

LAW OFFICES
SCHMITTINGER AND RODRIGUEZ, P.A.
414 SOUTH STATE STREET
POST OFFICE BOX 497
DOVER, DELAWARE 19901
TELEPHONE 302-674-0140
FAX 302-674-1830

NICHOLAS H. RODRIGUEZ
PAUL H. BOSWELL
JOHN J. SCHMITTINGER
DOUGLAS B. CATTS
WILLIAM D. FLETCHER, JR.
CRAIG T. ELIASSEN
WILLIAM W. PEPPER SR.
CRYSTAL L. CAREY*
SCOTT E. CHAMBERS*
FRED A. TOWNSEND III
NOEL E. PRIMOS
DAVID A. BOSWELL
WALT F. SCHMITTINGER
R. SCOTT KAPPES
JEFFREY J. CLARK
BETH B. MILLER
KYLE KEMMER
KATHRYN J. GARRISON
MAGNOLIA SOLANO

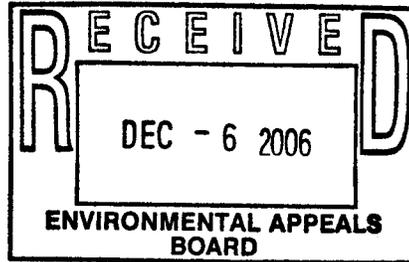
*ALSO ADMITTED IN MARYLAND

HAROLD SCHMITTINGER
OF COUNSEL

NEWARK OFFICE
CHRISTIANA EXECUTIVE CAMPUS
220 CONTINENTAL DRIVE, STE 203
NEWARK, DELAWARE 19713
TELEPHONE 302-894-1960
FAX 302-894-1965

REHOBOTH BEACH OFFICE
WACHOVIA BANK BUILDING
4602 HIGHWAY ONE
REHOBOTH BEACH, DELAWARE 19971
TELEPHONE 302-227-1400
FAX 302-645-1843

ODESSA OFFICE
ODESSA PROFESSIONAL PARK
POST OFFICE BOX 626
ODESSA, DELAWARE 19730
TELEPHONE 302-378-1697
FAX 302-378-1659



December 6, 2006

VIA HAND DELIVERY & FACSIMILE

Delaware Environmental Appeals Board
89 Kings Highway
Dover, DE 19901

Re: Notice of Appeal of Regulation No. 1146: Electric Generating Unit (EGU) Multi-Pollutant Regulation

Dear Delaware Environmental Appeals Board:

Pursuant to 7 Del. C. § 6008, The City of Dover ("The City") hereby appeals Delaware Regulation 1146, adopted by the Delaware Department of Natural Resources and Environmental Control ("DNREC") on November 15, 2006 (the "Regulation"), posted on the DNREC website on Nov 17, 2006, and published pursuant to 7 Del. C. § 6008(a) on December 1, 2006. This letter provides the information required by § 2.0 of the Environmental Appeals Board Regulations.

I. The Interest Which Has Been Substantially Affected

The City owns and operates the McKee Run Generating Station, a 136 MW station that consists of three oil-fired generating units. The Regulation requires oil-fired units, including the City's McKee Run Unit 3 (102 MW), to reduce emissions of sulfur dioxide ("SO₂") and nitrogen oxides ("NO_x") in two phases. Phase I requires emissions reductions beginning in 2009 and Phase II requires further reductions beginning in 2012. The alleged purpose of the Regulation is to improve Delaware's air quality and benefit the public health and welfare of Delaware's residents and visitors.

The Regulation will impose substantial burdens on The City and Delaware by requiring

The City to reduce emissions to levels that have not been shown to be necessary to improve the air quality in Delaware or to protect the health and welfare of Delaware's residents. The most significant impact of this Regulation will be to make it cost prohibitive to operate oil-fired power plants in Delaware. As a result, additional electricity to meet current and future load demand will have to be generated elsewhere and imported into the state. The extra generation from surrounding states will increase the quantity of emissions transported into the state, thereby degrading Delaware's air quality and frustrating the purposes of the Regulation.

II. The Adoption of the Regulation is Improper

The decision to adopt the Regulation is improper for the reasons outlined below.

III. Reasons Why the Decision is Improper

1. DNREC's adoption of the Regulation was arbitrary and capricious or otherwise contrary to law because DNREC violated 7 Del. C. § 6001 and 29 Del. C. § 10101 *et al.* and other applicable laws. For example, the Regulation violates the policy and purposes of § 6001 because it fails to make the maximum contribution to the interests of the people of Delaware and the Order promulgating the Regulation does not satisfy the requirements of § 10118 (b) in that it does not make adequate findings of fact with respect to the evidence and information provided.

2. DNREC failed to provide adequate notice and a comment period with respect to the "Technical Support Document" on which the Regulation is based. On September 22, 2006, only one working day before the first of three public hearings on the Regulation, DNREC posted the "Technical Support Document for Proposed Regulation No. 1146 Electric Generating Unit (EGU) Multi-Pollutant Rule." on its website.

3. DNREC, in its development of the compliance timeline, failed to consider the fact that when all 8 affected units simultaneously shutdown to install new technology there will be a major negative impact on power supply in the region.

4. DNREC failed to consider the Regulation's economic impact on Delaware's economy, including jobs lost and the economic impacts to Delaware residents and the businesses from higher cost replacement generation sources within Delaware. DNREC did not consider these economic concerns that were expressed by the State Department of Economic Development of the Delaware Chamber of Commerce and are included in the administrative record.

5. DNREC used unrealistic cost estimates (1999 data) to predict estimated costs of compliance, thereby underestimating actual compliance costs. This was a clear attempt to mislead the public. In addition, DNREC published a brochure and handed same out at the public hearings. This brochure stated that "(the regulation) will not result in costs being directly passed to rate-payers – the electric market is deregulated". This is also misleading to the public as any costs

paid by The City to comply with this regulation will most certainly have to be passed on to The City rate payers.

6. DNREC failed to evaluate properly the Regulation's environmental impacts. The Regulation assumes that reducing emissions from stations in Delaware will assist Delaware in attaining certain air quality standards. However, DNREC has no support in the administrative record for this assertion. Further, DNREC did not calculate or model the reduced impacts of emissions transport as a result of the United States Environmental Protection Agency's ("EPA") Clean Air Interstate Rule and the Clean Air Mercury Rule nor did DNREC calculate or model the impact of other state-specific initiatives on Delaware's ambient air quality. DNREC's entire basis for the Regulation is flawed, and DNREC failed to act in the public's best interest.

7. DNREC failed to properly prepare for the eventual closure of many of the affected units. DNREC response to the probable closure of Delaware EGUs was that "becomes PJM's problem". The City, NRG, and Conectiv are members of PJM. If every state had this same response PJM would collapse.

In addition to the above-outlined reasons, the Appellant hereby reserves the right to identify other supporting rationales as they may be uncovered during the course of these proceedings.

The Appellant estimates that it will call 3 witnesses and will need approximately 3 days to present this Appeal at a public hearing. The number of witnesses and the time involved in presenting this Appeal may be reduced and even eliminated if the Appellant and DNREC are able to resolve any of these issues on a reasonable basis through negotiation, mediation or other means.

As required in the Environmental Appeals Board Regulations, enclosed is a check in the amount of \$50.00 for the payment of the applicable costs.

We will await to hear from your office and the Secretary's Counsel's office regarding the scheduling of the date, time and location of the Hearing and other pre-hearing matters referenced in the Board Regulations. In the meantime, if this Notice of Appeal prompts any additional questions or concerns, please do not hesitate to contact me.

Respectfully submitted,



NICHOLAS H. RODRIGUEZ, ESQ.
Counsel to The City of Dover, DE.

cc: The Honorable John A. Hughes (via Fax and First Class Mail)