BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ELECTRIC ENERGY, INCORPORATED,	)	
Petitioner,	)	
v.	)	PCB 06-65
	)	CAAPP Appeal
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING

To: Mr. Robb Layman
Ms. Sally Carter
Division of Legal Counsel
1021 North Grand Avenue
Post Office Box 19276
Springfield, IL 62794-9276

Ms. Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
1000 West Randolph Street
Suite 11-500
Chicago, IL 60601

Please take notice that on November 30, 2005, the undersigned caused to be filed with the Clerk of the Illinois Pollution Control Board, Motion for Leave to File Reply to Motion in Partial Opposition to, and Partial Support of, Petitioner's Request for Stay, and Petitioner's Response to Respondent's Motion in Partial Opposition to, and Partial Support of, Petitioner's Request for Stay, copies of which are herewith served upon you.

By: James T. Harrington
One of its attorneys

James T. Harrington
David L. Rieser
McGuireWoods LLP
77 West Wacker, Suite 4100
Chicago, IL 60601
Telephone: 312/849-8100

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MOTION FOR LEAVE TO FILE REPLY TO MOTION IN PARTIAL OPPOSITION TO, AND PARTIAL SUPPORT OF, PETITIONER'S REQUEST FOR STAY

NOW COMES the Petitioner, by its Attorneys, James T. Harrington, David R. Rieser and McGuireWoods LLP and moves the Illinois Pollution Control Board (the "Board") for leave to file a brief Response to Respondent's Objections to Petitioner's Motion for Stay. In support of this motion, Petitioner states as follows.

1. The Petitioner has filed Petition for Review of the terms and conditions of the CAAPP Permits issued by Respondent for the above-named coal fired electrical generating uses.

2. The Petitioner has set forth the applicable provisions of the Illinois Administrative Procedure Act, (5 ILCS 1001-10-65(b)), and applicable case authority (Borg-Warner Corporation v. Mauzy, 427 N.E. 2d 415, 56 Ill.Dec. 335 (3rd Dist. 1981)) establishing that the terms of the CAAPP Permits cannot go into effect pending the decision of the Board and any necessary action of the Respondent implementing the Board's decision.

3. Respondent served its Motion in Partial Opposition to, and Partial Support of Petitioner's Request for Stay by depositing the same in the United States Mail on

November 18, 2005. Respondent also sent copies by e-mail to Petitioner's counsel on the same date.

4. The effectiveness of the Permit pending the Board's decision is an issue of overriding importance to the Board, the Petitioner and to the administration of environmental law in Illinois.

5. Respondent has raised arguments in opposition to the Motion for Stay that were not anticipated and could not have been anticipated at the time the Motion was filed. In particular, Respondent has raised the "severability clause" regarding the CAAPP Permit Program as evidence that the legislature did not want the otherwise applicable provisions of the Administrative Procedure Act staying the terms of permits pending completion of the administrative process through review by the Board applied to CAAPP Permits.

6. Failure to grant Petitioner leave to file a Response would materially prejudice Petitioner within the meaning of 35 Ill.Adm. Code Section 101.500(e).

WHEREFORE, Petitioner moves for leave to file the attached Response to Respondent's Motion.

Respectfully submitted,

Dated: NOV 30 2005

James T. Harrington
David L. Rieser

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PETITIONER'S RESPONSE TO RESPONDENT'S MOTION IN PARTIAL OPPOSITION TO, AND PARTIAL SUPPORT OF, PETITIONER'S REQUEST FOR STAY

NOW COMES the Petitioner, by and through its attorneys, and responds to the Motion in Partial Opposition to, and Partial Support of Petitioner's Request for Stay.

1. The CAAPP Permit is Not in Effect and Is Stayed as a Matter of Law Pursuant to the Illinois Administrative Procedure Act ("APA").

The Respondent admits that the CAAPP Permit is a license of a continuing nature as defined by the APA. 5 ILCS 1001-35. (Respondent's Motion p. 3). It also admits that the decision in Borg-Warner Corporation v. Mauzy, 427 N.E.2d 415, 56 Ill.Dec. 335 (3d Dist. 1981), holding that the final administrative decision within the meaning of the Administrative Procedure Act is the decision of the Pollution Control Board on the Petition for Review "may still reflect good law and that it probably warrants, in the appropriate case, application of the doctrine of stare decisis by Illinois Courts." EPA Motion, p. 4. It further admits "the CAAPP program itself does not reveal the General Assembly's intentions to change this administrative arrangement." *Ibid.*

Nevertheless, Respondent contends that the APA does not apply to CAAPP Permits. First, it points out that the legislature has in the case of administrative citations specifically provided that the APA does not apply. See 415 ILCS 5/31.1(e). Yet, this merely

proves the opposite that the legislature intended and believed clearly that the APA applied to all proceedings under the Environmental Protection Act unless specifically exempted. It further proved that the legislature knew how to exempt actions under the Environmental Protection Act when it chose to do so.

Second, the Respondent claims that the provisions of Section 39.5(7)(i) (415 ILCS 5/39.5(7)) providing for severability of permit terms in the event of a challenge to any terms of the permit indicates legislative intent that the permit would not be stayed pending the Board's decision on review. This argument stretches too far. Since the legislature chose not to expressly exempt CAAPP Permits from the APA, the severability clause must apply where some terms of a permit are successfully challenged so that other unrelated terms may remain in force. It does not address the applicability of the APA or the long standing precedent that the permit cannot go into effect until the administrative process is complete.

Clearly if the legislature chose to exempt CAAPP Permits from the APA, it would have done so expressly, by innuendo. It did not do so. Under the usual rules of statutory construction, the APA and the "stay" provisions of 5 ILCS 1001/10-65(b), as applied to Permit Appeals in Borg-Warner Corporation v. Mauzy, *supra*, and in Board decisions,[1] govern CAAPP Permit proceedings. Therefore, the CAAPP Permits under review are not in effect and are stayed as a matter of law pending the Board's decision on the merits.

2. The CAAPP Permits Should be Stayed In Its Entirety for the Reason Stated in the Petition.

Should the Board conclude that the Permit is otherwise final and effective, a discretionary stay of the entire Permit should be granted. Without belaboring the lengthy Petition and Motion, Petitioner admits that it has sought review of only portions of the CAAPP Permit. One of those conditions is the effective date. If the effective date is stayed, then none of the other

[1] Electric Energy, Inc. v. Illinois Environmental Protection Agency, PCB 85-14 (1985), 1985 WL 21205, and IBP, Inc. v. Illinois Environmental Protection Agency, PCB 89-128 (1989), WL 137356.

conditions are in effect. Petitioner has adequately supported the stay of the effective date as it pointed out the numerous conditions which would have required immediate or retroactive actions by Petitioner. As Respondent has agreed to the stay of all contested terms and one of those terms is the effective date, all of the conditions of the permit should be stayed pending a Board ruling on the merits. Moreover, while Petitioner has challenged only a portion of the CAAPP Permit terms, those challenged terms encompass almost all significant terms that add to Petitioner's obligations over those in existing laws, regulations and permits that remain in force and effect during the period of review. Therefore, the public health and environment remain fully protected during a stay.

Conclusion. Petitioner requests the Board reject the arguments advanced by Respondent and issue its order finding that the CAAPP Permit at issue here is not in effect pending the decision of the Board and the action of the Agency implementing it.

Respectfully submitted,

Dated: NOV 30, 2005

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CERTIFICATE OF SERVICE

I, James T. Harrington, one of the attorneys for Petitioner, hereby certify that I served copies of:

1. Motion for Leave to File Reply to Motion in Partial Opposition to, and Partial Support of, Petitioner's Request for Stay; and

2. Petitioner's Response to Respondent's Motion in Partial Opposition to, and Partial Support of, Petitioner's Request for Stay.

upon

Mr. Robb Layman and Ms. Sally Carter
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue
Springfield, IL 62794-9276

on November 30, 2005 via Federal Express.

James T. Harrington
One of the Attorneys for Petitioner

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