

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMEREN ENERGY GENERATING)
COMPANY, AMERENENERGY RESOURCES)
GENERATING COMPANY, AND ELECTRIC)
ENERGY, INC.,)

Petitioners,)

v.)

ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY,)

Respondent.)

PCB 09-21
(Variance – Air)

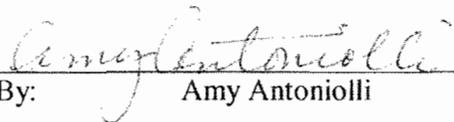
NOTICE OF FILING

To: John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board, **RESPONSE TO RECOMMENDATION** and **RESPONSE TO MOTION TO WAIVE NOTICE REQUIREMENTS**, copies of which are herewith served upon you.

Ameren Energy Generating Company


By: Amy Antonioli

Dated: November 25, 2008

Amy Antonioli
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 25th day of November, 2008, I have served electronically the attached **RESPONSE TO RECOMMENDATION** and **RESPONSE TO MOTION TO WAIVE NOTICE REQUIREMENTS**, upon the following persons:

John Therriault, Assistant Clerk
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James R. Thompson Center
Suite 11-500
100 West Randolph
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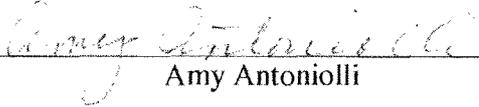
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and by first class mail, postage affixed, upon:

Illinois Environmental Protection Agency
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Amy Antonioli

Renee Cipriano
Kathleen C. Bassi
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AMEREN ENERGY GENERATING)	
COMPANY, AMERENENERGY)	
RESOURCES GENERATING COMPANY,)	
AND ELECTRIC ENERGY, INC.,)	
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Petitioners,)	
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v.)	PCB 09-21
)	(Variance – Air)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

RESPONSE TO RECOMMENDATION

NOW COME AMEREN ENERGY GENERATING COMPANY, AMERENENERGY RESOURCES GENERATING COMPANY, and ELECTRIC ENERGY, INC. (collectively, “Ameren” or “Petitioners”), by and through their attorneys, SCHIFF HARDIN, LLP, and, pursuant to Section 104.220 of the Illinois Pollution Control Board’s (“Board”) procedural rules (35 Ill. Adm. Code 104.220), in response to the Illinois Environmental Protection Agency’s (“Illinois EPA”) recommendation to deny the petition as filed or, in the alternative, to grant the petition subject to an additional condition as set forth in the recommendation. Ameren accepts the stated condition and asks that the Board substitute paragraph F of Ameren’s compliance plan (*see* Petition, Section G, Par. 50(F)) with the condition in its consideration of the petition for variance. In support of its response, Ameren provides the following:

Ameren filed a petition for variance from one requirement of the Illinois Multi-Pollutant Standard, 35 Ill. Adm. Code 225.233 (“MPS”), on October 1, 2008 (“Petition”). The MPS requires compliance with a declining sulfur dioxide (“SO₂”) emission rate over time, including

an SO₂ limit of 0.33 pounds per million British thermal units (“lb/mmBtu”) by 2013, declining to a rate of 0.25 lb/mmBtu in 2015. Ameren specifically seeks relief from Section 225.223(e)(2)(A), which requires compliance with the 0.33 lb/mmBtu from January 1, 2013, through December 31, 2014, and instead requests the Board to allow Ameren to meet a 0.50 lb/mmBtu emission rate system-wide by January 1, 2010, and then to meet a 0.44 lb/mmBtu emission rate, system-wide, by January 1, 2014. Ameren’s request for relief would also require compliance with an SO₂ emission rate of 0.23 lb/mmBtu by 2017 and several new nitrogen oxide (“NO_x”) rate requirements.

Section 104.216 of the Board’s procedural rules requires the Illinois EPA to “make a recommendation to the Board as to the disposition of the petition” within 45 days after the petition is filed. 415 ILCS 5/37(a); 35 Ill. Adm. Code 104.216. Illinois EPA filed a recommendation with the Board on November 17, 2008, recommending that the Board deny the petition as requested, but stating that the Agency would not object to the requested relief if the relief included a condition discussed by the parties subsequent to the filing of the petition. After the filing of the petition, the parties discussed a system-wide annual average SO₂ emission rate of 0.43 lb/mmBtu (rather than 0.44 lb/mmBtu) for the period from January 1, 2014, through December 31, 2014.

Ameren acknowledges that the parties have engaged in discussions after the filing of the petition and accepts the condition presented by Illinois EPA. There are, however, several seemingly inconsistent statements in the Illinois EPA recommendation that Ameren addresses in the following paragraphs.

First, there can be no doubt that we are in an economic crisis in this country and globally. Further, the recent and impending changes in the environmental regulatory arena

regarding emission from coal-fired electric generating facilities are known and well reported, with the only uncertainty being the final resolution. Indeed, Ameren's decision to come to this Board and seek relief was not made lightly especially as one of the chief architects of the MPS approach. In this variance proceeding, Ameren bears the burden under Section 35(a) of the Act to show that compliance with the MPS would impose an arbitrary and unreasonable hardship. 415 ILCS 5/35(a); 35 Ill. Adm. Code 104.238.

Ameren has, however, provided estimates, done prior to the vacatur of the Clean Air Interstate Rule ("CAIR"), of their capital costs of compliance with the Illinois CAIR, the Illinois mercury rule (including the MPS), and Illinois' requirements to address visibility as well as the attainment of both the ozone and PM_{2.5} National Ambient Air Quality Standards ("NAAQS") for comparison. Due to the recent bankruptcy filing of Lehman Brothers, which is believed widely as precipitating the current financial crisis gripping the economy, the size of Ameren Corporation's credit facilities were effectively reduced by up to \$121 million.¹ Compliance with environmental obligations is dependent upon securing adequate capital funding. The relief sought in this petition for variance would allow Ameren to defer approximately \$500 million in environmental capital expenditures scheduled for the 2009-2012 timeframe to subsequent years when the regulatory landscape is better defined and stability in the credit market returns.

Further, the Illinois EPA admits that the long term viability and effect of the CAIR and Illinois CAIR rules are in question. Recommendation at 14, par. 40. Ameren maintains that

¹ The current economic and credit crisis has been felt more broadly by Ameren. On October 20, 2008, issuance of ten-year senior secured notes by one of Ameren's regulated subsidiaries (AmerenIP) was at an effective interest rate of 10% and took approximately three days to market. In comparison, prior to the onset of the economic crisis - in late summer 2008 - Ameren debt with similar credit quality could be sold in hours and at an approximate rate of 7% to 7.5%. This issue is widespread. Recent utility long-term debt issuances (of equivalent credit quality to Ameren subsidiaries) have been rare.

given the combination of these factors, Ameren has clearly met its burden to show that compliance with the MPS would amount to an arbitrary hardship - especially in light of the reduced 2014 and 2017 SO₂ emission rates and additional emission rates for NO_x. included in the request for relief.

Second, the recommendation states that the requested relief would result in additional SO₂ for the period of 2013 *and beyond*. Ameren disagrees with this statement and has shared with Illinois EPA its concerns regarding the implication this statement. As proposed, the requested relief seeks to defer only the 2013 rate and not the 2015 rate which will remain completely unchanged. In exchange for the deferral of the 2013 rate, Ameren has agreed to additional rate commitments both for SO₂ and NO_x. These additional rate commitments coupled with the 2015 rate, which remains unchanged, would actually achieve reductions greater than provided under the MPS. Further, the even more stringent emission rate of 0.43 lb/mmBtu for 2014 that Ameren has agreed to meet will, in the Agency's own words, "result in a small net environmental benefit, and given the vacatur of CAIR, will provide reductions in 2010 beyond those currently required under federal and State law." Recommendation at 10, par. 28, 14, par. 40.

The Illinois EPA contends that Ameren has not identified any data or technical support for the conclusion that the additional reductions in SO₂ emission rates would offset any environmental impact resulting from the requested relief. This statement appears to be inconsistent with the Agency's statements found in other sections of the recommendation and may be inadvertent or simply intended differently. This statement could also reflect the Agency's position without considering Ameren's agreement to include the new system-wide annual average SO₂ emission rate of 0.43 lb/mmBtu from January 1 through December 31, 2014.

Nonetheless, both parties' conclusions as to environmental impact are supported by the record of the MPS rulemaking when considering Ameren's agreement to the more stringent system-wide annual average SO₂ emission rate of 0.43 lb/mmBtu as requested by Illinois EPA.

Third, Illinois EPA states that permanent relief is generally provided by an adjusted standard proceeding under Section 28.1 of the Act. 415 ILCS 5/28.1. Ameren reiterates that immediate relief, such that is available through a variance proceeding subject to a decision deadline, rather than a rulemaking or adjusted standard proceeding, is critical for Petitioners to make compliance determinations and investment decisions in early 2009. Nonetheless, Ameren will subsequently seek permanent relief perhaps, as the Illinois EPA suggests, in the Illinois mercury rule revisions currently pending before the Board. Amendments to 35 Ill. Adm. Code 225: Control of Emissions from Large Combustion Sources (Mercury Monitoring), R09-10 (Oct. 3, 2008).

Overall, Ameren agrees that the parties have engaged in discussions subsequent to the filing of the petition in which Petitioners agreed to a system-wide annual average SO₂ emission rate of 0.43 lbs/mmBtu in 2014 which, coupled with the other new and existing rate commitments, will result in a small net environmental benefit through 2020. The Illinois EPA states it would not object to the requested relief so long as the compliance plan included this SO₂ rate for the period from January 1, 2014 through December 31, 2014, and Ameren accepts this condition.

WHEREFORE, for the reasons set forth above, Petitioners AMEREN ENERGY GENERATING COMPANY, AMERENENERGY RESOURCES GENERATING COMPANY, and ELECTRIC ENERGY, INC., ask that the Board replace paragraph F of Ameren's compliance plan (*see* Petition, Section G, Par. 50(F)) with a system-wide annual average SO₂ emission rate of 0.43 lb/mmBtu from January 1, 2014 through December 31, 2014 in the Board's consideration of the petition for variance.

Respectfully submitted,

AMEREN ENERGY GENERATING
COMPANY, AMERENENERGY RESOURCES
GENERATING COMPANY, and ELECTRIC
ENERGY, INC.,

By:



One of Its Attorneys

Dated: November 25, 2008

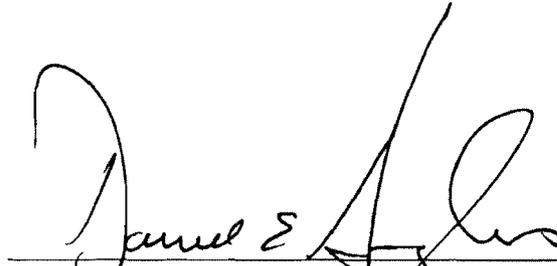
Kathleen C. Bassi
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SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
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312-258-5500

AFFIDAVIT OF DARRELL E. HUGHES

I, DARRELL E. HUGHES, having first been duly sworn, state as follows:

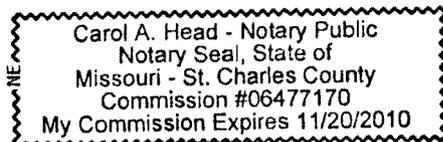
1. I am an employee of AMEREN SERVICES COMPANY which provides a variety of administrative and business services to Ameren Corporation and its subsidiaries including petitioners AMEREN ENERGY GENERATING COMPANY, AmerenENERGY RESOURCES GENERATING COMPANY, and ELECTRIC ENERGY, INC. I am a Supervisor within the Treasury Department and in that capacity I am familiar with the capital budgets, credit ratings, and debt structures of the Ameren Corporation and the petitioner companies.
2. I have read the preceding Response to Recommendation.
3. The statements of facts contained therein are true and correct to the best of my knowledge and belief.

FURTHER, AFFIANT SAYETH NOT.


Darrell E. Hughes

Subscribed and sworn to before me this 25 day of November, 2008.


NOTARY PUBLIC



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

**AMEREN ENERGY GENERATING
COMPANY, AMERENENERGY
RESOURCES GENERATING COMPANY,
AND ELECTRIC ENERGY, INC.,**

Petitioners,

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,**

Respondent.

**PCB 09-21
(Variance – Air)**

RESPONSE TO MOTION TO WAIVE NOTICE REQUIREMENT

NOW COME AMEREN ENERGY GENERATING COMPANY, AMERENENERGY RESOURCES GENERATING COMPANY, and ELECTRIC ENERGY, INC. (collectively, “Ameren” or “Petitioners”), by and through their attorneys, SCHIFF HARDIN, LLP, and, pursuant to Section 101.500(d) of the Illinois Pollution Control Board’s (“Board”) procedural rules (35 Ill. Adm. Code 101.500(d)), to respond to the Illinois Environmental Protection Agency’s (“Illinois EPA”) motion to waive notice requirements. Ameren does not object to the Agency’s motion, but respectfully requests that the Board find Ameren properly served the Illinois EPA with the petition for variance in this matter. In response, Ameren provides the following:

Ameren filed a petition for variance from certain requirements of the Illinois Multi-Pollutant Standard, 35 Ill. Adm. Code 225.233, on October 1, 2008 (“Petition”). Section 104.214(a) of the Board’s procedural rules requires the Illinois EPA to publish notice of the

petition for variance in a newspaper of general circulation in the county where the facility or pollution source is located within 14 days after the Petition is filed. 35 Ill. Adm. Code 104.214(a). The Illinois EPA published notification of the variance petition in seven newspapers, appearing October 27 through October 30, 2008. On November 13, Illinois EPA filed a certificate of publication with the Board.

On November 17, 2008, the Illinois EPA moved the Board or hearing officer to waive the 14-day publication of notice. 35 Ill. Adm. Code 104.214(a). The title, "Motion to Waive Notice Requirement," mischaracterizes the nature of the motion. The Illinois EPA's motion does not seek to waive the notice requirement altogether, but rather seeks a retroactive extension of the deadline within which to publish notice. As such, the motion would more appropriately be entitled a motion for extension of the deadline to publish notice or a motion to waive the deadline to publish notice of the petition.

Although, Ameren does not object to the Agency's late publication, since publication is a statutory requirement and must be done, Ameren and the Board have potentially been prejudiced by the late publication nor has the general public. The Board has a very tight timeframe in which to render its decision regarding a request for variance. The lateness of the publication, though it provided more time for members of the public to request a hearing on the Petition, compressed the time for any requested hearing to be held, followed by the Board's deliberation process. A request for hearing must be made within 21 days after publication. The two-week delay in publishing notice reduced the Board's time for deliberation by two weeks and exposed Ameren, who specifically did not request a hearing, to a hearing and its associated costs in terms of time and preparation. Any requests in this matter were due to be filed with the Board by November 20, 2008. 35 Ill. Adm. Code 104.224(c).

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The Illinois EPA clearly states that the delay in publication is “the fault of the undersigned attorney.” However, the Illinois EPA also lists as a contributing factor the fact that Ameren served the petition on two attorneys who were out of the office at the time. Though not part of the motion for waiver, the Illinois EPA notes in its recommendation that the Petition should have been served on the Illinois EPA Chief Legal Counsel. Ameren objects to any inference of improper service and asserts that service on the Illinois EPA Chief Legal Counsel is not required by the Board’s procedural rules. Ameren properly served the Illinois EPA Division of Legal Counsel with the petition for variance as required by Section 101.304(g)(1). 35 Ill. Adm. Code 101.304(g)(1). Further, service by U.S. Mail is deemed complete four days after mailing. 35 Ill. Adm. Code 101.300(c). Ameren specifically listed two Illinois EPA attorneys on the service list as a courtesy, but has no further way of confirming receipt of or intra-Agency routing of the Petition.

WHEREFORE, for the reasons set forth above, Petitioners AMEREN ENERGY GENERATING COMPANY, AMERENENERGY RESOURCES GENERATING COMPANY, and ELECTRIC ENERGY, INC., do not object to the Illinois EPA's motion for an extension of time to file the notice and respectfully request that the Board find that the Petition was properly served on Illinois EPA.

Respectfully submitted,

AMEREN ENERGY GENERATING
COMPANY, AMERENENERGY RESOURCES
GENERATING COMPANY, and ELECTRIC
ENERGY, INC.,

By:



One of Its Attorneys

Dated: November 25, 2008

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