BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DYNEGY MIDWEST GENERATION, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**PCB 09-48**
	)	**Variance – Air**
ILLINOIS ENVIRONMENTAL PROTECTION Agency,	)	
	)	
	)	

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

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

PLEASE TAKE NOTICE that we have today electronically filed with the Office of the Clerk of the Pollution Control Board **MOTION FOR RECONSIDERATION**, copies of which are herewith served upon you.

Kathleen C. Bassi

Dated: February 18, 2009

Kathleen C. Bassi
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312-258-5500

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DYNEGY MIDWEST GENERATION, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**PCB 09-048**
	)	**Variance – Air**
ILLINOIS ENVIRONMENTAL PROTECTION Agency,	)	
	)	
	)	
Respondent.	)	

MOTION FOR RECONSIDERATION OF RECOMMENCING THE 120-DAY PERIOD FOR THE BOARD'S DECISION

NOW COMES Petitioner, DYNEGY MIDWEST GENERATION, INC. ("DMG"), by and through its attorneys, SCHIFF HARDIN, LLP, pursuant to 35 Ill.Adm.Code § 101.520,[1] and moves the Board to reconsider its Order entered February 5, 2009, in this matter ("Order"), finding that the "informational deficiencies" cited by the Board are so egregious as to require DMG to submit an amended petition,[2] thereby recommencing the 120-day statutory period for the Board to issue its decision on the merits of DMG's Petition for Variance ("Petition"). More specifically, DMG respectfully requests that the Board reconsider its determination that the 120-

[1] Hereinafter, references to the Board's rules codified at 35 Ill.Adm.Code are referred to merely by section number.

[2] DMG is, indeed, providing the four additional items of information requested by the Board by filing a document stylized as an Amended Petition for Variance simultaneously with this Motion for Reconsideration. However, as stated in the Amended Petition, the document would be more correctly stylized as a Supplement to DMG's Petition for Variance. Also as stated in the Amended Petition, DMG does not waive any rights of appeal of the Board's Order by complying with its terms and submitting document stylized as an Amended Petition for Variance.

day statutory period for decision must recommence. In support of its Motion for Reconsideration, DMG states as follows:

I. BACKGROUND

1. On January 9, 2009, DMG petitioned the Board to grant it relief from the requirements of Sections 225.233(c)(1)(A) and 225.233(c)(2)[3] that it inject halogenated activated carbon[4] at a rate of 5.0 pounds per million actual cubic feet ("lb/macf") exhaust gas flow beginning July 1, 2009, at Unit 3 at its Baldwin Energy Complex ("Baldwin Unit 3"). Pet., p. 1. The relief sought in the Petition for Variance is time-sensitive in light of the July 1, 2009, compliance date applicable to Baldwin Unit 3 and the lead time needed to prepare Baldwin Unit 3 to meet the requirements of Section 225.233. The term of the variance would end March 31, 2010, by which time Baldwin Unit 3 will be temporarily shut down as part of the outage necessary for DMG to install various pollution control equipment on that unit. Pet., p. 20, ¶ 34. If DMG is not timely granted the relief sought, then DMG must take a two-day outage in spring 2009 to install the sorbent injection lances for Baldwin Unit 3 and have sorbent on-site before July 1, 2009, in order to comply with Section 225.233(c).[5]

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[3] DMG also sought relief from the related monitoring, recordkeeping, and reporting provisions at Sections 225.210(b) and (d) and 225.233(c)(5).

[4] The terms "halogenated activated carbon" and "sorbent" were used interchangeably in the Petition for Variance and are, likewise, used interchangeably here.

[5] As discussed in the Amended Petition, DMG must comply with Section 225.233(c) and, therefore, must proceed with plans for installing the sorbent injection system at Baldwin Unit 3 if it does not have a decision from the Board at its May 7, 2009, meeting, barring any other relief that might be available. Moreover, DMG will not inject sorbent at Havana Unit 6 or Hennepin Unit 2 beginning July 1, 2009, unless the relief requested in the Petition for Variance is granted, as the compliance date for these units is not until December 31, 2009.

2. To ensure there would be no environmental harm resulting from the granting of this variance, DMG proposed to inject sorbent at Unit 6 at its Havana Power Station ("Havana Unit 6") and at Unit 2 of its Hennepin Power Station ("Hennepin Unit 2") approximately six months before required, *see* Section 225.233(c)(1)(A), at a rate of 5 lbs/macf or at the rate necessary for these two units to achieve, either individually or averaged together, mercury reductions of 90% or a mercury emission rate of 0.0080 lb/GWhr[6] based upon a single stack test on the applicable unit or units in accordance with proposed Sections 225.239(d)(4) and (5), (e), and (f)(1), assuming that those sections are adopted under the Board's Docket R09-10 substantively the same as on the date of the filing of the Petition. Pet. p. 20, ¶ 36(A).

3. On February 5, 2009,[7] the Board issued an Order in this matter identifying four "informational deficiencies." Order, p. 1. The Order further stated that

> [b]efore this proceeding can continue, petitioners must remedy these informational deficiencies by filing an amended petition. . . . Failure to timely file the amended petition will subject this matter to dismissal. *See* 35 Ill. Adm. Code 104.230. The 120-day statutory period for the Board to decide this case will recommence upon filing of the amended petition. *See* 35 Ill. Adm.Code 104.232(a)(2).

Order, p. 2. For each of the "informational deficiencies" identified in the Order, the Board cited a subsection of Section 104.204.

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[6] The proposed compliance plan providing for DMG's compliance with the 90% removal rate or the mercury emission rate was for purposes of the variance only and was not intended to be an opt-in to the mercury emission standards of Section 225.233(d). *See* Pet., p. 21, ¶ 39.

[7] Note that the Board's Order contains a typographical error and dates the Order as February 5, 2008.

II. THE BOARD'S INFORMATION REQUESTS DO NOT ESTABLISH AN INADEQUATE PETITION FOR VARIANCE.

4. Pursuant to Section 104.230, the provisions of Section 104.204 are essentially jurisdictional in nature. That is, if the information required by one or more of the subsections of Section 104.204 is not included in the petition, the Board may dismiss the petition for variance pursuant to Section 104.230(b). However, the "informational deficiencies" identified by the Board in this matter do not support dismissal and do not rise to the level of jurisdictional deficiencies. Rather, each one is in the nature of a request for additional information, such as information that would or could be obtained through direct or cross examination at a hearing or through interrogatories or other fact-gathering procedures. Certainly any number of questions might be raised about any variance petition, but that does not mean that the Petition filed is deficient. None of the information requested by the Board is essential for the Board to fairly and comprehensively determine whether DMG's Petition should be granted. None of the particular information requested by the Board in the Order is specifically, or in some cases, even indirectly, referenced under Section 104.204. Therefore, it is improper for the Board to treat DMG's submittal of this information as an amended petition (regardless of the phrasing of the document), thus recommencing the 120-day statutory period for the Board to issue its decision in this matter.

A. Item 1: Location of Air Quality Monitors Relative to DMG's Power Plants

5. Item 1 requires DMG to "indicate the nearest monitoring station as well as the nearest downwind monitoring station maintained by the Agency that are used for monitoring mercury emissions for each of Dynegy's power stations and identify the specific stations by name and location." Order, p. 1. DMG provided a map taken from page 34 of the Illinois Environmental Protection Agency's ("Agency") *Illinois Annual Air Quality Report 2006*. Pet.

Ex. 1 (cited at Pet. p. 2, ¶ 2, footnote 2). DMG's power stations were superimposed upon this map. DMG contends that this map alone is sufficient to satisfy the requirements of Section 104.204(b)(2).

6. Section 104.204(b)(2) requires identification of the nearest air monitoring stations "if known." 35 Ill.Adm.Code § 104.204(b)(2). Section 104.204(b)(2) does not require the identity of specific stations by name and the exact street address. The map taken from the 2006 air quality report shows the locations of the Agency's air monitoring stations, which is all that Section 104.204(b)(2) requires. There is nothing in Section 104.204(b)(2) to suggest that anything more than a copy of the Agency's map from the Agency's annual air quality report is required if the petitioner's source is identified on that map or otherwise in relation to that map.

7. Moreover, the Agency's annual air quality reports are readily available online, and the map was properly cited. The information the Board requests in Item 1 is readily obtainable by the Board and would not have caused it to expend undue time and effort to obtain it.

8. DMG is, indeed, providing the information requested by the Board in the Amended Petition filed simultaneously with this Motion for Reconsideration. However, the information is taken from the Agency's 2007 air quality report, not available at the time that the Petition for Variance was initially filed. Had the Board's rules been more specific regarding the level of detail the Board prefers, DMG would have provided it at the time that it initially filed its Petition for Variance.

9. For the reasons set forth above, the additional information requested by the Board in its Order at Item 1 does not rise to the level of a jurisdictional deficiency and is not a ground for the Board to dismiss DMG's Petition for Variance or recommence the 120-day statutory

period for decision. The map at Exhibit 1 of DMG's Petition for Variance showed the locations of all of the Agency's air monitoring stations and the locations of DMG's power plants, thereby satisfying the requirements of Section 104.204(b)(2).

B. Item 2: Quantification of the Amount and Type of Coal Burned at Baldwin Unit 3, Havana Unit 6, and Hennepin Unit 2

10. Item 2 of the Board's Order quotes DMG's statement in its Petition stating that it burns low sulfur coal to control sulfur dioxide ("SO_2") emissions and then requests quantification of "the amount and type of coal used at each power station (Baldwin Unit 3, Havana Unit 6, and Hennepin Unit 2) and [whether] that amount and type is expected to change during the proposed variance period," citing Section 104.204(b)(6). Order, p. 1. Again, Item 2 asks for supplemental information that might be of general interest to the Board, but the lack of this information does not rise to the level of a deficiency that supports dismissal of the Petition for Variance. Moreover, DMG's Petition for Variance made no claim of a fuel switch or different coal usage and so had no reason to even consider providing such information in the Petition for Variance. The use of sorbent for mercury control will not change the rate of coal used by these units.

11. First, SO_2 emissions, to which the Board's Item 2 initially refers, are irrelevant to the Petition for Variance. The pollutant of concern to the Petition for Variance is mercury.

12. Second, the "materials used in the process or activity for which the variance is sought," 35 Ill.Adm.Code § 104.204(b)(6) are sorbent, not coal. DMG stated in its Petition that it estimates that it would inject 4 million pounds of sorbent at Baldwin Unit 3 during the variance period. Pet., p. 13, ¶ 18. Likewise, DMG stated that it expected to inject 2.5 million fewer pounds of sorbent in Havana Unit 6 and Hennepin Unit 2 during the variance period. Pet., p. 15. In fact, the Board referred to these very numbers in Item 4 of its Order.

13. Though the amount of coal burned at these units during the variance period is not necessarily germane to the requirements of Section 104.204(b)(6) for DMG's Petition for Variance, the information is provided in the Petition, though it was not presented as obviously as the Board apparently prefers. *See* Pet. Ex. 6, Table labeled "Predictions of Mercury Emissions Off-sets for Baldwin Unit 3, 70% Removal" ("Table"). The amount of coal burned in each unit, which is a direct function of the capacity factor, heat rate, and coal heating value, is implicitly included in the Table, and one can use that information to determine the amounts of coal used for determining the mercury reduction anticipated during the variance period. Nonetheless, for clarity and convenience for the Board, DMG is specifying the amount of coal DMG anticipates will be burned during the variance period in the Amended Petition filed simultaneously with this Motion for Reconsideration.

14. For the reasons set forth above, specifically that coal is not the relevant "material[] used in the process . . . for which the variance is sought," 35 Ill.Adm.Code § 104.204(b)(6), and because DMG did provide the Board with both the amounts of sorbent (the relevant "material[] used in the process") that would be injected at Baldwin Unit 3 if that unit were to comply with Section 225.233(c) and at Havana Unit 6 and Hennepin Unit 2 during the variance period and information from which the amount of coal can be derived, Item 2 of the Board's Order does not rise to the level of a jurisdictional deficiency and cannot serve as a basis for dismissal of the Petition or recommence the 120-day statutory period for decision.

C. Item 3: Additional Mercury Emissions at Baldwin Unit 3 if the Unit Operated Past March 10, 2010

15. While understanding the Board's confusion that gave rise to the question posed at Item 3 in the Order, the additional information requested does not rise to the level of a jurisdictional deficiency in the Petition creating a ground for dismissal of the Petition.

Moreover, Section 104.204(c), the section cited as support for the Board's request for information, does not require the type of information that the Board requested in Item 3, despite the Board's reference to the end date on the Table in Exhibit 6 to the Petition.

16. Section 104.204(c) requires that the Petitioner provide "[d]ata describing the nature and extent of the present or anticipated failure to meet the regulation . . . from which variance is sought and facts that support petitioner's argument that compliance with the regulation . . . was not or cannot be achieved by any required compliance date." The Board's information request asks for any amount of mercury to be emitted in excess of 126.83 pounds at Baldwin Unit 3 if the unit is operated past March 6, 2010. The information on the Table was provided to demonstrate that there would be no environmental harm resulting from the variance and that, in fact, DMG estimated there could be a net environmental benefit resulting from its proposed compliance plan relative to its operation of Havana Unit 6 and Hennepin Unit 2.[8]

17. The amount of mercury that could be emitted during the term of the variance is not part of the "extent of the . . . anticipated failure" to comply because there is no requirement that DMG emit only a certain amount of mercury or at a prescribed rate. The only requirement applicable to Baldwin Unit 3 during the variance period is that it inject one of the named brands of sorbent at a rate of 5 lb/macf through an injection system designed for effective absorption of mercury. 35 Ill.Adm.Code § 225.233(c)(2); *see also* Testimony of Jim Ross, R09-10 Tr., pp. --- (Feb. 10, 2009). That system was described in the Petition. *See* Pet., p. 13, ¶ 19; *see also* Pet. Ex. 5 (discussion of the inhibitive effect of injection of sulfur trioxide on mercury removal, a

[8] The Board could view subparagraph A of the compliance plan at ¶ 36 of the Petition as more appropriately characterized as a condition of granting the variance. However, the Board determines the conditions of a variance, and DMG's characterizing its proposed operation of Havana Unit 6 and Hennepin Unit 2 as part of the compliance plan rather than as a condition to the granting of the variance is also not a ground for dismissal of the Petition.

limitation on the ability of Baldwin Unit 3 to more effectively remove mercury). The extent of the "anticipated failure" is that DMG would inject no sorbent at Baldwin Unit 3. That is implicit in DMG's request for the variance and was stated numerous times in the Petition. *See, e.g.*, Pet. p. 20, ¶ 35(A).

18. For the reasons set forth above, the Board's request for additional information regarding the amount of mercury that DMG estimates would be emitted if the spring 2010 outage begins after March 6, 2010, does not rise to the level of a jurisdictional deficiency and cannot serve as a basis for dismissal of the Petition or recommence the 120-day statutory period for decision. Because there is no requirement for reduction of a specific amount of mercury and no mercury emission limitation that applies to Baldwin Unit 3, the amount of mercury that would be emitted during the 15 days identified in Item 3 of the Order is irrelevant.

D. Item 4: Amount of Money Saved by Not Losing Revenue Through an Outage to Install Lances at Baldwin Unit 3

19. The Board cites DMG's decision to not include the cost of lost revenue (a commercially sensitive issue in light of market competition) due to the outage that would be necessary to install lances for injecting sorbent at Baldwin Unit 3 as a piece of information rising to the level of a jurisdictional deficiency pursuant to Section 104.204(d). However, Section 104.204(d) does not require a petitioner to provide explicitly each cost of immediate compliance. It does state that a petition may provide the overall capital costs and annualized capital and operating costs of immediate compliance. Therefore, the additional information that the Board requests does not rise the level of a jurisdictional deficiency, serving as a basis for dismissal of the Petition or recommencement of the 120-day statutory period for decision.

20. Section 104.204(d) requires the corresponding costs of compliance alternatives. DMG provided those costs, though again apparently not as obviously as the Board prefers.

There is no compliance alternative. DMG must inject sorbent at a rate of 5 lb/macf at Baldwin Unit 3. There is no other way for Baldwin Unit 3 to comply with Section 225.233(c)(2). Therefore, there is no cost associated with a compliance alternative.

21. DMG did propose to inject sorbent at Havana Unit 6 and Hennepin Unit 2 to ensure there was no environmental harm resulting from the granting of the variance. Item 4 of the Board's Order refers to this proposal and confuses the cost of this action, not required by any rule but offered as an offset to avoid environmental harm, with the cost of an alternative compliance approach. Injecting sorbent at Havana Unit 6 and Hennepin Unit 2 is not an alternative compliance approach. It is merely an activity that DMG is willing to undertake to offset the mercury emissions that would occur from operating Baldwin Unit 3 without sorbent injection during the variance period.

22. For the reasons set forth above, Item 4 of the Board's Order does not request information that is required by Section 104.204(d). The information required by Section 104.204(d) was included in the Petition for Variance. Item 4 cannot serve as a basis for the Board to dismiss DMG's Petition or recommence the 120-day statutory period for decision.

III. CONCLUSION

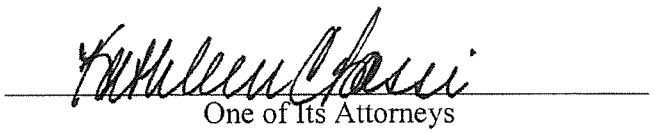
WHEREFORE, for the reasons set forth above, DMG asserts that there were no "informational deficiencies" in its Petition for Variance and that the Board's Order was improper. Therefore, the Board's determination that the 120-day statutory period for it to issue its decision regarding DMG's Petition for Variance must recommence was improper as well. For these reasons, DMG respectfully requests that the Board reconsider its determination that the

120-day statutory period for decision must recommence upon the filing of DMG's responses to the Board's requests for additional information.

Respectfully submitted,

DYNEGY MIDWEST GENERATION, INC.,

by:



One of Its Attorneys

Dated: February 18, 2009

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 18th day of February, 2009, I have served electronically the attached **MOTION FOR RECONSIDERATION** upon the following persons:

John Therriault, Assistant Clerk
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and by first class mail, postage affixed, upon:

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