BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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PLEASE TAKE NOTICE that I today I electronically filed with the Office of the Clerk of the Pollution Control Board the Appearances of Elizabeth Schenkier and Keith Harley and the Public Comments of the Respiratory Health Association of Metropolitan Chicago, the Sierra Club of Illinois, the Natural Resources Defense Council, the American Bottom Conservancy and the Environmental Law and Policy Center, copies of which are served upon you.

/s/ Keith Harley
Keith Harley

Dated: December 15, 2008

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Petitioners,	)	PCB – 09-21 (Variance – Air)
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

APPEARANCE

I, Keith Harley, hereby enter my Appearance as an attorney on behalf of the Respiratory Health Association of Metropolitan Chicago, the Sierra Club of Illinois, the Natural Resources Defense Council, the American Bottom Conservancy and the Environmental Law and Policy Center in the above matter.

Respectfully submitted,

/s/ Keith Harley
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Dated: December 15, 2008

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

APPEARANCE

I, Elizabeth Schenkier, hereby enter my Appearance as an attorney on behalf of the Respiratory Health Association of Metropolitan Chicago, the Sierra Club of Illinois, the Natural Resources Defense Council, the American Bottom Conservancy and the Environmental Law and Policy Center in the above matter.

Respectfully submitted,

/s/ Elizabeth Schenkier

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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PUBLIC COMMENTS OF RESPIRATORY HEALTH ASSOCIATION OF METROPOLITAN CHICAGO, SIERRA CLUB OF ILLINOIS, NATURAL RESOURCES DEFENSE COUNCIL, THE AMERICAN BOTTOM CONSERVANCY AND THE ENVIRONMENTAL LAW AND POLICY CENTER

NOW COMES the Chicago Legal Clinic, Inc., by its attorneys Elizabeth Schenkier and Keith Harley, on behalf of the Respiratory Health Association of Metropolitan Chicago, the Natural Resources Defense Council, the Sierra Club of Illinois, the American Bottom Conservancy and the Environmental Law and Policy Center (hereinafter "the Public Interest Commentators"), in response to the Petition for Variance of Ameren Generating Company, AmerenEnergy Resources Generating Company and Electric Energy, Inc. (collectively "Ameren") , from certain requirements of the Multi-Pollutant Standard ("MPS"), 35 Ill. Admin. Code 225.233. Pursuant to 35 Ill. Admin. Code Section 104.224, the Public Interest Commentators urge the Illinois Pollution Control Board (the "Board") to deny Ameren's Petition for Variance or, in the alternative, require Ameren to present evidence at a public hearing to prove its

entitlement to the requested variance. In support of its recommendation, the Public Interest Commentators state as follows:

INTRODUCTION

On October 1, 2008, Ameren petitioned the Board for a variance from Section 225.233(e)(2)(A) of the Illinois Multi-Pollutant Standard ("MPS"), 35 Ill. Admin. Code § 225.233. Under the Illinois Environmental Protection Agency Act, 415 ILCS § 5/35(a) and Board rules, Ameren's petition for a variance can only be granted if Ameren is able to present "adequate proof" that compliance with the rule would "impose an arbitrary or unreasonable hardship." 35 Ill. Admin. Code § 104.200. The burden of proof is strictly on the petitioner. 35 Ill. Admin. Code § 104.238.

In assessing the merits of petitions for a variance, the Board holds petitioners to a high standard: proof that the claimed hardship of compliance with existing regulations outweighs the public interest in attaining compliance. *Plexis Scientific Corp. v. Illinois Environmental Protection Agency,* PCB No. 01-120, 2001 Ill. ENV. LEXIS 325 (July 12, 2001); *Monsanto v. Illinois Pollution Control Board,* 67 Ill. 2d 276, 292, 367 N.E. 2d 684 (1977)("In granting or denying a variance . . . , the Board must balance individual hardship against environmental impact"), *Willowbrook Motel Partnership v. Illinois Pollution Control Board,* 135 Ill. App. 3d 343, 350, 481 N. E. 2d 1032, 1037 (1st Dist. 1985). As the court explained in *Willowbrook*, the burden on the party petitioning for a variance is "heavy" and doubts should be resolved against the variance and in favor of compliance with regulations designed to protect public health and the environment. 135 Ill. App. 3d at 349-50. Because Ameren has failed to meet its burden of proving that compliance with the currently applicable standards would impose unreasonable or

arbitrary hardship, and because Ameren has failed to address adequately the environmental and public health impacts of its proposal, the variance petition should be denied.

1. Uncertainty about future regulatory requirements does not create an arbitrary or unreasonable hardship justifying a variance.

Ameren's claim of undue hardship is primarily based on the description it provides of the current uncertainties in environmental law. Ameren argues that the vacaturs of the Clean Air Mercury Rule ("CAMR") and the Clean Air Interstate Rule ("CAIR") regulations have "created confusion, upheaval, and uncertainty such that what appeared reasonable in 2006 is no longer so." Ameren Petition at p. 8. Ameren also points to the likelihood of greenhouse gas regulation and potential SIP revisions from new PM 2.5 and ozone NAAQS. Ameren Petition at pp. 14 – 20. But uncertainty about the content of future environmental regulations is a constant, and it cannot and should not justify a variance.

As the Board held in *Citizens Utility Co. v. Illinois Environmental Protection Agency*, 1984 Ill. ENV. LEXIS 404, * 7, "[a]lthough revisions to standards do occasionally occur, the Board cannot grant variances based on a petitioner's hope that a particular set of standards will be changed in the future," *aff.d in Citizens Utility Co. v. Illinois Pollution Control Board*, 134 Ill. App. 3d 111, 115, 479 N. E. 2d 1213, 1216 (3d Dist. 1985), where the court stated that "[i]f the speculative prospect of future changes in the law were to constitute an arbitrary and unreasonable hardship, then the law itself would be emasculated with variances, as there is always the prospect for future change."

In its Recommendation, the Illinois EPA asserted its own objection to Ameren's attempt to justify its variance proposal on the basis of uncertainties in law: "Petitioners

are citing speculation over the impact of CAIR, CAMR, and GHG legislation, and recent market conditions as a basis for arbitrary and unreasonable hardship instead of data and technical support." Illinois EPA Recommendation at p. 14. In summary, legal uncertainty does not create an unreasonable or arbitrary hardship; uncertainty about the impacts of future laws and regulations is ever-present.

2. There is no greater uncertainty about future laws now than there was when Ameren agreed to comply with the MPS.

The uncertainty which Ameren now claims as a justification for revising the MPS is nothing new. At the time that Ameren opted into the MPS on December 27, 2007,[1] less than a year ago, there was similar uncertainty in the future regulatory structure to which coal-fired electrical generating units would be subject. The Supreme Court's decision in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), based on Petitions for rulemaking filed nearly ten years ago and lawsuits filed in 2003, was issued in April of 2007, and climate change regulations have been on the agenda since at least that date. Challenges to CAIR and CAMR were raised in August of 2005 and the possibility of changes to those rules is nothing that Ameren could not have predicted at the time that it signed off on the MPS.

Uncertainty about the nature of future regulation of coal-fired power plants has been a part of the regulatory landscape for many years. By opting into the MPS as a vehicle for resolving compliance issues with the Illinois mercury rule, Ameren took the risk that the regulatory structure would not be static. And it is important to note here that the MPS was not simply a set of rules made applicable to Ameren without any input from Ameren. Rather, the MPS was a regulatory compromise structured with direct input and

[1] *See* Ameren Exhibit 2, Ameren's Notice of Intent to demonstrate compliance with the MPS.

negotiation by Ameren, as Ameren points out in its Petition. Ameren Petition at p.6, n. 6. Indeed, during hearings on the MPS regulations, Ameren itself testified to the "technical and economic reasonableness of the MPS". *In the Matter of Proposed New 35 IAC 225 Control of Emissions from Large Combustion* Sources, R06-25, 2006 Ill. ENV. LEXIS 520, at * 26-27 (November 2, 2006). Therefore, Ameren's attempt to avoid the MPS requirements now should be rejected. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 760-61 (1992) where the Supreme Court held, with respect to modifications to consent decrees, "[o]rdinarily . . . modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree."

Finally to the extent that uncertainties in environmental law should ever be considered in the context of variance proceedings, it is important to note that the regulatory changes Ameren is pointing to will subject it to more stringent rules rather than less. The decisions in *Massachusetts v. EPA, supra*, *New Jersey v. EPA*, 517 F. 3d 574 (D.C. Cir. 2008), and *State of North Carolina v. EPA*, 531 F. 3d 896, (D.C. Cir. 2008), all reject U.S. EPA decisions and regulations on the basis that they do not provide sufficient regulations under the Clean Air Act. A petition to release a source from emission limits it had previously agreed to on the basis of the impact of prospectively more stringent standards should be greeted with heightened skepticism.

3. The possibility of future shut-downs of Ameren plants does not justify the variance because the MPS already provides a path for shutdown.

Ameren relies heavily on its assertion that because there is currently no technology to reduce or capture CO2 from large coal-fired power plants, it may end up shutting down certain plants to meet greenhouse gas targets and hence the costs of SO2

compliance will be wasted. This argument is highly speculative both as to the nature of CO2 regulations and the options for compliance with regulations not yet in existence. More to the point, however, the current MPS already took the possibility of plant shutdowns into consideration and constructed a specific path for exemption due to plant shutdowns.

Applicable regulations allow sources to choose among three alternative methods of compliance: (1) comply with the numerical mercury limits of Section 225.230; (2) comply with the MPS standards of Section 225.233; or (3) designate plants for permanent shutdown under Section 225.235.[2] But Ameren is apparently dissatisfied with the three compliance alternatives established by Illinois EPA regulations it helped to forge and thus seeks now to add a fourth alternative to allow it to obtain the benefits of the shutdown exemption without complying with the provisions and deadlines governing shutdown. This should not be permitted. The possibility of shut-down as a compliance alternative has already been provided for in the MPS and hence this possibility provides no basis for a request for variance.

4. Ameren's claim to financial hardship is vague and unsubstantiated and therefore does not justify its petition for a variance.

There is no denial from the environmental groups that the United States and global economies are facing significant stress and that the credit market is weak. But environmental regulations put into place to protect the public health and environment are not enforceable only in "good times." Thus, a petition for variance can be justified only by specific proof by the petitioner of an "undue and arbitrary hardship." 35 Ill. Admin.

[2] Under the shutdown alternative, permanent shutdown provides an exemption from otherwise applicable emission limits if a source (a) shuts down by 12/31/2010 or 12/31/2011, depending on whether or not it is being replaced, and (b) provides notice to the IEPA of shutdown by June 30, 2009. 35 Ill. Admin. Code 225.235.

Code § 104.200. Ameren's petition fails to provide adequate proof that its individual economic situation has changed to such an extent that compliance with the MPS standards which it agreed to last December now will be an undue and arbitrary hardship. For even without a particularized showing of environmental harm, the burden remains on the petitioner "to convince the Board that a variance [is] necessary to avoid arbitrary or unreasonable hardship." *Willowbrook Motel, supra* at 349.

In its Petition, Ameren asserts that the financing of large projects is at risk due to "events on Wall Street." Petition at p. 14. As Illinois EPA noted in its Recommendation, Ameren's assertions fail to make the case for undue hardship: "Petitioners have presented no financial information to support the need for financial conservatism." Illinois EPA Recommendation at p. 14. Interestingly, of Ameren's 29 Exhibits to its Petition for Variance, only four are specifically related to Ameren; the other 25 are articles and letters concerning general issues in environmental law and climate change regulations. *See* Ameren's Petition at pp. xiii – xv, "Exhibit List".

Ameren's November 25, 2008 Response provides more discussion of current national economic conditions, but still fails to demonstrate that compliance with the MPS would cause undue or arbitrary hardship. In its Response, Ameren states that its credit has been squeezed and that interest on loans has increased substantially in recent weeks. Response at p. 3. But it does not present evidence that compliance with the MPS would create an undue or arbitrary economic hardship. While Illinois EPA concludes in its December 4, 2008 Reply that it does not object to Ameren's Petition for Variance, as amended, it reiterates its position that the record does not contain information to confirm

or contradict Ameren's claims about undue economic hardship. Illinois EPA Reply at pp. 2 – 3.

In fact, in a November 5, 2008 article in the St. Louis Post Dispatch, Ameren Chief Financial Officer Warner Baxter is quoted as telling investors and analysts that Ameren has $1.45 billion of cash and available liquidity at the end of October and no significant near-term debt maturities. *See* www.stltoday.com. Moreover, Ameren is the recipient of two large recent rate increases, *see* Illinois Commerce Commission Dockets No. 07-0165 and 07-0585 (currently on appeal) and its latest filing with the SEC indicates that net income for the period January 1 to September 30, 2008 is up to $548 million from $510 million for the same period in 2007. *See* www.ameren.com [Form 10Q for 1st three quarters of 2008, filed Nov. 10, 2008.] For these reasons, Ameren's Petition falls far short of meeting its burden of showing undue and arbitrary economic hardship from meeting applicable environmental regulations and the Petition should therefore be denied.

5. Ameren's Petition for Variance gives short shrift to the environmental impacts of the MPS revisions it seeks.

Under the variance rules, Ameren bears the burden of demonstrating that its hardship in compliance outweighs the environmental impact of the variance. But in its Petition, Ameren acknowledges that it "does not have data that addresses the qualitative and quantitative impact of its activity on human health and the environment." Ameren Petition at p. 26. Instead, it merely concludes that "[a]ny minimal environmental impact resulting from the requested relief will be offset by the new and additional emission rates for SO2 and NOx Ameren has set forth in this Petition." *Id.* But "conclusory assertion[s]" unsupported by data and analysis are insufficient to meet a petitioner's

burden of proof. *Illinois Environmental Protection Agency v. Illinois Pollution Control Board*, 95 Ill. App. 3d 400, 405-06, 420 N.E. 2d 245, 249 (3d Dist. 1981). Thus, Ameren's failure to fully analyze the data on the environmental impact of this variance is fatal.

Unfortunately, the Illinois EPA overlooks Ameren's failure to address the environmental impact of its proposal and merely concludes that "the negotiated relief will result in a small net environmental benefit and will result in emission reductions beginning in 2010." Illinois EPA Recommendation at p. 14. But the Illinois EPA's oversight does not justify the granting of the variance because the burden is on the petitioner and not on the Illinois EPA. *Illinois Environmental Protection Agency*, *supra* at 95 Ill. App. 3d at 406, 420 N. E. 2d at 250. "The burden is upon the Pollution Control Board to see that adequate information is provided so that the Board may make an informed decision as to how the variance will fit within the regulatory requirements under the Act." *Id.*

The Public Interest Commentators' concern about the alleged environmental benefit of the variance petition is based on the failure of Ameren or Illinois EPA to fully analyze the data on the environmental impact of this variance. As originally promulgated, the MPS requires Electrical Generating Units to reduce overall annual average SO2 emissions to 0.33 lbs/MMBTU by 2013 and 0.25 lbs/MMBTU by 2015. 35 Ill. Admin. Code § 225.233. Ameren's proposed variance would instead impose a system-wide average SO2 rate of .50 lb/MMBTU from 2010 to 2013, .43 lb/MMBTU in 2014, .25 lb/MMBTU in 2015 and .23 lb/MMBTU in 2017 and thereafter. So, in some years, the MPS sets a stricter emission rate than the variance (2013 and 2014) and in

some years, the variance sets a more stringent emission rate (2010-2013 and post-2017). Ameren asserts in its Petition that the near-term increases in SO2 emissions will have a minimal environmental impact and no significant downwind health effect. Ameren Petition at p.26. But without any information on operating use of the plants over the relevant period and data on emissions and air quality with and without the proposed variance, it is impossible to confirm Ameren's claim.

The Board has a statutory responsibility to judge a variance petition by weighing facts balancing economic hardship and environmental harm. For the Board to make a decision on a variance petition without those facts would be an abdication of its responsibility and set a poor precedent for future variance proceedings. Therefore, despite both Ameren and Illinois EPA's conclusory statements that the variance will create a net environmental benefit, the Board should reject Ameren's Petition as unsupported by data. In the alternative, the Board should grant a public hearing and demand that Ameren and the Illinois EPA provide a full analysis of the environmental impact of granting this variance before reaching its decision.

6. Granting Ameren's Petition for variance on the basis of speculation rather than factual evidence of an undue hardship that outweighs environmental harm will set a dangerous precedent for future variance proceedings.

Ameren is not the only electric generator in the State of Illinois subject to the 2007 regulatory structure and affected by the uncertainties of future regulations and future balancing of shutdown possibilities. To approve this variance petition on the grounds raised by Ameren will just open the door to new and additional claims of "undue hardship" by other coal-fired power plant owners and operators. If speculation over future legislation and regulation is sufficient to justify a variance, the Board will be

opening the floodgates to variance requests from a variety of sources subject to state standards that are in flux.

CONCLUSION

In conclusion, Ameren's Petition for Variance should be denied because Ameren has not met its burden of providing facts that prove that it will face an undue and arbitrary hardship in meeting the MPS limits that outweighs the environmental impact of its variance proposal. The Board should deny Ameren's Petition for Variance or, in the alternative, hold hearings to require Ameren to meet its burden of proof.

Respectfully submitted,

/s/ Elizabeth Schenkier
Elizabeth Schenkier

/s/ Keith Harley
Keith Harley

Chicago Legal Clinic, Inc.
Attorneys for Respiratory Health Association of Metropolitan Chicago, Sierra Club of Illinois, Natural Resources Defense Council, the American Bottom Conservancy and the Environmental Law & Policy Center

CERTIFICATE OF SERVICE

I, Keith Harley, certify that on this 15th day of December, 2008, I served the attached Appearances of Elizabeth Schenkier and Keith Harley and the Public Comments of the Respiratory Health Association of Metropolitan Chicago, the Sierra Club of Illinois, the Natural Resources Defense Council, the American Bottom Conservancy and the Environmental Law and Policy Center upon the following persons by mailing them by first class mail from Chicago, Illinois with sufficient postage affixed to the following persons:

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