

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

**CENTERPOINT ENERGY - MISSISSIPPI
RIVER TRANSMISSION, LLC,**

Petitioner

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,**

Respondent.

**PCB 12-14
(Permit Appeal - CAAPP)**

**MOTION TO CONFIRM AUTOMATIC STAY OF
EFFECTIVENESS OF CAAPP PERMIT AND REQUEST TO GRANT STAY OF
EFFECTIVENESS OF ENTIRE CAAPP PERMIT**

NOW COMES Petitioner, CENTERPOINT ENERGY - MISSISSIPPI RIVER TRANSMISSION, LLC ("Petitioner"), and hereby requests the Illinois Pollution Control Board ("Board") grant a stay of effectiveness regarding the entire Clean Air Act Permit Program permit as issued to Petitioner or, in the alternative, confirm the automatic stay of the contested conditions within the CAAPP permit.

In support thereof, Petitioner states as follows:

1. On June 14, 2011, the Illinois Environmental Protection Agency ("IEPA") issued a final CAAPP Permit (No. 1 19818AAA) ("CAAPP Permit") for Petitioner's St. Jacob Natural Gas Compressor Station ("Compressor Facility") and the St. Jacob Natural Gas Storage and Transmission ("Storage Facility") located in St. Jacob, Illinois.

2. Today, October 14, 2011, Petitioner has filed a Petition to Appeal and is seeking Board review of the CAAPP Permit.

3. Section 105.304 of the Board's rules states that the "petition may include a request to stay the effectiveness of a denial of the CAAPP Permit until final action is taken by the Board pursuant to Section 40.2 of the Act." 35 Ill. Admin. Code § 105.304.

4. Section 40.2(f) of the Act states that "[i]f requested by the applicant, the Board **shall** stay the effectiveness of all the **contested conditions** of a CAAPP permit. The Board **may** stay the effectiveness of **any or all uncontested conditions** if the Board determines that the uncontested conditions would be affected by its review of contested conditions." (Emphasis added) 415 ILCS 5/40.2(f).

5. The Board, as discussed in more detail below, has held that the provision of the Administrative Procedure Act ("APA"), 5 ILCS 100/1, et seq., regarding automatic stays of licenses¹ is applicable to the appeal of CAAPP permits issued by the IEPA. *In the Matter of Dynegy Midwest Generation, Inc. (Havana Power Station) v. Illinois EPA*, PCB 06-7 1 (Ill.Pol.Control.Bd. Feb. 16, 2006) (hereafter cited as "*Dynegy*").²

¹ The APA defines "license" to include "the whole or part of any agency permit. .. 5 ILCS 100/1-35 . "Licensing" includes "the agency process respecting the grant, denial, renewal, revocation, annulment. withdrawal. or amendment of a license." 5 ILCS 100/1-40 .

² See also *Midwest Generation, LLC, Crawford Generating Station v. Illinois EPA*, PCB 06-56 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Midwest Generation, LLC, Fisk Generating Station Illinois EPA*, PCB 06-57 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Midwest Generation, LLC, Joliet Generating Station v. Illinois EPA*, PCB 06-58 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Midwest Generation, LLC, Powerton Generating Station v. Illinois EPA*, PCB 06-59 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Midwest Generation, LLC, Will County Generating Station v. Illinois EPA*, PCB 06-60 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Southern Illinois Power Cooperative v. Illinois EPA*, PCB 06-61 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Kincaid Generation, LLC v. Illinois EPA*, PCB 06-62 (Ill.Pol.Control.Bd. Feb. 16,2006); *Dynegy Midwest Generation, Inc. (Baldwin Energy Complex) v. Illinois EPA*, PCB 06-63 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Ameren Energy Generating Company, Cofeen Power Station v. Illinois EPA*, PCB 06-64 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Electric Energy Incorporation v. Illinois EPA*, PCB 06-65 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Ameren Energy Resources Generating Company, Duck Creek Power Station v. Illinois EPA*, PCB 06-66 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Ameren Energy Resources Generating Company, Edwards Power Station v. Illinois EPA*, PCB 06-67 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Ameren Energy Generating Company, Newton Power Station v. Illinois EPA*,

6. The APA states, in part, in regards to licensing:
- (a) When any licensing is required by law to be preceded by notice and an opportunity for a hearing, the provisions of this Act concerning contested cases shall apply.
 - (b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court.

- (d) Except as provided in subsection (c), no agency shall revoke, suspend, annul, withdraw, amend materially, or refuse to renew any valid license without first giving written notice to the licensee of the facts or conduct upon which the agency will rely to support its proposed action and an opportunity for a hearing in accordance with the provisions of this Act concerning contested cases. At the hearing, the licensee shall have the right to show compliance with all lawful requirements for the retention, continuation, or renewal of the license. If however, the agency finds that the public interest, safety, or welfare imperatively

PCB 06-68 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Ameren Energy Generating Company, Merodosia Power Station v. Illinois EPA*, PCB 06-69 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Ameren Energy Generating Company, Hutsonville Power Station v. Illinois EPA*, PCB 06-70 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Dynegy Midwest Generation, Inc. (Hennepin Power Station) v. Illinois EPA*, PCB 06-72 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Dynegy Midwest Generation (Vermilion Power Station) v. Illinois EPA*, PCB 06-73 (Ill.Pol.Control.Bd. Feb. 16, 2006); *Dynegy Midwest Generation, Inc. (Wood River Power Station) v. Illinois EPA*, PCB 06-74 (Ill.Pol.Control.Bd. Feb. 16, 2006); *City of Springfield v. Illinois EPA*, PCB 06-75 (Ill.Pol.Control.Bd. Feb. 16, 2006).

requires emergency action, and if the agency incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Those proceedings shall be promptly instituted and determined.

- (e) Any application for renewal of a license that contains required and relevant information, data, material, or circumstances that were not contained in an application for the existing license shall be subject to the provisions of subsection (a). 5 ILCS 100/10-65. (Emphasis added.)

7. In *Borg-Warner Corporation v. Mauzy*, 100 Ill. App. 3d 862 (3d Dist. 1981) ("*Borg- Warner*"), the only case to interpret the APA licensing provision in the context of the Act and its regulations, the petitioner filed a timely application to renew its NPDES permit. Although the court addressed several issues, it did determine that the Section 10-65 of the APA applied to NPDES permits and concluded that the petitioner's original NPDES permit continued in effect until the Board issued a final decision on the NPDES permit appeal. Similarly, the Board has held that "the APA's automatic stay provision applies to ... CAAPP permit[s]." *Dynegy* at *7.

8. In *Dynegy*, *Dynegy Midwest Generation ("DMG")* appealed a CAAPP permit issued by the Illinois EPA to DMG for its facility located in Havana, Illinois. In its appeal DMG argued that the APA's automatic stay procedures apply to the appeal of CAAPP permits. The Board, in making the determination that the APA's automatic stay provisions apply to CAAPP permits, reviewed Section 10-65 of the APA, and quoting the Borg-Warner Court stated:

Under applicable Illinois statutes, such a stay of the effectiveness of a renewal permit is required. In this case Borg-Warner made application for renewal of its NPDES permit, that application was timely and sufficient on the record before us, and therefore its original permit continues in effect until final action on the application by the administrative bodies charged with making the determination. A final decision, in the sense of a final and

binding decision coming out of the administrative process before the administrative agencies with decision making power, will not be forthcoming in the instant case until the PCB rules on the permit application, after Borg-Warner has been given its adjudicatory hearing before the PCB. Thus, until that time, under section 16(b), the effectiveness of the renewed permit issued by the EPA is stayed.

Dynegy at * 5 (quoting *Borg-Warner* at 870-871.)

9. Thus, the Board held in *Dynegy* that of CAAPP permits are automatic by operation of law.

10. The Board also noted in *Dynegy* that "[i]f necessary, the Agency may certainly choose to bring legislative attention to the problem." *Dynegy* at *8. The "problem" being any concern USEPA may have with "the applicability of the APA stay provisions in CAAPP appeals " *Id.* Subsequently, in 2008, legislation was introduced in the Illinois General Assembly that would have amended the APA to provide that the automatic stay provision in Section 10-65 of the APA no longer applies to CAAPP permits. *See* S.B. 2640, 95th Gen. Assem. (Ill. 2008). However, the proposed legislation was never enacted into law.

11. The Board determined in *Dynegy* that the automatic stay provisions apply in CAAPP permit appeals. Accordingly, the Final Permit issued on June 14, 2011 to Petitioner is automatically stayed, and the Final Permit is not effective. Further, the Final Permit for Petitioner will not be effective until a final order is issued by the Board on Petitioner's Petition to Appeal Final CAAPP Permit, and the IEPA acts in accordance with the Board's order. Thus, the stay of the Petitioner permit was automatic by operation of law on the day of issuance, June 14, 2011.

12. Petitioner, therefore, requests confirmation from the Board that the Final Permit was automatically stayed pursuant to the APA and Section 40.2(f) of the Act, until the final Board decision on the permit has been made. Accordingly, the Final Permit was never effective,

and Petitioner's existing permits will continue in full force and effect. In addition, Petitioner remains subject to all applicable federal and state regulations.

13. In the alternative, should the Board determine that the automatic stay in accordance with the APA does not apply in this instance, Petitioner requests that the Board exercise its discretion and stay the effectiveness of the entire Final Permit, in accordance with Section 105.304(b) of the Board's rules, in order to prevent irreparable harm to Petitioner and to protect the clearly ascertainable right of Petitioner to appeal permit conditions. The Board has stated:

In determining whether a discretionary stay is appropriate, the Board may refer to four factors: (1) a certain and clearly ascertainable right needs protection; (2) irreparable injury will occur without the stay; (3) no adequate remedy at law exists; and (4) there is a probability of success on the merits.

Board Order, *Bridgestone/Firestone Of-Road Tire Co. v. Illinois EPA*, PCB No. 02-31 at *6 (Ill.Pol.Control.Bd. Nov. 1, 2001) (hereafter "*Bridgestone*"). (Citations omitted.); see also Board Order, *Oasis Industries, Inc. v. Illinois EPA*, PCB No. 04-166 at *1 (Ill.Pol.Control.Bd. May 6, 2004) (hereafter "*Oasis*"). The Board has also held that "it is not required to specifically address each of these factors in making a stay determination." *Oasis* at * 1 (citing *Bridgestone*).

14. As noted above, Petitioner has a certain and clearly ascertainable right to appeal CAAPP permit conditions. 415 ILCS 5/40.2; see also *Bridgestone* at *7 (stating the "Board finds that the petitioner's right to appeal the permit condition is a certain and ascertainable right that needs protection"). The Final Permit imposes requirements that are not supported by the Act or Board regulations. Petitioner would be irreparably harmed if required to implement the requirements of the Final Permit. See *Id.* (stating "the Board is persuaded that the petitioner's appeal of the permit condition would be rendered moot if it had to comply with the contested

condition during appeal"). The numerous conditions at issue, once automatically stayed, would prevent the remaining conditions of the Final Permit from being effective. In addition, the issuance of a stay of the entire Final Permit will not harm the public or the environment as the Facility will continue to operate in accordance with all applicable federal and state regulations, and the Facility's existing permits remain in full force and effect.

WHEREFORE, Petitioner, CENTERPOINT ENERGY - MISSISSIPPI RIVER TRANSMISSION, LLC requests the Board to grant a stay of effectiveness of Petitioner's entire CAAPP Permit or, in the alternative, confirm the automatic stay of effectiveness of the contested conditions for the CAAPP Permit issued on June 14, 2011 until the Board's final action in this matter.

Respectfully submitted,

DATED: October 14, 2011

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