BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
UtiliCorp United, Inc.,	)	CAA Appeal Nos. 99-2 & 99-3

ORDER CONSOLIDATING PETITIONS FOR REVIEW, DENYING REQUEST FOR INTERIM RELIEF, AND DENYING REVIEW OF PETITION NO. 99-3

On November 16, 1999, UtiliCorp United, Inc. ("UCU") filed a petition for review of a decision by EPA's Office of Air and Radiation, Acid Rain Division, dated October 15, 1999 (the "October Decision"). The October Decision denied UCU's petition for approval of a plan for apportionment of the nitrogen oxide emissions from a common stack at UCU's facility located at Sibley, Missouri (the "Sibley Facility"). UCU's petition sets forth the relief requested by UCU in three numbered paragraphs, the last of which ("Relief Request No.3") raises issues regarding UCU's obligations under 40 C.F.R. § 75.17(a)(2)(iii) during the pendency of this appeal.

On December 17, 1999, UCU filed a petition for review of a second decision issued by EPA's Office of Air and Radiation, Acid Rain Division, which was dated November 19, 1999 (the "November Decision"). The November Decision denied UCU's request, which UCU had submitted to EPA's Acid Rain Division on November 10, 1999, for a stay of the same regulatory

provision that is the subject of UCU's Request No. 3 of its first petition for review. Both requests relate to the same factual circumstances and request substantially similar relief (although set in a different procedural posture). UCU's petition for review of the October Decision and its request for review of the November Decision are hereby consolidated for the purposes of consideration and decision by this Board. A joint proceeding on the issues discussed in this order is in the interest of justice, and consolidation will not prejudice any party. 40 C.F.R. § 78.8(a).

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

This matter arises under Title IV of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7651 - 7651o. The purpose of Title IV is to reduce the adverse impacts of depositions from the atmosphere of acidic compounds through reductions in annual emissions of sulfur dioxide ("SO_2") and nitrogen oxides ("NO_X"). 42 U.S.C. § 7651.

Among other things, Title IV requires owners and operators of either SO_2 or NO_X emission sources to comply with certain monitoring, reporting, and record keeping requirements. In particular, the statute provides as follows:

> The owner and operator of any source subject to this subchapter shall be required to install and operate [a continuous emissions monitoring system ("CEMS")] on each affected unit at the source, and to quality assure the data for sulfur dioxide, nitrogen oxides, opacity and volumetric flow at each unit. The Administrator shall, by regulations * * * specify the requirements for CEMS, for any alternative monitoring system that is demonstrated as providing information with the same precision, reliability, accessibility, and timeliness as that provided by CEMS, and for recordkeeping and reporting of information from such systems.

42 U.S.C. § 7651k(a).

EPA's regulations governing implementation of CEMS, or continuous emission monitoring systems, are contained in 40 C.F.R. part 75. At issue in this case is the CEMS regulation for monitoring NO_X emissions where affected units with acid rain NO_X emission limits and affected units without such limits[1] emit through a common stack at the source. *See* 40 C.F.R. § 75.17(a)(2)(iii). That regulation provides that the owner or operator of such a source must both "[i]nstall, certify, operate, and maintain a NO_X continuous emission monitoring system in the common stack" and

> the owner or operator shall either:
> (A) Install, certify, operate, and maintain NO_X and diluent monitors in the ducts from the affected units; or
> (B) Develop, demonstrate, and provide information satisfactory to the Administrator on methods for apportioning the combined NO_X emission rate (in

[1] *See infra,* Part I.B (discussing the emission limit at issue in this case).

> lb/mmBtu) measured in the common stack on each of the units. The Administrator may approve such demonstrated substitute methods for apportioning the combined NO_X emission rate measured in a common stack whenever the demonstration ensures complete and accurate estimation of all emissions regulated under this part.

40 C.F.R. § 75.17(a)(iii).

B. *Factual Background*

UCU owns and operates the Sibley Facility, which is a 500-megawatt coal-fired power plant consisting of three cyclone units that discharge emissions through a common stack. UCU's Petition for Review of EPA's Final Decision Under 40 C.F.R. Part 75 [hereinafter, "First Petition"] at 2. Unit 3 is required, pursuant to 40 C.F.R. § 76.6(a)(2), to meet an annual NO_X emission limitation of 0.86 lb/mmBtu starting January 1, 2000 [hereinafter, "0.86 lb/mmBtu Limitation"]. First Petition at 2. Units 1 and 2, however, are exempt from the 0.86 lb/mmBtu Limitation. *Id.*

The Facility presently has a CEMS installed in the common stack through which emissions from all three units are discharged. *Id.* However, UCU does not have a monitoring system that enables it to segregate NO_X emissions of unit 3, which is subject to the 0.86 lb/mmBtu Limitation, from the emissions of units 1 and 2, which are not subject to that limitation. *Id.* at 3. In anticipation of the need to demonstrate unit 3's compliance with the 0.86 lb/mmBtu

Limitation beginning on January 1, 2000, UCU submitted to EPA Region VII's Air Permitting & Compliance Branch a request for approval, pursuant to 40 C.F.R. § 75.17, of a proposed method for apportioning the combined NO_X emissions as measured in the common stack. *See* Letter from Jeremy Morgan, Environmental Manager of UCU, to Donald Toensing, Chief EPA Region VII Air Permitting and Compliance Branch (Sept. 3, 1998) [hereinafter, "Request Letter"]. During the course of communications between UCU, Region VII's Air Permitting and Compliance Branch [hereinafter, "Region VII"], and EPA's Office of Air and Radiation, Acid Rain Division [hereinafter, "Acid Rain Division"], UCU modified its request in several respects. Thereafter, the Acid Rain Division issued the October Decision denying UCU's Request Letter, as modified. *See* Letter from Brian J. McLean, Director Acid Rain Division to Glenn Keefe, representative of UCU (Oct. 15, 1999).

UCU has now filed its First Petition seeking review of the October Decision. The First Petition requests both interim relief pending the Board's decision on the merits of the First Petition and that this Board review the October Decision and in connection with that review grant UCU an evidentiary hearing. Pursuant to an order of this Board dated December 1, 1999, the Acid Rain Division has filed, on an expedited basis, its response to UCU's request for interim

relief, which it opposes. *See* Response of EPA Office of Air and Radiation in Opposition to Petitioner's Request for a Stay (Dec. 15, 1999) [hereinafter, "Response"].[2] In its Response, the Office of Air and Radiation ["OAR"] apprised the Board that OAR's Acid Rain Division had received on November 10, 1999, and denied on November 19, 1999, a separate request by UCU for the Acid Rain Division to stay the requirement set forth in 40 C.F.R. § 75.17(a)(2)(iii) as it pertains to unit 3. OAR noted that this denial was appealable to the Board; by its Second Petition, UCU subsequently appealed the November Decision.

This Order addresses UCU's Second Petition and its request for interim relief as set forth in Request No. 3 of the First Petition. This Order does not address or reflect any opinion of the Board relative to the merits of the First Petition with respect to relief other than that set forth in Request No. 3.

II. *DISCUSSION*

UCU requests that the Board hold that the October Decision is inoperative pending the Board's disposition of the First Petition and that UCU may proceed with its proposed

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[2]The Board's December 1, 1999 order did not require an expedited response on UCU's other relief requests and the Acid Rain Division stated that it intends to file its complete response to the First Petition on or before January 5, 2000. Response at 1.

apportionment plan or, alternatively, that the Board issue a stay pending the duration of the appeal. OAR's Response raises several noteworthy objections in response. First, OAR argues that any stay of the October Decision that occurred automatically upon UCU's filing of its First Petition cannot serve to authorize UCU to proceed with its proposed apportionment plan to demonstrate unit 3's compliance with the 0.86 lb/mmBtu Limitation. Second, it argues that the request for a stay is not properly before the Board insofar as it is raised in Request No. 3. OAR does acknowledge that this Board has jurisdiction to consider UCU's
Second Petition, which has now been timely filed. OAR further argues that the Board should affirm the Acid Rain Division's November Decision denying the request for stay because that decision was appropriately rendered and because a denial of a stay will not harm UCU.

For the following reasons, the Board holds (1) that UCU may not use its unapproved apportionment plan to demonstrate unit 3's compliance with the 0.86 lb/mmBtu Limitation pending a determination of the merits of UCU's petition for review of the October Decision, and (2) that UCU has failed to make a sufficient showing to warrant a stay.

A. *UCU Does Not Have Approval From the Administrator to Use Its Proposed Apportionment Plan to Demonstrate Compliance*

With respect to UCU's request that we hold that the October Decision is inoperative and that UCU may proceed with the proposed apportionment method during the pendency of this appeal, UCU states its contention as follows:

> EPA's October 15, 1999 final decision is inoperative once a timely petition for administrative appeal is filed. 62 Fed. Reg. 55,473 (Oct. 24, 1997). Since UCU filed its Petition for Review within the 30 day appeals period provided by 40 C.F.R. § 78.3, EPA's decision denying UCU's proposed apportionment method is stayed until resolution of this appeal, and UCU may proceed with its proposed apportionment plan to demonstrate Unit 3's compliance with the NO_x emission limitation.

First Petition at 15-16. This argument must be rejected.

The regulations provide that UCU may use its proposed apportionment plan *only if* UCU has obtained prior written approval of the plan from the Administrator. This conclusion flows first from section 75.17(a)(2)(iii)(B), which states that the owner or operator shall "provide information satisfactory to the Administrator on methods for apportioning the combined NO_x emission rate (in lb/mmBtu) measured in the common stack" and that "[t]he Administrator may approve such demonstrated substitute methods for apportioning the combined NO_x emission rate measured in a common stack whenever the demonstration ensures complete and accurate estimation of all emissions regulated under this part." 40 C.F.R.

§ 75.17(a)(2)(iii)(B). The plain language of this regulation provides that an apportionment method proposed under subparagraph (B) is a "substitute method," that the information regarding the substitute method must be "satisfactory" to the Administrator,[3] and that the Administrator may "approve" the substitute method only when it meets the requirement of complete and accurate estimation of all regulated emissions. It is only reasonable to interpret this regulatory language as requiring the Administrator's prior approval of a substitute apportionment method proposed under subparagraph (B) before that substitute apportionment method may be used by the source owner or operator to satisfy its monitoring and reporting obligations.

Furthermore, in reading together 40 C.F.R. §§ 75.5(c) and 75.66, which govern the procedures for requesting approval of a substitute apportionment method and prohibit the use of unapproved alternative methods, it becomes clear that the prior approval of the alternative apportionment method must be in writing. First, section 75.66(a) establishes the requirements for requesting the Administrator's approval. In particular, it authorizes the designated representative for an

[3]The term "Administrator" is defined as "the Administrator of the United States Environmental Protection Agency or the Administrator's duly authorized representative." 40 C.F.R. § 72.2.

affected unit to submit petitions to the Administrator and it states that "[a]ny petitions shall be submitted in accordance with the requirements of this section." 40 C.F.R. § 75.66(a). Paragraph (g) of that section, which is captioned "petitions for emissions or heat input apportionments," states that "[t]he designated representative of an affected unit shall provide information to describe a method for emissions or heat input apportionment under §§ 75.13, 75.16, 75.17 or appendix D of this part" and further specifies the minimum requirements of any such petition. 40 C.F.R. § 75.66. Thus, paragraphs (a) and (g) of section 75.66 contemplate that the Administrator's approval of a "substitute" apportionment method under section 75.17(a)(2)(iii)(B) be requested by means of a petition under section 75.66. Finally, section 75.5(c) expressly states that "[n]o owner or operator of an affected unit shall use any alternative monitoring system, alternative reference method, or any other alternative for the required continuous emission monitoring system *without having obtained the Administrator's prior written approval* in accordance with §§ 75.23, 75.48 and 75.66." 40 C.F.R. § 75.5(c) (emphasis added).

In the present case, UCU has not obtained written approval from the Administrator of a petition pursuant to section 75.66 for approval of a "substitute" apportionment

method under section 75.17(a)(2)(iii)(B).[4] Accordingly, section 75.5(c) prohibits UCU from using that alternative apportionment method until UCU has obtained prior written approval of its proposal.

UCU's only argument as to why it should not be subject to these requirements is that "EPA's October 15, 1999 final decision is inoperative once a timely petition for administrative appeal is filed." First Petition at 15, citing 62 Fed. Reg. 55,473 (Oct. 24, 1997). UCU is correct that the 1997 amendment to the regulations governing appeal procedures for Title IV made decisions that have been appealed automatically "inoperative" in all circumstances. *See* 62 Fed. Reg. 55,460, 55,473 (Oct. 24, 1997). In making this change to the regulations, EPA explained that a decision is "inoperative once a timely petition for administrative appeal is filed[.]" *Id.* at 55,473. Thus, UCU's appeal of the October Decision denying its apportionment plan prevented that denial from immediately becoming a final agency action. However, UCU's unilateral action of filing the appeal did not turn the denial into a written approval issued by the Administrator, even for a period of limited duration. Instead, UCU's request for approval of its proposed apportionment method remains pending

[4]While UCU's request for approval of a its proposed apportionment method was not expressly filed under section 75.66, the Acid Rain Division treated it as such.

and is subject to review by this Board under the standards and procedures established by 40 C.F.R. part 78. Thus, UCU still does not have written approval of any alternative or substitute apportionment plan under section 75.17(a)(2)(iii)(B), and thus, at present, its only option for demonstrating compliance with the 0.86 lb/mmBtu Limitation is set forth in section 75.17(a)(2)(iii)(A), which does not require the Administrator's prior written approval for UCU to select it as UCU's method for demonstrating compliance.

For all of the foregoing reasons, the Board rejects UCU's contention that UCU may proceed with its proposed apportionment plan to demonstrate Unit 3's compliance with the NO_X emission limitation without having obtained prior written approval from the EPA.

B. *UCU's Petitions Fail to Demonstrate a Basis for a Stay*

In its First Petition, UCU requested in a single sentence that this Board alternatively grant "a stay, for the duration of this appeal, of the requirement set forth in 40 C.F.R. § 75.17(a)(2)(iii) as it pertains to Sibley Unit 3." First Petition at 16. This request was opposed by OAR on a number of grounds, including that this Board allegedly does not have jurisdiction to grant UCU's request as set forth in its First Petition. Response at 20-21. We do not need to resolve this question in the present case because UCU has not provided any evidence, affidavits, or other documentation to support its request for a stay set forth in its First Petition. Accordingly, assuming arguendo that the Board has authority to issue the stay requested by UCU in Request No. 3 of its First Petition, that request is denied. We note, however, that UCU's Second Petition presents a question of whether a substantially similar stay should be issued and, because that request for review of the Acid Rain Division's denial of a stay is properly before us, we will consider it next.

By its Second Petition, UCU has requested, in particular, that the Board review the Acid Rain Division's November Decision denying UCU's request for a stay of "the requirement set forth in 40 C.F.R. [§] 75.17(a)[(2)](iii) as it pertains to Unit 3 at Utilicorp's Sibley Generating Station until the

later of October 1, 2000 or until six months after final resolution of an appeal by Utilicorp." Letter from Sarah Toevs Sullivan, counsel to UCU, to Brian McLean, Director, Acid Rain Division (Nov. 10, 1999) at 2. UCU has requested both that the Board grant review of the November Decision and grant UCU an evidentiary hearing "in order to demonstrate that EPA's delay has caused UCU's inability to meet the compliance demonstration requirement without suffering irreparable harm and that a stay, therefore, is a fair and equitable remedy." Second Petition at 9.

The Board's consideration of UCU's Second Petition is governed by the regulations set forth at 40 C.F.R. part 78. Those regulations state that the Board shall apply the following standard of review where, as is the case here, there has not been an opportunity for public comment or to submit a claim of error notification:

> The Administrator shall have the burden of going forward to show the rational basis for the decision. The petitioner shall have the burden of persuasion to show that a finding of fact or conclusion of law underlying the decision is clearly erroneous or that an exercise of discretion or policy determination underlying the decision is arbitrary and capricious or otherwise warrants review.

40 C.F.R. § 78.12(b). With respect to the question of whether an evidentiary hearing should be granted, the part 78 regulations provide in relevant part as follows:

> The Environmental Appeals Board may grant a request for an evidentiary hearing * * * if the Environmental Appeals Board finds that there are disputed issues of fact material to contested portions of the decision and determines, in its discretion, that an opportunity for direct- and cross-examination of witnesses may be necessary in order to resolve these factual issues.

40 C.F.R. § 78.6(b)(1).

1. *Insufficient Basis for Review*

We find, in the present case, that the Acid Rain Division has stated a rational basis for its decision and UCU has not shown that a finding of fact or conclusion of law underlying the decision is clearly erroneous or that an exercise of discretion or policy determination underlying the decision is arbitrary and capricious or otherwise warrants review. 40 C.F.R. § 78.12(b).

The Acid Rain Division's November Decision stated two independent grounds for denying UCU's request for a stay. The Acid Rain Division stated its first reason for denying the stay request as follows:

> [A]pproving such a stay request would be contrary to the purposes of title IV and part 76 of the Acid Rain regulations. Title IV and part 76 require that Unit 3 meet an annual NO_X emission limit of 0.86 lb/mmBtu starting January 1, 2000. 42 U.S.C. [§] 7651f(b)(2); and 40 C.F.R. [§] 76.6(a)(2). Section 76.6(b) requires UtiliCorp to determine Unit 3's NO_X emission rate, and to comply with the unit's NO_X emission limit, in accordance with the requirements of part 75, e.g., § 75.17(a)(2)(iii). Section 75.17(a)(2)(iii) requires the installation of NO_X concentration and diluent monitors at Unit 3 (and at Units 1 and 2) unless UtiliCorp submits an

> apportionment methodology that is approved by the Administrator as providing complete and accurate estimates of each unit's NO_X emission rate. * * * UtiliCorp failed to provide an apportionment methodology that the Administrator approved. Consequently, the only approach available for monitoring Unit 3's NO_X emissions is the installation of NO_X concentration and diluent monitors at Unit 3 under § 75.17(a)(2)(iii)(A). Staying the requirements of [§] 75.17(a)(2)(iii) would result in there being no NO_X monitoring requirement for Unit 3, and no way of implementing Unit 3's NO_X emission limit, during the period January 1, 2000 through the end of such a stay. This would be contrary to the purposes of title IV and part 76, which impose a NO_X emission limit starting January 1, 2000.

November Decision at 3-4. As discussed below, this reason is sufficient to support the November Decision denying UCU's stay request, and, therefore, we do not need to consider the second basis for the November Decision.[5]

First, the Acid Rain Division's analysis quoted above presents a rational basis for its decision. The first part of this explanation simply notes the existence of the O.86 lb/mmBtu Limitation and the requirement of 40 C.F.R. § 75.17(a)(2)(iii)(B) that approval of a proposed substitute apportionment methodology must be obtained before that methodology may be used. These statements of the applicable

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[5]The second basis stated by the Acid Rain Division for its November Decision was that the Acid Rain Division found certain factual statements made by UCU relative to its ability to comply with the monitoring requirement to be unsupported and that UCU had not "shown that it undertook any steps to meet the January 1, 2000 installation and certification requirements." November Decision at 5.

legal requirements are consistent with our conclusions stated in Part A of our discussion above. Next, the conclusion that "[s]taying the requirements of [§] 75.17(a)(2)(iii) would result in there being no NO_X monitoring requirement for Unit 3, and no way of implementing Unit 3's NO_X emission limit," logically follows from the legal conclusion that a substitute apportionment methodology may not be used to demonstrate compliance unless prior approval of that methodology has been obtained. Finally, the conclusion that a stay resulting in no way to implement the 0.86 lb/mmBtu Limitation would be "contrary to the purposes of title IV and part 76" also logically follows from the legal conclusion that part 76 imposes the 0.86 lb/mmBtu Limitation starting January 1, 2000. Thus, the Acid Rain Division's November Decision meets the burden under 40 C.F.R. § 78.12(b) of going forward with showing a rational basis for its decision.

In contrast, UCU's Second Petition fails to satisfy its burden of showing that these conclusions are, as the case may be, either clearly erroneous, arbitrary and capricious or otherwise warrant review. First, UCU states that the Acid Rain Division's concern regarding the existence of an approved monitoring methodology is a "false concern" because "[t]ests have demonstrated that, with the over-fire air system, Unit 3 will be capable of meeting the emission limitation by January

1, 2000." Second Petition at 8. This statement fails to raise a genuine issue as to the validity of the November Decision not only because UCU has not provided any information to support its allegation, but more significantly, because any such test results showing unit 3's capability of meeting the emission limitation are not material. UCU has not explained how such test results show its ability to satisfy the requirement to *actually monitor and demonstrate compliance* on a continuing basis from and after January 1, 2000. Stated simply, UCU has not shown any legal basis for use of such tests to implement the NO_X emissions limit and to monitor for compliance. Thus, UCU's unsupported allegation cannot serve to demonstrate that the Acid Rain Division made a clear error of fact or law or that any exercise of discretion or policy determination was arbitrary or capricious or that review is otherwise warranted.

Second, UCU argues that "EPA's statement that a stay would 'result in there being no NO_X monitoring requirement for Unit 3, and no way of implementing Unit 3's NO_X emission limit, during the period January 1, 2000 through the end of such a stay' is simply untrue." Second Petition at 8, quoting November Decision at 4. UCU asserts that either its proposed apportionment plan or a suggestion made by EPA's Region VII "could be used to demonstrate Unit 3's compliance with the

0.86 lb/mmBtu emission limitation on an interim basis." *Id.* at 8-9. This argument, however, must be rejected because we have concluded above, as a matter of law, that the regulations require UCU to obtain approval of any proposed substitute apportionment methodology before it can use that methodology as a means of demonstrating compliance with the 0.86 lb/mmBtu Limitation. UCU has not obtained such prior approval for its suggested substitute apportionment methods and it has not shown any legal basis for those methodologies to be used without such prior approval. Thus, UCU's reference to the unapproved substitute apportionment methodologies cannot serve to show that the November Decision denying a stay was clearly erroneous, arbitrary and capricious or that review is otherwise warranted.

2. *Evidentiary Hearing*

UCU has argued that it should be granted an evidentiary hearing "in order to demonstrate that EPA's delay has caused UCU's inability to meet the compliance demonstration requirement without suffering irreparable harm and that a stay, therefore, is a fair and equitable remedy." Second Petition at 9. The Board has not previously addressed the issue of evidentiary hearings under part 78. However, the rules governing requests for evidentiary hearings under Title IV were modeled after the regulations governing such requests

in the NPDES program. *See* Acid Rain Program: Permits, Allowance System, Continuous Emissions Monitoring, and Excess Emissions (Proposed Rule), 56 Fed. Reg. 63,002, 63,032 (Dec. 3, 1991). In the NPDES context, we have stated that the request "must raise actual, relevant, and material disputes of fact in order to obtain an evidentiary hearing." *In re City of Port St. Joe,* 7 E.A.D. 275, 283 (EAB 1997). "In administering this requirement the Board is governed by an administrative summary judgment standard requiring the presentation of a genuine and material factual dispute, similar to judicial summary judgment under Rule 56, Fed. R. Civ. P." *Id.,* citing *In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), aff'd sub nom. *Puerto Rico Aqueduct and Sewer Auth. v. EPA*, 35 F.3d 600 (1st Cir. 1994).

In the present case, UCU has not shown a genuine factual dispute that is material to the Board's decision today and, therefore, UCU's request in its Second Petition for an evidentiary hearing on issues relative to the November Decision is denied.[6] UCU had notice of the regulations that,

[6]This denial of UCU's evidentiary hearing request as set forth in the Second Petition does not address or reflect any opinion of the Board relative to UCU's request for an evidentiary hearing as set forth in the First Petition with respect to the October Decision. To the contrary, we are reserving for later decision whether an evidentiary hearing should be granted as to the merits of UCU's appeal of the

as explained in part A of our discussion, require UCU to obtain prior approval of its proposed substitute apportionment method before it can use that method to demonstrate compliance with the 0.86 lb/mmBtu Limitation. UCU has not made any allegation, much less provided any evidentiary support, that it was led to believe that its proposed substitute apportionment method had been or would be approved, or that it reasonably relied upon such approval. By pursuing an alternative that required prior approval, UCU assumed the risk that the approval would not be forthcoming. Indeed, the record reflects that, at all relevant times, UCU knew that it did not have the required approval; it should have reconsidered its approach to compliance in that light.[7] Thus, its allegations of delay do not provide any basis whatsoever for relief from the requirements of 40 C.F.R. § 75.17(a)(2)(iii).

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apportionment method, as requested in the First Petition.

[7]OAR has also argued that "questions concerning [UCU]'s ability to meet the installation and certification requirement [of the CEMS rules] by January 1, 2000 are more appropriately addressed in the context of future enforcement action, if such action proves necessary[.]" Response at 29. OAR states that in the context of an enforcement action, EPA can establish "an appropriate period of time for UCU to attain compliance with section 75.17(a)(2)(iii), if necessary." *Id.*

III. *Conclusion*

For the foregoing reasons, the Board hereby (1) rejects UCU's contention that it may proceed with its proposed apportionment plan to demonstrate unit 3's compliance with the NO_X emission limitation without having obtained prior written approval from the EPA, and (2) denies UCU's requests for a stay and denies UCU's request for review of the Second Petition (Petition No. 99-3).

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: /S/
Edward E. Reich,
Environmental Appeals Judge

Dated: December 29, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Consolidating Petitions for Review, Denying Request For Interim Relief, And Denying Review of Petition No. 99-3 in the matter of UtiliCorp United, Inc., CAA Permit Appeal No. 99-2 & , were sent to the following persons in the manner indicated:

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Dated: December 30, 1999

/s/
Annette Duncan
Secretary