subsection (2) of this  
19 section on a finding that the proposed facility is designed to and, as located, would  
20 meet the goals of KRS 224.10-280, 278.010, 278.212, 278.214, 278.216, 278.218,  
21 and 278.700 to 278.716 at a distance closer than those provided in subsection (2) of  
22 this section.

23 (5) If the merchant electric generating facility is proposed to be located on a site of a  
24 former coal processing plant in the Commonwealth where the electric generating  
25 facility will utilize on-site waste coal as a fuel source, then the one thousand (1,000)  
26 foot property boundary requirement in subsection (2) of this section shall not be  
27 applicable; however, the applicant shall be required to meet any other setback

1 requirements contained in subsection (2) of this section.

2 (6) If requested, a merchant electric generating entity considering construction of a  
3 facility for the generation of electricity or a person acting on behalf of such an entity  
4 shall hold a public meeting in any county where acquisition of real estate or any  
5 interest in real estate is being considered for the facility. A request for such a  
6 meeting may be made by the commission, or by any city or county governmental  
7 entity, including a board of commissioners, planning and zoning, fiscal court,  
8 mayor, or county judge/executive. The meeting shall be held not more than thirty  
9 (30) days from the date of the request.

10 (7) The purpose of the meeting under subsection (6) of this section is to fully inform  
11 landowners and other interested parties of the full extent of the project being  
12 considered, including the project time line. One (1) or more representatives of the  
13 entity with full knowledge of all aspects of the project shall be present and shall  
14 answer questions from the public.

15 (8) Notice of the time, subject, and location of the meeting under subsection (6) of this  
16 section shall be posted in both a local newspaper, if any, and a newspaper of general  
17 circulation in the county. Notice shall also be placed on the Web sites of the  
18 unregulated entity, and any local governmental unit. Owners of real estate known to  
19 be included in the project and any person whose property adjoins at any point any  
20 property to be included in the project shall be notified personally by mail. All  
21 notices must be mailed or posted at least two (2) weeks prior to the meeting.

22 (9) The merchant electric generating entity or a person acting on behalf of a merchant  
23 electric generating entity shall, on or before the date of the public meeting held  
24 under subsection (6) of this section, provide notice of all research, testing, or any  
25 other activities being planned or considered to:

26 (a) The Energy and Environment Cabinet;

27 (b) The Public Service Commission;

- 1 (c) The Transportation Cabinet;
- 2 (d) The Attorney General; and
- 3 (e) The Office of the Governor.

4 (10) ~~[(A person that, on or before April 10, 2014, has started acquiring interests in real~~  
 5 ~~estate for a project as described in subsection (6) of this section shall hold a meeting~~  
 6 ~~that complies with this section within thirty (30) days of April 10, 2014.~~

7 ~~(11)~~ Subsections (6) to (9)~~[(10)]~~ of this section shall not apply to any facility or project  
 8 that has already received a certificate of construction from the board.

9 ➔Section 3. KRS 278.706 is amended to read as follows:

10 (1) Any person seeking to obtain a construction certificate from the board to construct a  
 11 merchant electric generating facility shall file an application at the office of the  
 12 Public Service Commission.

13 (2) A completed application shall include the following:

14 (a) The name, address, and telephone number of the person proposing to  
 15 construct and own the merchant electric generating facility;

16 (b) A full description of the proposed site, including a map showing the distance  
 17 of the proposed site from residential neighborhoods, the nearest residential  
 18 structures, schools, and public and private parks that are located within a two  
 19 (2) mile radius of the proposed facility;

20 (c) Evidence of public notice that shall include the location of the proposed site  
 21 and a general description of the project, state that the proposed construction is  
 22 subject to approval by the board, and provide the telephone number and  
 23 address of the Public Service Commission. Public notice shall be given within  
 24 thirty (30) days immediately preceding the application filing to:

- 25 1. Landowners whose property borders the proposed site; and
- 26 2. The general public in a newspaper of general circulation in the county or  
 27 municipality in which the facility is proposed to be located;

- 1 (d) A statement certifying that the proposed plant will be in compliance with all  
2 local ordinances and regulations concerning noise control and with any local  
3 planning and zoning ordinances. The statement shall also disclose setback  
4 requirements established by the planning and zoning commission as provided  
5 under KRS 278.704(3);
- 6 (e) If the facility is not proposed to be located on a site of a former coal  
7 processing plant and the facility will use on-site waste coal as a fuel source or  
8 in an area where a planning and zoning commission has established a setback  
9 requirement pursuant to KRS 278.704(3), a statement that the exhaust stack of  
10 the proposed facility and any wind turbine is at least one thousand (1,000) feet  
11 from the property boundary of any adjoining property owner and all proposed  
12 structures or facilities used for generation of electricity are two thousand  
13 (2,000) feet from any residential neighborhood, school, hospital, or nursing  
14 home facility, unless facilities capable of generating ten megawatts (10MW)  
15 or more currently exist on the site. If the facility is proposed to be located on a  
16 site of a former coal processing plant and the facility will use on-site waste  
17 coal as a fuel source, a statement that the proposed site is compatible with the  
18 setback requirements provided under KRS 278.704(5). If the facility is  
19 proposed to be located in a jurisdiction that has established setback  
20 requirements pursuant to KRS 278.704(3), a statement that the proposed site  
21 is in compliance with those established setback requirements;
- 22 (f) A complete report of the applicant's public involvement program activities  
23 undertaken prior to the filing of the application, including:
- 24 1. The scheduling and conducting of a public meeting in the county or  
25 counties in which the proposed facility will be constructed at least ninety  
26 (90) days prior to the filing of an application, for the purpose of  
27 informing the public of the project being considered and receiving

- 1 comment on it;
- 2 2. Evidence that notice of the time, subject, and location of the meeting
- 3 was published in the newspaper of general circulation in the county, and
- 4 that individual notice was mailed to all owners of property adjoining the
- 5 proposed project at least two (2) weeks prior to the meeting; and
- 6 3. Any use of media coverage, direct mailing, fliers, newsletters, additional
- 7 public meetings, establishment of a community advisory group, and any
- 8 other efforts to obtain local involvement in the siting process;
- 9 (g) A summary of the efforts made by the applicant to locate the proposed facility
- 10 on a site where existing electric generating facilities are located;
- 11 (h) Proof of service of a copy of the application upon the chief executive officer
- 12 of each county and municipal corporation in which the proposed facility is to
- 13 be located, and upon the chief officer of each public agency charged with the
- 14 duty of planning land use in the jurisdiction in which the facility is proposed
- 15 to be located;
- 16 (i) An analysis of the proposed facility's projected effect on the electricity
- 17 transmission system in Kentucky;
- 18 (j) An analysis of the proposed facility's economic impact on the affected region
- 19 and the state;
- 20 (k) A detailed listing of all violations by it, or any person with an ownership
- 21 interest, of federal or state environmental laws, rules, or administrative
- 22 regulations, whether judicial or administrative, where violations have resulted
- 23 in criminal convictions or civil or administrative fines exceeding five
- 24 thousand dollars (\$5,000). The status of any pending action, whether judicial
- 25 or administrative, shall also be submitted;~~and~~
- 26 (l) A site assessment report as specified in KRS 278.708. The applicant may
- 27 submit and the board may accept documentation of compliance with the



1 National Environmental Policy Act (NEPA) rather than a site assessment  
2 report; and

3 (m) A decommissioning plan that shall describe how the merchant electric  
4 generating facility will be decommissioned and dismantled following the  
5 end of its useful life. The decommissioning plan shall, at a minimum,  
6 include plans to:

7 1. Remove all above-ground facilities and any underground components  
8 and foundations of above-ground facilities to a depth of three (3) feet  
9 below the surface grade of the land in or on which the component was  
10 installed;

11 2. Return the land to a substantially similar state as it was prior to the  
12 commencement of construction;

13 3. Leave any interconnection or other facilities in place for future use at  
14 the completion of the decommissioning process;

15 4. Secure a bond or other similar security to assure financial  
16 performance of the decommissioning obligation, provided that:

17 a. The amount of the bond or similar security shall be determined  
18 by an independent, professional engineer who is experienced in  
19 the decommissioning of electric generating facilities and has no  
20 financial interest in either the merchant electric generating  
21 facility or any parcel of land upon which the merchant electric  
22 generating facility is located. The amount of the bond or similar  
23 security shall be either:

24 i. The net present value of the total estimated cost of  
25 completing the decommissioning plan, less the current net  
26 salvage value of the merchant electric generating facility's  
27 components; or

1                    ii. In an amount required by a county or municipal  
 2                    government that has established a decommissioning bond  
 3                    or similar security obligation in the county or municipality  
 4                    where the merchant electric generating facility will be  
 5                    located;

6                    b. The bond or other similar security names the landowner from  
 7                    whom the applicant leases land as the primary beneficiary; and

8                    c. If the merchant electric generating facility is to be located in a  
 9                    county or municipality that has not established a  
 10                    decommissioning bond or other similar security obligation, the  
 11                    bond or other similar security shall name the county or  
 12                    municipality as a secondary beneficiary with the county's or  
 13                    municipality's consent;

14                    5. Communicate with the affected landowner at the end of the merchant  
 15                    electric generating facility's useful life so that any requests of the  
 16                    landowner that are in addition to the minimum requirements set forth  
 17                    in this paragraph may, in the sole discretion of the applicant or its  
 18                    successor or assign, be accommodated; and

19                    6. Incorporate the requirements of paragraph (m)1. to 5. of this  
 20                    subsection into the applicant's leases with landowners.

21 (3) Application fees for a construction certificate shall be set by the board and  
 22 deposited into a trust and agency account to the credit of the commission.

23 (4) Replacement of a merchant electric generating facility with a like facility, or the  
 24 repair, modification, retrofitting, enhancement, or reconfiguration of a merchant  
 25 electric generating facility shall not, for the purposes of this section and KRS  
 26 224.10-280, 278.704, 278.708, 278.710, and 278.712, constitute construction of a  
 27 merchant electric generating facility.

1 (5) The board shall promulgate administrative regulations prescribing fees to pay  
2 expenses associated with its review of applications filed with it pursuant to KRS  
3 278.700 to 278.716. All application fees collected by the board shall be deposited in  
4 a trust and agency account to the credit of the Public Service Commission. If a  
5 majority of the members of the board find that an applicant's initial fees are  
6 insufficient to pay the board's expenses associated with the application, including  
7 the board's expenses associated with legal review thereof, the board shall assess a  
8 supplemental application fee to cover the additional expenses. An applicant's failure  
9 to pay a fee assessed pursuant to this subsection shall be grounds for denial of the  
10 application.

11 ➔Section 4. KRS 278.710 is amended to read as follows:

12 (1) Within one hundred twenty (120) days of receipt of an administratively complete  
13 application, or within one hundred eighty (180) days of receipt of an  
14 administratively complete application if a hearing is requested, the board shall, by  
15 majority vote, grant or deny a construction certificate, either in whole or in part,  
16 based upon the following criteria:

- 17 (a) Impact of the facility on scenic surroundings, property values, the pattern and  
18 type of development of adjacent property, and surrounding roads;
- 19 (b) Anticipated noise levels expected as a result of construction and operation of  
20 the proposed facility;
- 21 (c) The economic impact of the facility upon the affected region and the state;
- 22 (d) Whether the facility is proposed for a site upon which existing generating  
23 facilities, capable of generating ten megawatts (10MW) or more of electricity,  
24 are currently located;
- 25 (e) Whether the proposed facility will meet all local planning and zoning  
26 requirements that existed on the date the application was filed;
- 27 (f) Whether the additional load imposed upon the electricity transmission system

1 by use of the merchant electric generating facility will adversely affect the  
2 reliability of service for retail customers of electric utilities regulated by the  
3 Public Service Commission;

4 (g) Except where the facility is subject to a statewide setback established by a  
5 planning and zoning commission as provided in KRS 278.704(3) and except  
6 for a facility proposed to be located on a site of a former coal processing plant  
7 and the facility will use on-site waste coal as a fuel source, whether the  
8 exhaust stack of the proposed merchant electric generating facility and any  
9 wind turbine is at least one thousand (1,000) feet from the property boundary  
10 of any adjoining property owner and all proposed structures or facilities used  
11 for generation of electricity are two thousand (2,000) feet from any residential  
12 neighborhood, school, hospital, or nursing home facility, unless a different  
13 setback has been requested and approved under KRS 278.704(4). If a planning  
14 and zoning commission has established setback requirements that differ from  
15 those under KRS 278.704(2), the applicant shall provide evidence of  
16 compliance. If the facility is proposed to be located on site of a former coal  
17 processing plant and the facility will use on-site waste coal as a fuel source,  
18 the applicant shall provide evidence of compliance with the setback  
19 requirements provided in KRS 278.704(5);

20 (h) The efficacy of any proposed measures to mitigate adverse impacts that are  
21 identified pursuant to paragraph (a), (b), (e), or (f) of this subsection from the  
22 construction or operation of the proposed facility; ~~and~~

23 (i) Whether the applicant has a good environmental compliance history; ***and***

24 ***(j) Whether the decommissioning plan complies with the requirements of***  
25 ***subsection (2)(m) of Section 3 of this Act.***

26 (2) When considering an application for a construction certificate for a merchant  
27 electric generating facility, the board may consider the policy of the General

1 Assembly to encourage the use of coal as a principal fuel for electricity generation  
2 as set forth in KRS 152.210, provided that any facility, regardless of fuel choice,  
3 shall comply fully with KRS 224.10-280, 278.212, 278.216, and 278.700 to  
4 278.716.

5 (3) A person that has received a construction certificate for a merchant electric  
6 generating facility shall:

7 (a) File with the board the copy of the bond or other similar security that,  
8 pursuant to subsection (2)(m)4. of Section 3 of this Act, is required by a  
9 county or a municipal government or as part of a decommissioning plan, no  
10 later than the date upon which the construction of the merchant generating  
11 facility commences, and refile an updated copy at least once every five (5)  
12 years thereafter;

13 (b) Not transfer rights and obligation under the certificate without having first  
14 applied for and received a board determination that:

15 1.{(a)} The acquirer has a good environmental compliance history; and

16 2.{(b)} The acquirer has the financial, technical, and managerial capacity  
17 to meet the obligations imposed by the terms of the approval or has the  
18 ability to contract to meet these obligations;

19 (c) File with the board a notice of the date that construction is complete and the  
20 merchant electric generating facility begins producing electricity for sale;  
21 and

22 (d) Following the date the merchant electric generating facility begins  
23 producing electricity for sale, file a notice of any transaction involving the  
24 transfer or sale of ownership, control, or the right to control the merchant  
25 electric generating facility, with lessors of property where the merchant  
26 electric generating facility is located, the board, the county judge/executive  
27 of a county and, if applicable, the mayor of a municipality in which the

1 merchant electric generating facility is located, within five (5) days of  
 2 completing the transaction. The notice shall include the name, street  
 3 address, telephone number, and e-mail address of the person acquiring  
 4 ownership, control, or the right to control the merchant electric generating  
 5 facility.

6 (4) A person that has acquired a merchant electric generating facility from the  
 7 applicant or its successor or assign shall file with the board within ten (10) days  
 8 of completing the acquisition:

9 (a) A written consent to assume the obligations set forth in the  
 10 decommissioning plan as of the date the acquisition occurred; and

11 (b) A notice of adoption of an existing bond or other similar security previously  
 12 filed pursuant to subsection 3(a) of this section or a replacement bond or  
 13 other similar security that complies with subsection (2)(m)4. of Section 3 of  
 14 this Act. An existing bond or other similar security shall be adopted, or a  
 15 replacement bond or other similar security shall be in place, as of the date  
 16 the acquisition occurs so that there is no lapse in coverage of the  
 17 decommissioning bond or other similar security. A person making a filing  
 18 pursuant to this subsection shall file an updated bond or other similar  
 19 security that complies with subsection (2)(m)4. of Section 3 of this Act at  
 20 least once every five (5) years.

21 ➔Section 5. KRS 278.718 is amended to read as follows:

22 The provisions of KRS 278.700, 278.704, 278.706, 278.708, and 278.710 shall ~~be in~~  
 23 ~~addition to, and shall~~ not supplant, any other state or federal law, including the powers  
 24 available to local governments under the provisions of home rule under KRS 67.080,  
 25 67.083, 67.850, 67.922, 67A.060, 67C.101, and 82.082. An ordinance, permit, or license  
 26 issued by a local government shall have primacy over the provisions and requirements  
 27 of KRS 278.700 and Sections 2, 3, and 4 of this Act, and any conflict between an order

- 1 *of the board and a local ordinance, permit, or license shall be resolved in favor of the*
- 2 *local government's ordinance, permit, or license.*