BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC, FISK GENERATING STATION	)	
Petitioner,	)	
v.	)	**PCB No. 2006-57**
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

To: Dorothy Gunn, Clerk
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board **RESPONSE TO AGENCY MOTION FOR LEAVE TO FILE A SURREPLY**, copies of which are herewith served upon you.

Joshua R. More

Dated: December 30, 2005

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RESPONSE TO AGENCY MOTION FOR LEAVE TO FILE A SURREPLY

Petitioner, MIDWEST GENERATION, LLC, FISK GENERATING STATION ("Petitioner"), by and through its attorneys, submits this Response in opposition to Respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's (the "Agency"), motion for leave to file a surreply to Petitioner's December 2, 2005 reply regarding the issue of a stay. In support of this Response, the Petitioner states as follows:

1. On November 3, 2005, attorneys for the Petitioner filed this appeal with the Illinois Pollution Control Board ("Board") challenging certain permit conditions contained within the Clean Air Act Permit Program ("CAAPP") permit issued with respect to Petitioner by the Agency on September 29, 2005.

2. As part of its appeal Petition, Petitioner stated that the CAAPP permit is not effective until completion of the administrative process, which includes this appeal, pursuant to the Administrative Procedure Act ("APA") (5 ILCS 100/10-65), but, as a protective matter, Petitioner in the alternative, moved for a stay of the effectiveness of the

entire CAAPP permit pursuant to the Board's discretionary authority (collectively referred to as a "request for stay").

3. On November 18, 2005, the Agency responded to Petitioner's request for stay by filing a document entitled "Motion in Opposition to Petitioner's Request for Stay." As acknowledged by the Agency, the November 18, 2005 "Motion" was inartfully titled, and the pleading was not a motion but instead a "response" to the Petition. *See* Respondent's Motion for Leave, ¶ 6 n. 1.

4. On December 2, 2005, Petitioner filed a reply to the Agency's November 18, 2005 filing. The Agency received an electronic version of Petitioner's December 2, 2005 reply the same date.

5 Under date of December 19, 2005, the Agency filed with the Board, and served by mail on December 20, 2005 a surreply with an attached Motion for Leave to file the surreply.

6. The asserted basis for the Agency's motion is that Petitioner's December 2, 2005 reply contains misstatements concerning the Agency's arguments and that the Agency will be unduly prejudiced if it is not provided the opportunity to file a surreply. The only discernable, alleged misstatements by Petitioner were Petitioner's refusal to agree with, in fact, affirmative disagreement with the Agency's rather strained interpretation of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/40.2).

7. Upon a close examination of the surreply, it becomes clear that the surreply does nothing more than repeat the arguments previously set forth in the Agency's November 18, 2005 response.

8. First, the Agency once again asserts that implicit within Section 39.5(7)(i) of the Act is an exemption from Section 10-65(b) of the APA. *See* Agency's Surreply at pages 2-4. (Sometimes it even appears the Agency is arguing the General Assembly simply amended the APA, by language in the Act, to limit the automatic stay of the APA for CAAPP permits just to the contested provisions, while the uncontested provisions remain in effect: "implicitly revealing that the non-challenged portion of the permit should remain in effect during the appeal period . . ." Agency's Surreply at 3 (emphasis added). This stretches statutory construction beyond all breaking points.) As set forth in Petitioner's Reply, to read into Section 39.5(7)(i) of the Act an exclusion of the APA's automatic stay provision when the legislature chose not to include an exemption is an impermissible departure from the unambiguous statutory language. *See* Petitioner's Reply at pages 4-8. If the legislature had intended to accomplish the result espoused by the Agency, it could easily have done so by specifying that the APA does not apply in the CAAPP permit appeal context. *Id.* It chose not to do so, however. This illustrates that the Agency is simply re-arguing an issue that has already been briefed.

9. Second, the Agency asserts that a stay of the effective date should not run to the entire permit because Petitioner's challenge of the effective date is somehow limited in scope. *See* Agency's Reply at pages 4-5. The Agency's argument misstates the nature of the issue raised in Petitioner's appeal. Petitioner is concerned with the fact that the effective date set forth in the permit is the same date as the issuance date. For the reasons set forth in its Petition and Reply, it is unreasonable to expect Petitioner to have anticipated the final permit to the degree necessary for it to have been in compliance on the issuance date. *See* Petitioner's Petition at pages 12-14 and Reply at

page 12. Therefore, the effective date should not be the issuance date. Again, the Agency is arguing an issue that was, or certainly should have been argued in its November 18, 2005 response.

10. Third, the Agency once again asserts that a stay of the entire permit is not necessary because the uncontested conditions are not interwoven or linked with the contested conditions. *See* Agency's Surreply at pages 5-6. This argument, as more fully discussed in Petitioner's Reply, misconstrues the facts. *See* Petitioner's Reply at 12-13. Several uncontested conditions are, in fact, linked to contested conditions, and if the Board were to stay only the contested conditions, these uncontested conditions would become meaningless.

11. Finally, the Agency once again asserts that administrative confusion will not occur if a partial stay is granted because the underlying state operating permits become a nullity upon the issuance of the CAAPP permit. *See* Agency's Reply at pages 6-7. If the Agency is correct in its argument, there is no permit in effect under which a source can operate if a stay is issued by the Board, as has been the Board's practice in other CAAPP permit appeals. Even the partial stay that the Agency seems to support would result in a gap in permit coverage under the Agency's interpretation of the Act. The General Assembly could not have reasonably intended for a source to operate without permit coverage.

12. The Board's rules, which do not even authorize a reply as a matter of right, clearly disfavor endless pleadings on a matter. Here, the Agency has shown no material prejudice and is merely trying to re-argue or support positions it argued or should have argued in its prior pleading.

WHEREFORE, the Petitioner respectfully requests that the Board deny the Agency's Motion for Leave to File Surreply.

Respectfully submitted,

MIDWEST GENERATION, LLC
FISK GENERATING STATION

by: Joshua R. More

One of Its Attorneys

Dated: December 30, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December 2005, I did serve, by electronic filing, by electronic mail, and by U.S. Mail postage prepaid, a true and correct copy of the attached **RESPONSE TO AGENCY MOTION FOR LEAVE TO FILE A SURREPLY,** upon the following persons:

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