COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
FILE NO. DAQ-27602-042
PERMIT NO. V-02-043 R2

SIERRA CLUB, VALLEY WATCH, INC., and
SAVE THE VALLEY, INC.,

PETITIONERS,

VS.

ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
and
LOUISVILLE GAS AND ELECTRIC COMPANY,

RESPONDENTS.

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Exhibit 8

289. The Petitioners in their Memorandum argue as a principal of law that under 401 KAR 51:017, Section 8 (the general provisions pertaining to BACT analysis) and 401 KAR 51:001, Section 1(25) (definition for BACT) the Cabinet, in the course of determining the appropriate BACT emissions limit, should have required LG&E to consider cleaner fuels. The error, in the opinion of the Petitioners, is further compounded by the fact that the applicant did not justify an exemption from the requirement to employ such fuel.

290. In support of its legal argument, the Petitioners relied on cases that primarily have dealt with BACT analysis for SO_2 emission limits, and argued that 40 U.S.C. § 7479(3) of the CAA requires at a minimum a consideration of cleaner fuels in determining whether the SO_2 emission is BACT. To that end, the Petitioners maintain that the permit application did not contain any analysis or discussion as to whether the cleanest blend of low sulfur coal should be used. The argument basically stands for the proposition that the requirements of BACT with its top-down analysis and reference to clean coals require the permit applicant to use the cleanest coal possible as a starting point and then and only then reject that possibility based upon factors of achievability such as economic, energy or other environmental concerns. Petitioners' Memorandum at 59. Thus, the Petitioners maintain as an argument of law that the applicant, contrary to this protocol, has presumed the use of the worse coal in terms of sulfur emissions and has not set out any unique facts that would justify the use of a dirtier coal, so to speak. Thus, the permit application, in the Petitioners' view, sets forth only conclusions, not analysis, as to cost information for the various blends or other factors which would justify the use of the performance coal (the dirtier coal) instead of the Test Coal B.

291. As was the case in Count 15, these assertions of principles of law are to a very large extent utterly dependent on the facts of the case, and thus can only be accepted if the material facts are undisputed. In an effort to establish this point, Petitioners point out as being an undisputed fact that a cleaner coal from the blends being used at the facility could have been selected for the control of PM/PM_{10} and SAM. This assertion is based on their interpretation of the vendor proposals which indicated a far more stringent limit could be obtained for PM/PM_{10} if Test Coal B had been used instead of the designated performance coal. In addition, with respect to SO_2 which they maintain was improperly netted out, the 50/50 blend would be required because of its lower sulfur content and its related effect as to the amount of SAM that would be emitted. Since this evidence is undisputed in the Petitioners' view, there is no reason why the Cabinet should not have requested LG&E to consider the use of a cleaner type of coal or at least justify with more detail why it wasn't going to be used.

292. An auxiliary contention, which was also raised as to Count 15, can be found in Part c of the Petitioners Memorandum. This contention stands for the premise that even if unique factors were present justifying the use of the performance coal, BACT nevertheless requires LG&E to include a control efficiency for the burning of its coal, which was not set forth in the permit application. The foundation for this argument is based on the following observation:

> For example a WESP may have to operate at maximum control at maximum inlet concentrations of sulfuric acid mist to meet a static permit limit. It can, however, operate at lower efficiencies when the inlet concentration decreases and still meet the applicable static numeric emissions limit. Operation of control at maximum degree of reduction at lower inlet concentrations, conversely, would result in a great reduction that would simply meeting a static permit limit at such concentrations.

Petitioners' Memorandum at 66. (Emphasis added)

293. In their Response the Respondents make the following key assertions:

a. There is no basis either in fact or in law supporting an argument that a BACT analysis requires a clean coal analysis for any regulated PSD pollutant other than SO_2. SO_2 was netted out and hence a clean coal analysis was not required.
b. Petitioners' arguments that it should use only a 50/50 blend of coal or cleaner would only arguably result in an environmental benefit and would require the facility to redefine its emission source. (Emphasis added).

294. As to the latter argument, it is not surprising that LG&E would prefer to frame the Petitioners' argument that the facility should be required to use a low sulfur coal in terms of it being an impermissible re-defining project and thus reply on Thoroughbred as being dispositive of this issue. Thoroughbred does seemingly at first blush stand "solidly" for the proposition that with respect to the use of certain kinds of equipment such as an IGCC, the Cabinet has in place a long standing interpretation that such considerations do not have to be included in a BACT analysis for a PC facility. However, as to whether "redefining the source policy" has any merits to an argument regarding the necessity of a BACT analysis for clean coal, that assertion is not nearly as well supported by the case law or US EPA guidance. To that end, the Hearing Officer will point out that Mr. Campbell was hard pressed to point to any such guidance during his deposition. And in fact the Respondents really do not point to any compelling case authority clearly standing for that proposition. See Campbell Deposition, Vol. 2 at 80-81.[97]

295. Nor can it be said that Thoroughbred is necessarily dispositive of the non-necessity of performing a clean coal analysis. In that case, the Hearing Officer concluded that Sierra had made out a persuasive case that the BACT analysis was not sufficient and that the

[97] This is not to say that the witnesses did not in their expert opinion say that using other coals would effectively redefine the source. However, Ms. Andrews after making the point deferred to her engineers and her engineer basically stated the proposition but could not readily point to any interpretative guidance on the point. Depositions of Andrews at 39; Campbell at 71-74, and Lausman at 38-45.

Cabinet erred in not requiring Thoroughbred to perform a clean coal analysis when it accepted the applicants' contentions that coal washing was not economically feasible. It should be noted that this decision was made in conjunction with an earlier conclusion of law by Hearing Officer Thompson that the Cabinet erred when it agreed with Thoroughbred that consideration of the IGCC as a control technology was an impermissible redefinition of the source. This latter conclusion was rejected by the Secretary at some length in her Secretary's Order as summarized above.

296. However, with respect to the Hearing Officer's conclusions relating to the issue of whether Hearing Officer Thompson erred as a matter of law in concluding that the Cabinet should have also required a clean coal analysis, Secretary Wilcher in rejecting this conclusion stated in a rather cursory ruling that in her opinion the Petitioners did not have enough evidence to be persuasive on this issue. Thoroughbred (Secretary's Final Order at 34 – Slip Opinion). The Secretary, however, did not provide any opinion as to whether such a clean coal analysis was precluded because of a concern that requiring the facility to use a cleaner coal would compel the facility to redefine its combustion equipment. Thus, Thoroughbred does not support the Respondents' arguments that clean coal analysis is not required because it might be considered an impermissible redefinition of the emission source. This issue can be reserved for a different day because as will be discussed below, the underlying facts supporting the Petitioners' assertions are in fact in considerable dispute, and the Respondents are therefore entitled to a recommendation in their favor as a matter of law.

297. As to the question of whether the facts are undisputed, this Count clearly illustrates the difficulty the Petitioners have in mounting a successful argument that they are