BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R24-17
PROPOSED CLEAN CAR AND	)	(Rulemaking – Air)
TRUCK STANDARDS	)	
PROPOSED 35 ILL. ADM. CODE 242	)	

NOTICE OF FILING

TO: Persons on Attached Service List

PLEASE TAKE NOTICE THAT on the 29th day of August 2024, the undersigned electronically filed with the Clerk of the Illinois Pollution Control Bard, via the "COOL" System, Appearances of Kara M. Principe, Melissa L. Binetti, and Michael J. McNally and Motion to Dismiss on behalf of the Indiana, Illinois, Iowa Foundation for Fair Contracting, true and correct copies of which are attached hereto and hereby served upon you.

INDIANA, ILLINOIS, IOWA
FOUNDATION FOR FAIR
CONTRACTING

DATE: August 29, 2024

By: /s/ *Kara M. Principe*

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CERTIFICATE OF SERVICE

I, Kara M. Principe, Counsel for the Indiana, Illinois, Iowa Foundation for Fair Contracting, caused to be served on this 29th day of August 2024, a true and correct copy of the Notice of Filing, Appearances of Kara M. Principe, Melissa L. Binetti, and Michael J. McNally, and Motion to Dismiss upon the persons listed on the Service List via electronic mail or electronic filing, as indicated.

By: /s/ *Kara M. Principe*

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APPEARANCE

I, Kara M. Principe, hereby file my appearance in this matter on behalf of the Indiana, Illinois, Iowa Foundation for Fair Contracting, as an interested party. I authorize the service of documents by email at: kprincipe@iiiffc.org.

Respectfully Submitted,

DATE: August 29, 2024

By: /s/ *Kara M. Principe*

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APPEARANCE

I, Michael J. McNally, hereby file my appearance in this matter on behalf of the Indiana, Illinois, Iowa Foundation for Fair Contracting, as an interested party. I authorize the service of documents by email at: mcnally@iiiffc.org.

Respectfully Submitted,

DATE: August 29, 2024

By: /s/ *Michael J. McNally*

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APPEARANCE

I, Melissa L. Binetti, hereby file my appearance in this matter on behalf of the Indiana, Illinois, Iowa Foundation for Fair Contracting, as an interested party. I authorize the service of documents by email at: mbinetti@iiiffc.org.

Respectfully Submitted,

DATE: August 29, 2024

By: /s/ *Melissa L. Binetti*

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INDIANA, ILLINOIS, IOWA FOUNDATION FOR FAIR CONTRACTING MOTION TO DISMISS

NOW COMES the Indiana, Illinois, Iowa Foundation for Fair Contracting ("IIIFFC"), by one of its attorneys, pursuant to 35 Ill. Adm. Code 102.212(c) and (d) and 35 Ill. Adm. Code 101.500, hereby respectfully moves to dismiss Proponent's Proposed Clean Car and Truck Standards rulemaking. In support of its motion, the IIIFFC states as follows:

INTRODUCTION

On June 27, 2024, the Sierra Club, National Resources Defense Council Environmental Defense Fund, Respiratory Health Association, Chicago Environmental Justice Network, and Center for Neighborhood Technology ("Proponents") filed Proposed Clean Car and Truck Standards pursuant to Section 27 and 28 of the Environmental Protection Act ("Act"). 415 ILCS 5/27 and 28.

Proponents contend that the Illinois Pollution Control Board ("Board") has the legal authority to adopt California's Advanced Clean Cars II ("ACC II"), Advanced Clean Trucks ("ACT"), and Low-Nitrogen Oxides Omnibus ("Low NOx") under Sections 8 and 10 of the Act (415 ILCS 5/8 and 10) and with authorization under the federal Clean Air Act ("CAA") (42 USC §§7521, 7543). Neither Section of the Act grants the Board authority to adopt ACC II or ACT.

Proponents also contend the Board has authority under the CAA as it authorizes states to certify emission standards set by the U.S. EPA or by California, however, the State of Illinois has not authorized the Board to promulgate rules to adopt the standards pursuant to the CAA.

A proposal will be dismissed for inadequacy in cases in which the Board, after evaluating the proposal, cannot determine the statutory authority on which the proposal is made. 35 Ill. Adm. Code 102.212(c). Any person may file a motion challenging the statutory authority or sufficiency of the proposal under 35 Ill. Adm. Code 101.Subpart E. 35 Ill. Adm. Code 102.212(d).

The IIIFFC challenges the statutory authority of the Board under State and federal law to adopt Proponents' proposed rules for the reasons stated herein. The IIIFFC respectfully requests the Board dismiss this matter for lack of statutory authority pursuant to 35 Il. Adm. Code 102.212(c) and (d) and 35 Ill. Adm. Code 101.500.

DISCUSSION

I. The Board lacks the regulatory authority under State law to consider adopting the ACC II and ACT rules.

a. Relevant law

The Board was created by the Illinois Environmental Protection Act ("Act") and serves a quasi-legislative function as it relates to rulemaking, within the framework established by the Act. *Landfill, Inc. v. Pollution Control Bd.*, 74 Ill. 2d 541, 554 (1978). "An agency charged with enforcing a statute is given inherent authority and wide latitude to adopt regulations or policies reasonably necessary to perform the agency's statutory duty." *Chemed Corp. Inc. v. Illinois Department of Revenue*, 186 Ill. App. 3d 402, 410 (1989).

However, this authority is not absolute. Administrative agencies do not possess inherent or common law powers. *Illinois Dept. of Revenue v. Illinois Civil Serv. Comm'n*, 357 Ill.App.3d

352, 363-34 (2005). It is well established that agencies are limited to the powers vested in them by statute and their rules and regulations are only valid when implemented "in furtherance of the intention of the legislature as stated within the four corners of the statute." *People v. Illinois Pollution Control Bd.*, 119 Ill. App. 3d 561, 565 (1st Dist. 1983), *aff'd and remanded sub nom. People v. Pollution Control Bd.*, 103 Ill. 2d 441, 469 N.E.2d 1102 (1984). A regulation is valid only insofar as it implements the law, "only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined." *Id.*

In delegating legislative power to an administrative agency, the General Assembly "must establish intelligible standards to guide the officers of the agency in exercising that power." *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill.2d.540, 551 (1977); *Rockford Drop Forge Co. v. Pollution Control Bd.*, 71 Ill. App. 3d 295, 303 (2d Dist. 1979) (Seidenfeld, J., concurring), *aff'd*, 79 Ill. 2d 271 (1980).

To that end, rules promulgated without statutory authority are invalid. *Eastman Kodak Co. v. Fair Employment Practices Commission*, 86 Ill. 2d 50 (1981); *Board of Trustees of University of Illinois v. Illinois Educational Labor Relations Board*, 274 Ill. App. 3d 145, 148 (1995); *Landfill, Inc.*, 74 Ill. 2d. at 554 (if the Pollution Control Board lacks statutory authority to promulgate rules, the rules are void). In determining whether the Act justifies the Board's assertion of authority, the statutory language must be analyzed. *Landfill, Inc.*, 74 Ill. 2d. at 553.

"In construing a statute, divining the legislative intent of the language, as well as the purpose of a statute, is determinative. The cardinal rule in statutory construction is that the statute be construed so as to ascertain and give effect to the intention of the General Assembly as expressed in the statute." *Vill. of Lombard v. Pollution Control Bd.*, 66 Ill. 2d 503, 507 (1977) (internal citations omitted). The language of the statute is the most reliable indicator of the

legislature's intent where it is given plain and ordinary meaning. *Town & Country Utilities, Inc. v. Illinois Pollution Control Bd.*, 225 Ill. 2d 103, 117 (2007).

Further, words and phrases in a statute must be construed in light of other relevant provisions of the statute and should be read to yield logical and meaningful results to avoid constructions that render specific language meaningless or superfluous. *Id.*; *Rochelle Disposal Serv., Inc. v. Illinois Pollution Control Bd.*, 266 Ill. App. 3d 192, 198 (2d Dist. 1994). Finally, where there is a specific statutory provision, and where there is a general statutory provision either in the same or another act which relates to the same subject that the specific provision relates to, the specific provision should be applied. *U. S. Steel Corp. v. Pollution Control Bd.*, 64 Ill. App. 3d 34, 43 (1st Dist. 1978).

b. Analysis

In arguing the Board has authority under state law to adopt ACC II and ACT allowing for the limitation on sales of combustion-engine vehicles, Proponents point to Sections 8 and 10 of the Act.

Section 8 of the Act contains general findings of the General Assembly in enacting "Title II: Air Pollution" stating that air pollution is a public health issue and that the purpose of Title II is to restore, maintain, and enhance the purity of the air in the State. 415 ILCS 5/8.

Section 10 grants the Board the authority to adopt regulations to promote the purposes of Title II ("… to restore, maintain, and enhance the purity of the air in the State. …" (415 ILCS 5/8)) and contains a non-exhaustive catalog of regulations the Board can prescribe "without limiting the generality of this authority." 415 ILCS 5/10.

i. No implicit authority granted

While Section 8 is a broad statement of legislative findings, of which legislative intent can be inferred, and Section 10 grants general rulemaking authority, this is hardly an implied grant of authority to enact regulations that would limit the use and sale of combustion-engine vehicles.

In *Vill. of Lombard v. Pollution Control Bd*, the Illinois Supreme Court held the Act was neither sufficiently broad nor sufficiently specific to authorize the Board to promulgate regulations requiring the regional treatment of wastewater. 66 Ill. 2d at 506. The court noted that the specific authority granted by the Act included, among other things, standards for water quality, sewage treatment permits, and water pollution abatement. *Id.* Noting the list was not exclusive, the court stated it was obvious that the establishment of mandatory regional water treatment regions to build, operate, and maintain such systems is broader regulation of water treatment than the establishment of standards. *Id.* In concluding the lack of authority, the court reasoned:

> Mindful of the admonition that we must be wary against interpolating our notions of policy in the interstices of legislative provisions', we find no legislative intent in the [Act] to authorize the [Board] to promulgate a regulation involving detailed intervention by the Board into the economic and political operation of a county and the municipalities and sanitary districts within the county. Nor do we find an intent to permit the Board to compel independent governmental entities to cooperate with one another. An examination of the four corners of the [Act] fails to show vesting such authority in the [Board]. Indeed, wanting is the reference to even the possibility of such authority.
>
> The [Act] establishes the broad policy of the State to restore, maintain, and enhance the purity of the waters of the State. It expressly enjoins anyone from causing, threatening or allowing the discharge of any contaminant into the waters of the State. It grants the [Board] authority to adopt regulations to promote the [Act's] purposes and provisions and lists matters upon which the Board may regulate ‘without limiting the generality of this authority’. All the matters specified involve the establishment of standards.
> …

> The statute in question expresses a general policy to protect the State from pollution and creates a board of experts to implement that policy through regulation. Nowhere does it authorize a regional water-pollution plan requiring the cooperation of independent units of local government.

Id. at 506-507 (internal citations omitted).

In the case at hand, Section 8 establishes the broad policy of the State to "restore, maintain, and enhance the purity of the air in the State," granting the Board authority to adopt regulations that promote the purposes and provisions of Title II, while Section 10 lists matters the Board may regulate "without limiting the generality of this authority."[1] However, nothing in the Act authorizes the Board to intervene into the economic and political operation of the State by limiting or banning the sale of combustion-engine vehicles. There are no intelligible standards with which to guide the Board in establishing rules to limit or ban the sale or use of combustion-engine vehicles. There is no implicit grant of rulemaking authority in the enabling statute that would encompass such a regulation.

ii. No explicit authority granted

Notably and curiously, in arguing the Board has the explicit authority to adopt ACC II and ACT, Proponents point to a specific grant of authority contained in Section 10 but omit a crucial portion that renders it inapplicable to the proposed rules. The section states (Proponents' omitted sections italicized):

> Sec. 10. Regulations.
> (A) The Board, pursuant to procedures prescribed in Title VII of this Act, may adopt regulations to promote the purposes of this Title. Without limiting the generality of this authority, such regulations may among other things prescribe:

[1] Title II regarding air pollution and Title III regarding water pollution are analogous in their rulemaking authority as analyzed in *Vill. of Lombard v. Pollution Control Bd* because Sections 11 and 13 under Title III are identical in relevant part to Sections 8 and 10, respectively, under Title II ("… the pollution … of this State constitutes a menace to public health and welfare, creates public nuisances … purpose of this Title to restore, maintain and enhance the purity …" (415 ILCS 5/8, 11)); ("The Board, pursuant to procedures prescribed in Title VII of this Act, may adopt regulations to promote the purposes and provisions of this Title. Without limiting the generality of this authority, such regulations may among other things prescribe…" (415 ILCS 5/10, 13)).

> …
> (d) Standards and conditions regarding the sale, offer, or use of any *fuel*, vehicle, or other article *determined by the Board to constitute an air-pollution hazard*;
> …

415 ILCS 5/10(A).

The clear reading of Section 10 limits Board authority to the sale, offer, or use of any fuel or vehicle *determined by the Board to be an air-pollution hazard*. In omitting the phrase "determined by the Board to constitute an air-pollution hazard," Proponents ignore the intent of the legislature and render these words superfluous.

It is clear from the plain language of the Act, that in order for the Board to adopt a rule regarding the sale or use of any fuel or vehicle, the Board must first determine that fuel or vehicle to constitute an air-pollution hazard. Surely, the legislature would not have explicitly included this phrase had it intended for the Board to have the authority to regulate the sale and use of vehicles under any circumstance under its general rulemaking authority to "restore, maintain, and enhance" air quality. Without this phrase the result would be illogical, essentially granting the Board overly broad authority to regulate the sale or use of vehicles or fuels even if they emit non-hazardous substances such as hydrogen, for example. This reading contradicts the intent of the legislature in that Title II exists to control air pollution hazards as it relates to fuel and vehicles, not control any non-hazardous substance released into the air.

The next inquiry, then, is to determine whether combustion-engine vehicles, gasoline, or diesel are deemed a hazard of which the Board may regulate. Fortunately, we need not guess at what air pollution the Board deems hazardous. The Act specifically excludes petroleum and gas usable for fuel from the definition of "hazardous substance." The Act defines "hazardous substance" as:

> [A]ny hazardous air pollutant listed under Section 112 of the Clean Air Act (P.L. 95-95) as amended… The term does not include petroleum … and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel or mixtures of natural gas and such synthetic gas.

415 ILCS 5/3.215(E).

Thus, the explicit authority under Section 10(A)(d) to which Proponents cite to enact ACC II and ACT is misplaced. In fact, the legislature has explicitly denied the Board rulemaking authority with regard to the sale, offer, or use of any petroleum or gas usable for fuel as those cannot be defined as hazardous. Proponents' omission of the language suggest they are also aware of this exclusion. Moreover, nowhere in the Act is a combustion-engine deemed an air pollution hazard to which the Board has authority to regulate the sale or use of. [2]

In addition, Proponents erroneously presume that the Board itself has the authority to adopt the proposed rules under the federal Clean Air Act (CAA). However, as stated herein, an agency may not unilaterally adopt rules without the State legislature first authorizing the agency to do so, something the legislature has yet to do.

Notably, where a specific statutory provision and a general statutory provision relating to the same matter exist, the more specific provision is applied. Here, Section 8 relates to the overarching intent of Title II and Section 10 grants general as well as specific rulemaking authority under Title II. However, Section 10 specifically limits rulemaking authority as it relates to the sale and use of vehicles and gasoline to those air pollutants determined hazardous by the Board. Thus, the Section 10 specific grants of authority should be applied over general grants of authority as provided in Sections 8 and 10.

[2] Notably, Section 112 of the CAA that the Act uses to define hazardous air pollutants, establishes a list of hazardous air pollutants, none of which include combustion-engines, petroleum, gasoline, or diesel fuel. 42 U.S.C. § 7412.

iii. Conclusion

The Board unquestionably has broad power to adopt regulations to restore, maintain, and enhance the purity of the air in the State. However, nowhere in the Act does the legislature grant either implicit or explicit authorization to the Board to ban or limit the sale, offer, or use of petroleum, gas usable as fuel or combustion-engine vehicles.

II. Proponents are attempting to bypass the intent of the legislature by improperly using the regulatory process.

Proponents petition the Board to implement rules that no agency has yet been granted the authority to implement by the General Assembly. Courts have used the fact that legislation granting rulemaking authority was ultimately unsuccessful in finding that the authority in question did not exist. In finding no authority existed for the Board to compel the establishment of a countywide wastewater regionalization, the Illinois Appellate Court noted that during the course of regional hearings to implement such regionalization:

> … diligent efforts were made by … many of the participants to bring about the enactment of legislation to grant such power to the Board. These efforts proved unsuccessful.
>
> It is up to the State Legislature, if it deems such power necessary and advisable to grant such power to the Board. We decline to encroach upon the prerogatives of the State Legislature.

Vill. of Lombard, 37 Ill. App. 3d at 444.

In upholding the lower court's decision, the Illinois Supreme Court pointed to the legislature's prior consideration of unsuccessful bills as evidence of a lack of rulemaking authority:

> It is true that bills have been introduced before the General Assembly to provide for some form of regional treatment. These bills have never been enacted into law. The village of Lombard argues that the [Board] acted out of impatience for enabling legislation. David Currie, then a member of the [Board], stated the Board acted because the legislature failed to establish a countywide sanitation district.

Vill. of Lombard, 66 Ill.2d at 508 (internal citations omitted).

Similarly here, several pieces of legislation introduced in the General Assembly to implement the programs proposed by Proponents, including related rulemaking authority, ultimately failed. Indeed, unsuccessful bills from the latest 103rd General Assembly include Senate Bill 2839, House Bill 5829, House Bill 1634, and Senate Bill 2050.

Senate Bill 2839 would have amended the Illinois Vehicle Code to require the Illinois Environmental Agency to adopt rules to implement the California ACC II program, including the zero-emission vehicle program, the low-emission vehicle program, the ACT program, and the Low NOx rules. Illinois S.B. 2839, 103rd Gen. Assemb., 2024 Ill. Gen. Assemb. Notably, the legislature considered granting rulemaking authority to enact these programs to the Agency, not the Board. The bill did not make it out of committee.

House Bill 1634 and Senate Bill 2050 are identical bills that would have amended the Illinois Vehicle Code by directing the Agency to implement the motor vehicle emission standards of California in totality, including but not limited to the ACC II, ACT, and Low NOx rules. Illinois H.B. 1634, 103rd Gen. Assemb., 2023 Ill. Gen. Assemb.; Illinois S.B. 2050, 103rd Gen. Assemb., 2023 Ill. Gen. Assemb. Again, both bills directed the Agency, not the Board, to promulgate rules and neither progressed past committee.

Finally, among other things, House Bill 5829 aimed to create the Zero-Emission Vehicle Act whereby all government fleets would eventually be manufactured zero-emission. Illinois H.B. 5829, 103rd Gen. Assemb., 2024 Ill. Gen. Assemb. The legislation empowered the Illinois Department of Central Management Services with rulemaking authority. *Id.* The bill did not advance out of committee.

Thus, in the last session alone, the Illinois legislature has contemplated several bills to implement the Proponents' proposed ACC II, ACT, and Low NOx rules but such legislation has remained unsuccessful. It is not up to the Board to review a rule due to Proponents' impatience for enabling legislation.

Notably, in arguing the State has made investments toward EV usage, Proponents themselves cite to several laws adopted by the legislature to facilitate EV usage by the State and private citizens.[3] Proponents recognize that the legislature is the appropriate route to adopt EV usage regulations, not first to an agency. Indeed, Proponents explicitly state that the *General Assembly* made the decision to invest in clean energy in enacting the Climate and Equitable Jobs Act ("CEJA") (Proposal, p.20). So too, the inverse stands that it is the General Assembly's decision to disinvest in combustion-engine vehicles, not the Board's decision absent a specific grant of authority.

The intent of the legislature is clear that the ACC II, ACT, and Low NOx standards not be implemented as indicated by several unsuccessful bills.

III. The Board is not the appropriate agency to execute electrification standards pursuant to CEJA.

Proponents argue that the Board should adopt the ACC II, ACT, and Low NOx rules because they will help implement and further the objectives of the State and CEJA. In particular, Proponents argue that a hasty adoption of the proposed rules will further the State's goal of increasing the adoption of electric vehicles (EVs) in the State to one million by 2030 as outlined in CEJA. 2021 Ill. Legis. Serv. P.A. 102-662 (West) (amending the Electric Vehicle Act).

[3] In footnote 48 at pages 19-20, Proponents cite to Public Act 103-0581, 103rd Gen. Assemb., (Ill. 2024), Public Act 103-0281, 103rd Gen. Assemb., (Ill. 2024), and Public Act 103-0053, 1034rd Gen. Assemb., (Ill. 2024).

CEJA amended and added new sections to the Electric Vehicle Act, and in so doing, vested sole rulemaking authority to implement electrification goals and programs of the Electric Vehicle Act to the Illinois Environmental Protection Agency ("Agency"), not the Board. 20 ILCS 627/40 ("The Agency shall adopt rules as necessary and dedicate sufficient resources to implement Sections 45 and 55 [of the Electric Vehicle Act].").

Specifically, under CEJA, the Agency is granted the authority to promulgate rules to implement, among other things, an increase in EV adoption to one million in the State by 2030, facilitation of electrification of transit and light-duty, medium-duty, and heavy-duty sectors, development of beneficial electrification programs that aim to lower carbon dioxide emissions, replace fossil fuel use, and improve grid operations. *Id.* at 45.

While both the Agency and the Board were created by the Act, they are separate and have distinct functions as articulated by the Illinois Supreme Court:

> The Board, which was created by the Act, serves both quasi-legislative and quasi-judicial functions within a statutorily established framework. It must determine, define, and implement the environmental control standards and may adopt rules and regulations. It has authority to conduct hearings upon, among other specified matters, complaints charging violations of the Act or of regulations thereunder and upon petitions for review of the Agency's denial of a permit as well as authority to hold other such hearings as may be provided by rule. It may adopt substantive regulations and procedural rules to accomplish the purposes of the Act.
>
> The Agency too was created by the Act and performs technical, licensing, and enforcement functions. It has the duty to collect and disseminate information, acquire technical data, and conduct experiments to carry out the purposes of the Act. It has the authority to conduct surveillance and inspection of actual or potential pollution sources. It has the duty to investigate violations of the Act, regulations, and permits. The Agency must appear before the Board in hearings on the denial of permits, among other specified instances, and may appear in any other hearing under the Act. The Agency has the duty to administer permit systems established by the Act or regulations and has the authority to require permit applicants to submit plans and specifications and reports regarding actual or potential violations of the Act, regulations or permits.

Landfill, Inc., 74 Ill. 2d at 554–55.

Further, CEJA amended the Public Utilities Act to create a multi-year integrated grid plan, the primary goal of which is to align regulated utility operations, expenditures, and investments with the State's public benefit goals, including safety, reliability, resiliency, affordability, equity, emissions reductions, and expansion of clean distributed energy resources. 220 ILCS 5/16-105.17(a). As part of the plan, the General Assembly emphasizes the need for infrastructure investment supporting EV integration with current grid capabilities and modernization of the grid, supporting the use of EVs in a way that reduces overall emissions and improves energy efficiency, and supporting environmental and equity goals in the reduction of emissions and EV adoption. *Id.* at 5/16-105.17(a)-(d). The General Assembly grants the authority to implement the plan, including adopting emergency rules, to the Illinois Commerce Commission ("ICC"). *Id.* at 5/16-105.17(e),(i).

Thus, no grants of rulemaking authority are vested in the Board under CEJA. Much of Proponent's justification for their proposed rules seem to include statutes in which rulemaking powers are granted to agencies other than the Board. Proponents conflate the roles of the Agency and the ICC under CEJA with the Board's rulemaking authority under the Act. While the IIIFFC is not arguing the Board cannot consider the goals of the State when it promulgates rules within its authority, the IIIFFC contends the Board does not have authority to promulgate the rules in question where the General Assembly granted that specific rulemaking authority to a different agency, namely the Agency or the ICC under CEJA.

CONCLUSION

WHEREFORE, the IIIFFC, for the foregoing reasons, respectfully request that the Board dismiss this matter for lack of statutory authority pursuant to 35 Il. Adm. Code 102.212(c) and (d) and 35 Ill. Adm. Code 101.500.

INDIANA, ILLINOIS, IOWA
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