

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 13-24
)	(Variance – Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

To:

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

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

Bradley P. Halloran, Hearing Officer
 Illinois Pollution Control Board
 James R. Thompson Center
 Suite 11-500
 100 West Randolph
 Chicago, Illinois 60601

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board **PETITIONER'S POST-HEARING BRIEF**, copies of which are herewith served upon you.

Andrew N. Sawula (Signature)

Andrew N. Sawula

Dated: February 19, 2013

SCHIFF HARDIN LLP
Attorneys for Midwest Generation, LLC
Kathleen C. Bassi
Stephen J. Bonebrake
Andrew N. Sawula
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
Phone: 312-258-5500
Fax: 312-258-5600
kbassi@schiffhardin.com
sbonebrake@schiffhardin.com
asawula@schiffhardin.com

Christopher M. Foley
Managing Director and Senior Counsel
Midwest Generation EME, LLC
500 West Madison Street, Suite 2640
Chicago, Illinois 60661
312-583-6003
cfoley@mwgen.com

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PETITIONER’S POST-HEARING BRIEF

Petitioner MIDWEST GENERATION, LLC (“Midwest Generation” or “Petitioner” or “the company”) filed a Petition for Variance with this Board on November 30, 2012. In the Petition, Midwest Generation requested relief from two provisions of the Combined Pollutant Standard (“CPS”): (1) the annual average system-wide emission rates for sulfur dioxide (“SO₂”) for the years 2015 and 2016 set forth at 35 Ill. Adm. Code § 225.295(b)¹; and (2) the requirement at Section 225.296(a)(2) that Midwest Generation install and have operational flue gas desulfurization (“FGD”) equipment at Waukegan Unit 8 by December 31, 2014, for a period of five months, until May 31, 2015. Additionally, recognizing that the Board had required Midwest Generation to comply with the system-wide SO₂ emission rates in a variance granted earlier in 2012 relative to Waukegan Unit 7,² Midwest Generation sought whatever adjustment to that variance was necessary to accommodate the relief sought here.

¹ Hereinafter, citations to the Board’s rules will be by section number only.

² See, Order, *Midwest Generation, LLC – Waukegan Generating Station v. Illinois Environmental Protection Agency*, PCB 12-121, slip op. at 20 (August 23, 2012) (“2012 Waukegan Variance”).

This request for variance is an option of last resort for Midwest Generation, made only after taking significant actions over several years to comply with the CPS, including the installation of mercury and nitrogen oxide (“NOx”) controls in full compliance with the CPS and the use of ultra-low sulfur coal (“ULS”) to prepare for compliance with SO₂ system emission rates that start in 2013. Indeed, in both 2011 and 2012, Midwest Generation achieved the SO₂ emission rate that was not required by the CPS until 2013. Midwest Generation seeks this variance—which would provide limited relief for only two years—because it needs more time to manage additional CPS compliance requirements under exceptionally difficult economic circumstances and financial hardship, evidenced by a bankruptcy filing that occurred after the Petition was filed.³ By providing a temporary slowdown in the step-down of CPS system rates required by the CPS and, thus, a deferral in certain expenditures, the requested variance would materially enhance the prospects for continued generation from Midwest Generation’s coal-fired fleet and for preservation of related jobs and economic benefits to the state and local economies. The company seeks no relief from SO₂ emission rate requirements in 2013 or 2014, nor from the SO₂ emission rates that apply in 2017 and beyond, nor from requirements to install additional pollution controls on all except one of its generating units (Joliet Unit 6) by the end of 2018. Absent a variance, compliance with the CPS requirements at issue in this variance would cause arbitrary and unreasonable hardship to Midwest Generation and those who rely upon or benefit from the continued operation of Midwest Generation’s coal-fired fleet.

³ On December 17, 2012, Edison Mission Energy and certain of its subsidiaries and affiliates, including Petitioner, (collectively, the “Debtors”), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (“Bankruptcy Code”), in the United States Bankruptcy Court for the Northern District of Illinois. The Debtors’ Chapter 11 cases are pending before the Honorable Jacqueline P. Cox, United States Bankruptcy Judge, and are being jointly administered under the lead case, *In re Edison Mission Energy*, Case No. 12-49212 (JPC).

The situation in which Midwest Generation finds itself today was not foreseen at the time that the CPS was adopted, nor could it have been. Midwest Generation would prefer to continue to timely comply with all requirements of the CPS, but, at this time, it requires temporary relief in the pace of the decline of SO₂ emission rates. Additionally, Midwest Generation seeks a delay in the requirement to install and have operational FGD equipment on Waukegan Unit 8 for a period of five months in order to stagger the outage schedules at the two Waukegan electric generating units ("EGUs"), which enables the company to maintain a level of generation at that plant while construction is ongoing.

The proposed variance would not cause injury to human health or the environment. Rather, human health and the environment would benefit from the commitments offered in the compliance plan, which are in addition to other early emission reductions the company has achieved. To ensure a net environmental benefit during the variance period, Midwest Generation has proposed mass SO₂ emission limits in 2013 through 2016 as a new layer of protection.⁴ Midwest Generation's proposed commitments would yield overall, cumulative reductions in SO₂ emissions, as well as reductions in other emissions, including mercury and NO_x, beyond levels contemplated when the CPS was adopted. The requested delay in the compliance date applicable to Waukegan Unit 8 will cause no environmental impact because Midwest Generation, in its proposed compliance plan, commits to not operate the unit during that extension period (*i.e.*, from January 1, 2015, through May 31, 2015) unless and until the FGD equipment installation has been completed.

⁴ Midwest Generation has proposed the following SO₂ mass emission limits: 57,000 tons in 2013; 54,000 tons in 2014; 39,000 tons in 2015; and 37,000 tons in 2016. Pet. ¶ 84.

The variance is structured to ensure environmental benefits. Denial of the variance would cause significant financial hardship. Midwest Generation respectfully requests that the Board grant the requested variance.

BACKGROUND

A. PROCEDURAL BACKGROUND.

On December 20, 2012, the Board accepted this matter for hearing without ruling on the sufficiency of the Petition. Subsequently, on December 24, 2012, the Board issued a number of questions for Midwest Generation to address by January 18, 2013, and a second set of questions on January 25, 2013, to be addressed at hearing on January 29, 2013. Midwest Generation responded to the Board's first set of questions on January 18, 2013, and provided responses to the Board's second set of questions through the testimony of its witnesses at hearing.

Midwest Generation presented four witnesses at the January 29, 2013, hearing in Joliet, Illinois: Mr. Douglas McFarlan, President of Midwest Generation, LLC, and Senior Vice President, Public Affairs, of Edison Mission Energy ("EME"); Mr. William M. "Tres" Petmecky III, Vice President and Treasurer of EME; Mr. Fred McCluskey, Vice President of Technical Services for Midwest Generation and EME; and Dr. Lucy Fraiser, PhD, a board-certified, Senior Consulting Toxicologist at AECOM, a consultant. The Board asked several questions of these witnesses. The Illinois Environmental Protection Agency (the "Agency", "Illinois EPA" or "IEPA") presented no witness testimony, though Mr. Jim Ross, the Agency's Manager of the Division of Air Pollution Control, responded under oath to a question posed during the hearing. Numerous persons offered comments both in support of and opposed to Midwest Generation's request for variance. Several general themes, further discussed below, are discernible from the

testimony, questions from the Board, and comments: (1) Midwest Generation is suffering financial hardship, and the variance is needed to provide time for financial restructuring and to help preserve future operation of plants and the jobs and other benefits that flow from the operation of the plants; (2) the variance will not cause an adverse impact to human health or the environment and will not interfere with federal requirements; and (3) the proposed compliance plan, particularly as enhanced with the additional elements described in this brief, ensures environmental benefits and helps lead Midwest Generation toward compliance with the CPS at the end of the requested variance period.

B. MIDWEST GENERATION SEEKS A BRIEF SLOWDOWN IN CERTAIN CPS EMISSION REDUCTION REQUIREMENTS, AND THE VARIANCE IS STRUCTURED TO ENSURE A NET ENVIRONMENTAL BENEFIT.

Midwest Generation seeks limited relief from two provisions of the CPS: (1) Section 225.295(b) only as to the system-wide emission rates applicable in 2015 and 2016; and (2) Section 225.296(a)(2) regarding the date by which Midwest Generation must install and have operational FGD equipment or shut down the unit. Significantly, Midwest Generation seeks a temporary slowdown in the step-down of CPS system rates and a brief pause in the FGD equipment installation obligation at Waukegan Unit 8. Midwest Generation seeks this variance as a last resort. Tr. p. 24. To that end, Midwest Generation has fashioned a request for variance that respects the tenor of the CPS by affording Midwest Generation the flexibility necessary for it to determine the appropriate mix of control measures, combustion of low sulfur coal, curtailments, and perhaps even shutdowns, to comply with each CPS system-wide SO₂ emission rate, including the rate in 2017 at the end of the term of the variance. Tr. pp. 42-43. Further, the proposed variance requires interim measures that provide a net environmental benefit.

1. Midwest Generation Seeks Relief From The Annual Average System-Wide SO₂ Emission Rates Set Forth In Section 225.295(b) In 2015 And 2016 And Proposes Conditions To Ensure A Net Environmental Benefit.

Midwest Generation seeks relief from the requirement at Section 225.295(b) that it comply with annual average system-wide SO₂ emission rates of 0.28 lb/mmBtu in 2015 and 0.195 lb/mmBtu in 2016. During those two years, Midwest Generation proposes as a condition of the variance that it comply with an annual average system-wide SO₂ emission rate of 0.38 lb/mmBtu. The required emission rate in 2014 is 0.41 lb/mmBtu; therefore, the rate that Midwest Generation proposes for the two years for which it seeks relief is a step-down from the immediately preceding rate. In that sense, Midwest Generation is not seeking complete relief from the rates applicable in 2015 and 2016. Rather, it is seeking leave to comply with a less stringent rate for that two-year period that is still less than the CPS 2014 rate. During the term of the variance and for the two years before, Midwest Generation proposes, as an additional condition of the variance, that it comply with mass SO₂ emission limits, as follows: 57,000 tons in 2013; 54,000 tons in 2014; 39,000 tons in 2015; and 37,000 tons in 2016. Pet. ¶ 84.

2. Midwest Generation Seeks Specific, Limited Relief for Waukegan Unit 8.

In the 2012 Waukegan Variance, the Board granted Midwest Generation temporary relief from the requirement to either install and have operational FGD equipment on Waukegan Unit 7 and convert that unit's hot-side electrostatic precipitator ("ESP") to a cold-side ESP or shut down the unit by December 31, 2013, as set forth in Section 225.296(a)(1) and (c)(1). As part of its justification for this relief, Midwest Generation cited the economies of scale attendant upon the overlap of certain aspects of that work with the FGD work required for Waukegan Unit 8 a year later. Midwest Generation did not, however, seek any relief for Waukegan Unit 8 in the 2012 Waukegan Variance.

As detailed in the Petition, the Company's financial circumstances have deteriorated over the past year. Pet. ¶ 14. At the same time, demand for emission control services—from a limited number of suppliers—is increasing. Pet. ¶ 15. There is evidence that some of the increased demand has resulted from the remand, after the issuance of the 2012 Waukegan Variance, of the United States Environmental Protection Agency's ("USEPA's") Cross State Air Pollution Rule. *Id.* Midwest Generation seeks a five-month delay in the requirement that it install and have operational FGD equipment on Waukegan Unit 8 or that it shut down the unit in order to stagger outage schedules, which avoids both units being offline at the same time for an extended period, and further defers capital expense beyond the period of its financial restructuring in 2013-2014. Pet. ¶¶ 13-16.

Midwest Generation, as a condition of the variance, proposes not to operate Waukegan Unit 8 between January 1, 2015, and May 31, 2015, unless and until the FGD equipment is installed and operational. Therefore, this element of the requested variance would not impact the environment.

ARGUMENT

I. THE BOARD SHOULD GRANT THIS VARIANCE BECAUSE COMPLIANCE WITH THE CPS AS CODIFIED WOULD IMPOSE ARBITRARY AND UNREASONABLE HARDSHIP, AND THE VARIANCE WOULD YIELD ENVIRONMENTAL BENEFITS AND IS CONSISTENT WITH FEDERAL LAW.

Midwest Generation seeks this narrow variance from the CPS to avoid arbitrary and unreasonable hardship. The Board may grant a variance when compliance with a regulation "would impose an arbitrary or unreasonable hardship." 35 ILCS 5/35(a). In a variance proceeding, the petitioner must prove that immediate compliance with a regulation would cause an arbitrary or unreasonable hardship that outweighs the public interest in compliance with the

regulations. *See Willowbrook Motel v. PCB*, 135 Ill. App. 3d 343, 349-50, 481 N.E.2d 1032, 1036-37 (1st Dist. 1985). The Board can grant such a variance, however, only to the extent it is consistent with applicable provisions of certain enumerated federal laws and regulations. 35 ILCS 5/35.

Midwest Generation has demonstrated that compliance with certain CPS requirements, *i.e.*, the 2015 and 2016 SO₂ emission rates and the deadline for FGD installation or permanent shutdown of Waukegan Unit 8, would impose an arbitrary and unreasonable hardship on the company and those who rely on it. Midwest Generation has further demonstrated that the variance is consistent with and more stringent than applicable federal law, would not interfere with federal law, and would not negatively impact the environment. To the contrary, Midwest Generation carefully crafted its proposed compliance plan to ensure a net environmental benefit and to avoid any interference with the ability of the State to meet visibility requirements and National Ambient Air Quality Standards (“NAAQS”). Consequently, granting the variance would not have adverse consequences to the environment but would benefit Midwest Generation’s efforts to address and resolve its financial hardship. For these reasons, as detailed below, Midwest Generation strongly urges the Board to grant this variance.

A. Compliance With The CPS As Codified Would Impose An Arbitrary And Unreasonable Hardship.

At this time, Midwest Generation has not identified funding to install all of the controls that it currently anticipates would be necessary for its currently operating units to attain the CPS system-wide SO₂ emission rates in 2015 and 2016. Exh. 4, ¶ 24. Indeed, Midwest Generation recently filed for Chapter 11 bankruptcy, providing further evidence of its current financial distress. Thus, absent a variance, Midwest Generation would likely be forced to substantially curtail operation from the fleet. *See, e.g.*, Tr. p. 67-68. As Mr. McCluskey explained in his

affidavit, "Such curtailments would result in an unsustainable level of operation across Midwest Generation's fleet." Exh. 5, ¶ 22. In fact, "the curtailments could threaten the continued existence of Midwest Generation and the future viability of its stations." *Id.* That said, as Mr. McFarlan testified, "Even with the variance, [Midwest Generation] will be investing in the design, planning and/or the installation of pollution control equipment every year through 2019, just as we have done every year since the CPS was adopted in 2007." Tr. p. 26.

In addition, Midwest Generation seeks five additional months to install FGD equipment at Waukegan Unit 8. This additional time is needed to avoid extended overlapping outages at both Waukegan units and defer some expenditures. *See, e.g.,* Pet. ¶¶ 13-15; Tr. pp. 49, 50 72.

Any threat to Midwest Generation or the viability of its stations is a threat to the livelihood of the hundreds of employees who work for Midwest Generation and the benefits to many others from Midwest Generation's contributions to the economy and social fabric of the State of Illinois. As Mr. McFarlan summarized in his affidavit,

As of October 31, 2012, Midwest Generation's plants and supporting operations based in Illinois collectively employed 845 men and women, of which 539, or 64 percent, are [union members].... In calendar year 2011, the company provided for annual payroll and benefits totaling \$145 million; paid over \$100 million for contracted labor . . .; spent \$379 million to purchase goods and services from Illinois businesses, pay for various licenses and regulatory fees and support numerous Illinois-based organizations; and paid \$4.7 million in property taxes

Exh. 3, ¶ 20.

The Board heard comments at the hearing from many individuals and organizations who would be impacted by the reduction or elimination of plant operations: workers concerned about their jobs, Tr. pp. 88-90, 140-144, contractors worried about their businesses, Tr. pp. 95, 189-91, a civic organization worried about the impact to donations and volunteerism, Tr. pp. 99-101, and public officials worried about the impact to their constituents and tax bases, Tr. p. 13. It is no

exaggeration to conclude that closing Midwest Generation's plants "would have devastating impacts on hundreds of workers and their families, and would drain literally hundreds of millions of dollars from the economy." Exh. 5, ¶ 23.

When viewed in light of the net environmental benefit provided through the end of the variance period (discussed in Section II.B., below), these hardships would be arbitrary and unreasonable. The Board arrived at a similar conclusion when it granted a more extensive variance to Ameren Energy Resources ("Ameren") last fall (the "Ameren Variance"). See *Ameren v. Illinois EPA*, PCB 12-126, slip op. at 63 (Sept. 20, 2012). Midwest Generation's financial situation is at least as dire as Ameren's, as evidenced by Midwest Generation's Chapter 11 filing, and Midwest Generation's requested relief is narrower than the Board granted Ameren; it is shorter in duration and does not extend the end point to achieve all reductions required by the CPS. In addition, a variance would help mitigate the competitive disadvantage arising from the stringency of the CPS as compared to federal requirements for the same pollutants, some of which do not take effect until 2015 or are on indefinite hold in light of court action. These considerations support Midwest Generation's assertion that, absent a variance, the CPS would impose an arbitrary and unreasonable hardship.

B. The Variance Will Not Adversely Impact The Environment Or Human Health; Rather, Its Conditions Will Ensure A Net Environmental Benefit.

Midwest Generation proposed SO₂ mass emission limits for 2013 through 2016 that would ensure that this variance would result in a net environmental benefit. Under the proposed mass emission limits, total actual tons of SO₂ emissions for the period 2013 through 2016 would be lower than expected based upon historical average 2008 through 2011 heat input and the CPS rates. Midwest Generation conservatively calculated that the net environmental benefit would total 3,181 tons of SO₂. Pet. ¶ 66. Compliance with these limits would further result in a net

environmental benefit of 11,553 tons of NO_x, 4,306 tons of particulate matter ("PM"), 22,266,320 tons of carbon dioxide ("CO₂"), and 183 pounds of mercury. *See* Exh. 10.

Midwest Generation's emission calculations are reasonable, are consistent with precedent and the Agency accepted them. In its analysis, Midwest Generation calculated the emissions reasonably anticipated under the CPS in a business-as-usual scenario, including emissions from Crawford Units 7 and 8 in 2013 and 2014. Pet. ¶ 19. Emissions from the coal-fired boiler at Fisk Station were not included because the Board ordered, in the 2012 Waukegan Variance from the CPS, a shutdown of the boiler by the end of 2012. In the 2012 Waukegan Variance, the Board also ordered Midwest Generation to shut down Crawford Units 7 and 8 by the end of 2014. Therefore, emissions from Crawford Units 7 and 8 were reasonably anticipated in 2013 and 2014 under the provisions of both the CPS and the 2012 Waukegan Variance from the CPS.

The Agency stated in its Recommendation that it agrees with Midwest Generation's calculations of emission credits. Agency Recommendation, p.8. (hereinafter cited as "Rec."). The Agency found that the emissions reductions Midwest Generation calculated were "consistent with the data currently available to, and reviewed by, Illinois EPA." *Id.* The Agency further explained that "the emission reduction credits available as a result of [Midwest Generation's] proposed mass emission limitations are quantifiable and creditable." *Id.* The Agency affirmed that Midwest Generation's calculation of "net environmental benefit in SO₂ emissions over the term of the variance is consistent with the method utilized in similar previous variance requests." *Id.* The Agency attended and participated in the January 29, 2013, hearing and did not dispute Midwest Generation's calculations or methodology, even after hearing criticism of the methodology by certain of the commenters.

Midwest Generation ceased operation of Crawford Units 7 and 8 at the end of August 2012, around the same time that it ceased operation of the coal-fired boiler at Fisk Station, even though not required by the CPS or 2012 Waukegan Variance. For safety reasons, Midwest Generation has reduced the height of a stack at Crawford. Two commenters suggested that, as a result, Midwest Generation should not be able to credit Crawford emission reductions toward the net environmental benefit. Tr. pp. 112, 173-74. However, the argument misses the fundamental point that is applicable to this variance, that is, under the 2012 Waukegan Variance, the Crawford Station did not have to cease operations until December 31, 2014. Through the company's voluntary action, which would be codified in this variance, the station would not run prior to the deadline currently imposed by the 2012 Waukegan Variance, and it is therefore entirely appropriate that the early emission reductions achieved by the company's action be recognized. Voluntary safety work on the stack does not affect Midwest Generation's ability to include Crawford Units 7 and 8 in Midwest Generation's calculation of environmental benefits in 2013 and 2014. Indeed, under Board precedent, Crawford emission reductions could be used for the variance even if otherwise legally required. *See, e.g., ExxonMobil v. Illinois EPA*, PCB 11-86 and 12-46 (cons.), slip op. at 25, 29 (Dec. 1, 2011) (company appropriately calculated net environmental benefit from variance that would delay reduction of NO_x required at one portion of refinery by NO_x RACT rule by including credit for NO_x reductions from Selective Catalytic Reduction equipment legally required on another portion of refinery pursuant to a consent decree).

One commenter stated that Midwest Generation already met the 2013 mass emission level and, therefore, "it is possible that this net environmental benefit is not a real environmental

benefit.”⁵ Tr. pp. 147-48. In fact, the CPS has no requirement that Midwest Generation comply with any SO₂ mass emission level and the proposed mass emission limit under the variance would not apply until 2013. While Midwest Generation projected that its 2012 emissions would fall just below the mass emission limit it proposed for 2013, that early, voluntary emission reduction does not undermine the value of the proposed mass emission limits. Rather, it provides an early benefit that Midwest Generation conservatively did not include in its calculation of net environmental benefit.⁶

In preparation for compliance with CPS SO₂ system rate requirements that start in 2013, Midwest Generation began assuming additional costs to secure lower sulfur coal well before actual emissions reductions were required by the CPS. As a result, system-wide annual average SO₂ emissions have declined from 0.47 lbs/mmBtu in 2010 to 0.43 lbs/mmBtu in 2011, and stayed at 0.43 lbs/mmBtu in 2012. Significantly, both the 2011 and 2012 actual emission rates were below the limit imposed by the CPS in 2013. Therefore, Midwest Generation’s voluntary actions have already delivered environmental benefits to the State beyond what was envisioned under the CPS. These early actions do not in any way diminish the additional environmental benefits from the commitments offered in Midwest Generation’s proposed compliance plan.

Just as the variance will not negatively impact the environment, it also will not negatively impact human health. To the contrary, as Dr. Fraiser testified at the January 29, 2013, hearing,

⁵ The commenter cited page 6 of Doug McFarlan’s testimony as indicating that 2011 emissions were 56,395 tons. This is inaccurate. That is the annual emission level Mr. McFarlan cited in his affidavit as a projection for 2012. As shown on Exhibit 10, which Midwest Generation submitted in response to the Board’s December 24, 2012, questions, Midwest Generation’s 2011 SO₂ emissions totaled 67,773 tons.

⁶ The early shutdown of Fisk Unit 19 and cessation of operation Crawford Unit 7 and 8 in 2012 created a combined early reduction of 1,983 tons of SO₂, 461 tons of NO_x, 299 tons of PM, 3 pounds of mercury and 904,477 tons of CO₂. Pet. ¶¶ 67-68. Again, Midwest Generation conservatively did not include any of these early reductions in its calculation of net environmental benefit.

“the proposed variance, if granted, will result in a health and environmental benefit.” Tr. p. 129. Notably, the Board accepted a similar analysis by Dr. Fraiser when it granted the Ameren Variance. *See Ameren v. Illinois EPA*, at *55; *Ameren v. Illinois EPA*, Post Br. Exh. 3. The Agency, likewise, has expressed no concern regarding health effects relative to this requested variance, either in its recommendation or at the hearing. *See Rec.* pp. 6, 13. This conclusion is further supported by the fact that this variance will not impede the State’s obligations to attain and maintain NAAQS for SO₂. *See Rec.* p. 14; Tr. pp. 136-37. Simply put, “The Illinois EPA does not believe that any injury to the public will result from granting the variance.” *Rec.* p. 13.

C. The Variance Is Consistent With Applicable Federal Law.

The Board may grant a variance only to the extent it is consistent with applicable provisions of certain enumerated federal statutes and related regulations, including the federal Clean Air Act. 35 ILCS 5/35. Midwest Generation’s proposed variance is consistent with—and even more stringent than—applicable provisions of the federal Clean Air Act. As the Agency stated in its Recommendation, “The Illinois EPA agrees that there is currently no federal authority that precludes granting the instant variance request, and that if granted, the Illinois EPA will submit the variance order to USEPA for approval as a SIP revision.” *Rec.* p. 14. Further, in response to a question from the Board at the hearing, Mr. Ross confirmed that the Agency “believes that granting the variance request will not jeopardize its current obligations . . . to attain and maintain the NAAQS.” Tr. pp. 136-37. In addition, Mr. Ross confirmed that the Agency’s “obligations for the 2010 SO₂ NAAQS will not be jeopardized” by the variance. Tr. p. 137. Thus, there is no reason to deny Midwest Generation relief.

II. MIDWEST GENERATION PROPOSES ENHANCEMENTS TO ITS COMPLIANCE PLAN AND IT IS LEGALLY AND PRACTICALLY ADEQUATE.

A theme that emerged through the course of this proceeding concerns the sufficiency of the compliance plan that Midwest Generation proposed in its Petition. Some of the Board's written questions and questions at hearing addressed the sufficiency of the proposed compliance plan. The company recognizes and respects that the Board has indicated concern about the level of detail in the originally proposed compliance plan and has stated its interest in seeing more detail that would demonstrate progress toward CPS compliance in 2017. To address the Board's concerns, Midwest Generation has materially enhanced the compliance plan and provides more information in this brief concerning its compliance planning.

A. The Proposed Compliance Plan Has Been Enhanced And Complies With Board Requirements.

The originally proposed compliance plan included specific dates and substantive requirements. That plan included alternative SO₂ system emission rates in 2015 and 2016, new SO₂ mass emission limits in 2013 through 2016, a prohibition on the operation of the coal-fired units at Crawford Station in 2013 and 2014, and a prohibition on the operation of Waukegan Unit 8 during the requested deferral period. Midwest Generation proposes significant enhancements to the compliance plan. The proposed enhanced compliance plan is attached as Exhibit A. Midwest Generation has also attached a redline of the enhanced compliance plan, as Exhibit B, highlighting the changes and additions to the compliance plan as originally proposed.

In the first set of Board questions, the Board requested that Midwest Generation propose additional language for the compliance plan that provided for more detailed annual reporting of its progress. Midwest Generation provided such language in response and includes additional reporting in the enhanced compliance plan. *See Exhibit A.*

At hearing, Board staff asked whether the compliance plan could include a commitment not to operate the coal-fired units at Crawford in 2015 and 2016. Midwest Generation has added language to that effect to the enhanced compliance plan.

Based upon consideration of the Board's written questions and its questions at hearing, Midwest Generation proposes still further elements to the compliance plan. Midwest Generation has added to the compliance plan quarterly progress reports and, if requested by the Agency, meetings to inform the Agency of its status and plans and to discuss how it will achieve compliance with the CPS 2017 SO₂ system emission rate. The first progress report will discuss the compliance scenarios outlined below. These reports to and meetings with the Agency are intended to provide the Board with further assurance that Midwest Generation is and will remain on track to comply with the 2017 CPS emission rate.

In addition, Midwest Generation will commit to inform the Agency by December 31, 2014, of the compliance scenario, including any emission controls, that Midwest Generation will implement in order to achieve compliance with the CPS system-wide SO₂ rate in 2017. For all such selected emission controls, Midwest Generation will initiate engineering and planning by January 1, 2015, file construction permit applications by March 31, 2015, and commence construction activity by December 31, 2015. These planning, permitting and construction requirements apply to units that will receive controls under the selected compliance scenario and are in addition to the CPS requirements to retrofit Waukegan Units 7 and 8 and Will County Unit 3, or shut them down, by dates certain.

In addition to the enhanced compliance plan, Midwest Generation attaches to this brief for informational purposes as Exhibit C a detailed example of one possible schedule of unit-by-unit retrofit activity—from planning and engineering through completion of construction. This

exhibit assumes that all generating units will be in operation as of January 1, 2017, and will utilize FGD equipment to assist in achieving the CPS 2017 SO₂ emission rate. As the company has noted in this brief and elsewhere throughout this proceeding, numerous variables can impact such a schedule. Chief among these variables are economic decisions on whether individual units will be retired or retrofitted (which impacts the strategy and schedule for the remaining fleet), as well as fuel variability, changes in regulatory requirements, changes in technology and the cost of controls, and vendor availability to provide engineering, parts and labor for the design and installation of controls. Because of these and other variables—and, as discussed further below, consistent with the intent of the CPS to provide for maximum flexibility in the selection of control technologies and the timing of the installation of controls—Exhibit C is not intended as an element of the compliance plan to be codified in the variance. It is but one possible path to compliance in 2017.

For example, the Exhibit C schedule assumes that all units currently in operation are operating in 2017 and that FGD equipment is utilized on all of these units (except Joliet Unit 6) by 2017 to achieve the 2017 SO₂ emission rate limit. In another possible scenario, the effectiveness of ULS over a period of several years could be determined to be such that it negates the need to have one or more units equipped with FGD equipment by the start of 2017. In another possible scenario, the company may have made economic decisions to retire one or more of its smallest units, resulting in a situation wherein maximum SO₂ reductions on the largest units could negate the need to have FGD equipment installed on one or more remaining smaller units by the beginning of 2017. In yet another alternative scenario, all units could be running, but curtailment of output from smaller units, combined with maximum reductions at

larger units, could suffice to achieve compliance for a period of time. The core tenet of any scenario is that Midwest Generation will comply with the CPS in 2017.

The CPS—as it exists, and as it would exist under this variance—requires that all units except Joliet Unit 6 have FGD equipment operational by the end of 2018 (or earlier, in the case of Waukegan Units 7 and 8 and Will County Unit 3) or be shut down. The company continuously evaluates precise timing of equipment installation for any equipment that will be installed in advance of 2018. This is consistent with the original intent of the CPS to provide flexibility and consistent with the intent of the proposed variance to enable the company to defer capital expense to support its ongoing efforts to achieve financial stability through a Chapter 11 process—stability that is central to Midwest Generation’s ultimate ability to continue to operate these plants and to install emission controls.

Midwest Generation takes seriously its compliance obligations and the related need to develop and execute plans to achieve compliance. The sample schedule provides a detailed benchmark for reporting to and consulting, upon the Agency’s request, with the Agency. The enhanced compliance plan and sample schedule demonstrate that the company has undertaken detailed planning for how it will comply with emission rates after the variance period. The sample schedule shows wide ranges of timeframes for various activities. It will always be the company’s intent to defer startup of activities and expenditures as long as prudent to allow for external variables to clarify and to allow for economic decisions to be made regarding the retrofit or retirement of individual units. Nonetheless, the company has proposed to commit, in the enhanced compliance plan, to core milestones for engineering, planning, permitting and construction of any FGD equipment that the company will rely upon to achieve the 2017 SO₂ emission rate. Therefore, as discussed further below, the company believes strongly that it is not

possible or necessary for its compliance plan to include any further detail concerning the schedule.

We have solicited comments on the compliance plan from the IEPA and their comments have been incorporated. In summary, the proposed compliance plan, as enhanced, contains the following major elements:

- Meeting specific limits on annual system-wide SO₂ mass emission levels for calendar years 2013, 2014, 2015 and 2016—a new regulatory requirement not contemplated in the CPS as adopted in 2007;
- Complying with an annual average system-wide SO₂ emission rate of 0.38 lb/mmBtu in 2015 and 2016, a step-down from the 2014 rate though not as stringent as the rates required by the CPS for those years;
- Not operating Waukegan Unit 8 between January 1, 2015, and May 31, 2015, unless and until the FGD system is installed and operational;
- Permanently shutting down the operation of the coal-fired EGUs at Crawford Station, confirming, at the Board's request, that these EGUs will not operate in 2015 and 2016 in addition to not operating in 2013 and 2014;
- Submitting quarterly progress reports to the Agency and, upon the Agency's request, meeting with the Agency, regarding actions taken related to compliance with the variance, and, in particular, progress toward compliance with the CPS annual average system-wide 2017 SO₂ emission rate;
- Providing annual progress reports to the Agency by the end of each calendar year to demonstrate that Midwest Generation is achieving its compliance objectives;
- Informing the Agency by December 31, 2014, of the compliance scenario, including any emission controls, that Midwest Generation will implement in order to achieve compliance with the CPS system-wide SO₂ rate in 2017; initiating preliminary engineering and project planning for any such controls by January 1, 2015; filing any necessary permit applications for the installation of such controls by March 31, 2015; and commencing construction of such controls by December 31, 2015;
- Continuing to comply with all of the deadlines and requirements of the CPS not impacted by this variance, including the requirement to install FGD equipment at its units by dates specified in the CPS or, alternatively, to shut down units by those dates.

See Exhibit A.

In addition to its proposed compliance plan elements, Midwest Generation's Petition describes in detail the currently anticipated equipment and method of control generally that it has identified to achieve full compliance with the CPS. That is, Midwest Generation plans to install Trona injection systems to reduce SO₂ emissions and, related to the installation of the Trona systems, to upgrade the ESPs for those units, in conjunction with the use of low sulfur coal, generation curtailment, and perhaps even shutdown of one or more units. *See* Pet. ¶¶ 7, 16, 25-27; *see also* Tr. pp. 38-40, 62-64.

B. Midwest Generation's Proposed Enhanced Compliance Plan Is Legally And Practically Sufficient.

Midwest Generation's proposed enhanced compliance plan properly addresses the Board's compliance plan requirements for variances, including elements that lead toward compliance with the CPS in 2017. Midwest Generation discussed in its Petition and at hearing the estimated costs of different avenues to compliance. *See* Pet. ¶¶ 28-29, 47-48; Tr. pp. 65-68. Further, as discussed more below, Midwest Generation's enhanced compliance plan is supported by the company's need to continually evaluate alternative control scenarios and compliance options and to allow for the use of any new or evolving technology that may demonstrate utility for Midwest Generation's EGUs. Finally, Midwest Generation has demonstrated that it can comply with its planned compliance schedule.

The Board's rules require that a petition for variance include "a detailed description of the compliance plan," including the following:

- 1) A discussion of the proposed equipment or proposed method of control to be undertaken to achieve full compliance with the regulation, requirement, or order of the Board;
- 2) A time schedule for the implementation of all phases of the control program from initiation of design to program completion; and

- 3) The estimated costs involved for each phase of the total costs to achieve compliance.

35 Ill. Adm. Code § 104.204(f). As a general proposition, a variance petitioner is required, as a condition of the variance, “to commit to a plan that is reasonably calculated to achieve compliance within the term of the variance.” *General Business Forms, Inc. v. IEPA*, PCB 95-155, slip op. at 1 (July 7, 1995) (citing *City of Mendota v. IPCB*, 514 N.E.2d 218 (3d Dist. 1987)). Midwest Generation has proposed specific elements in its compliance plan described above, including a step-down in emission rates leading to 2017, shutdown of the Crawford coal-fired EGUs, progress reports to and meetings with the Agency about compliance steps and plans, identification to the Agency of a selected compliance scenario for 2017 by the end of 2014, and prompt related permitting, engineering and construction action. Further, the proposed elements must be considered in the light of the flexibility afforded by the CPS itself and Board decisions in cases that present circumstances like those presented here. Midwest Generation’s plan is legally and practically adequate.

The Board has allowed flexibility for compliance plans, including regarding control method selection and implementation, under similar circumstances. For instance, in *Minnesota Mining and Manufacturing Co. v. IEPA* (“3M”), the Board held that a proposed compliance plan that allowed the petitioner to make “compliance choices, depending on the success of various step-by-step compliance methods” was appropriate when the plan contained a definite commitment to achieve compliance by a certain date. PCB 89-58, slip op. at 3 (August 31, 1989) ((1) allowing petitioner to assess alternatives for achieving compliance with volatile organic material (“VOM”) emissions requirements during the variance period and to choose a method of compliance based on that assessment and (2) allowing petitioner to choose different compliance options based on the success and status of earlier compliance actions). In *Wallace*

Pharmaceuticals v. IEPA, the Board granted a variance allowing the petitioner to adopt a compliance plan that included evaluating various control equipment options for the elimination of VOM emissions during the variance period. PCB 02-207, slip op. at 5 (September 19, 2002). The petitioner had the flexibility to choose its ultimate compliance method based on the results of its evaluation. *Wallace Pharmaceuticals*, at *5. In *W.R. Grace & Co. v. IEPA*, the Board similarly accepted a compliance plan that allowed the petitioner to study various compliance options during the variance period. PCB 96-193, slip op. at 8 (February 6, 1997). The variance order provided that the petitioner could finalize a compliance option upon receiving approval from the Agency. *W.R. Grace*, slip op. at 14. In *Anderson Clayton Foods v. IEPA*, the petitioner requested a variance for its food processing plant to come into compliance with carbon monoxide emission requirements. PCB 84-147 (January 24, 1985). The technology needed to bring the petitioner into compliance was still being tested. *Anderson Clayton Foods*, slip op. at 4. Accordingly, the Board granted the variance without concrete plans for compliance and, rather, required the petitioner to continue studying compliance methods, to work with the Agency during the variance period to determine the best methods for compliance, and to submit bi-annual reports regarding the petitioner's progress. *Id.*

Midwest Generation seeks similar flexibility, and, as Mr. McFarlan has stated and as discussed further below, such flexibility clearly was understood by the company and the Agency to be a core component of the CPS construct. Tr. p. 41-42. Notably, in many aspects, Midwest Generation's proposed compliance plan is more detailed and concrete than the ones in *3M*, *Wallace Pharmaceuticals*, and *W.R. Grace*, because it already includes date-specific commitments to achieve emission rate reductions, submit progress reports, install control

equipment or shut down certain operations, inform the Agency of control plans, and undertake related permitting, engineering and construction by specified dates.

Midwest Generation continues to evaluate various compliance scenarios, with a focus on benefits that might be gained from yet unidentified scenarios and/or technology. Midwest Generation plans to continue to assess various compliance scenarios and then advise the Agency of the approach selected. Absent the advent of new technology, Midwest Generation, unlike the petitioners in *3M*, *W.R. Grace*, and *Anderson Clayton Foods*, does not require time to test technology; however, it does require the flexibility to determine which of the many compliance scenarios is going to work the best at the time and under the circumstances present when Midwest Generation must implement one of the alternatives. As discussed above, Midwest Generation will report to the Agency as it further develops and evaluates potential compliance scenarios, and will meet at the Agency's request to discuss those scenarios. In addition, by the end of 2014, Midwest Generation will inform the Agency of any controls it plans to install in order to achieve compliance with the CPS system-wide SO₂ rate in 2017 and take prompt related permitting, engineering and construction action. This approach allows Midwest Generation time and flexibility to evaluate options while providing specific steps toward compliance. Consistently, Mr. McFarlan testified at hearing that there has always been an explicit understanding with the Agency—during CPS negotiations and in subsequent discussions about permitting and compliance—that the focus of the CPS is on meeting fleet-wide emission rates to protect the public health and contribute to the State of Illinois attainment demonstrations for NAAQS, while providing flexibility for the company to select emission control technologies and the timing of control installations. Tr. p. 41.

Given this CPS history and in light of Board precedent as applied to the circumstances here, the presence of some flexibility in Midwest Generation's proposed compliance plan should not bar the Board's granting this variance. *See also, Dynegy Midwest Generation, Inc. v. IEPA*, PCB 09-48 at 12 (May 7, 2009) (the Board accepted the compliance plan even though "the compliance plan [did] not specifically address the various steps and associated timeline concerning the retrofitting of Baldwin Unit 3 with the dry scrubber and sorbent injection systems to achieve full compliance by the end of the variance term").

Additionally, "the Board has recognized that some factual circumstances prompt some flexibility" regarding the level of detail required in a compliance plan. *Illinois Power v. IEPA*, PCB 89-213, slip op. at 2, 3 (June 21, 1990) (citing *Anderson Clayton Foods*) (granting variance extension in the absence of a concrete compliance plan when changed conditions made it impossible for petitioner to comply within the variance term and any adverse environmental impact caused by the variance extension would be "minimal and temporary"). The Board held that such flexibility is required when more information needs to be gathered regarding compliance technology in order to properly recommend methods of compliance. *Anderson Clayton Foods*, at 4-5. The Board has recognized an exception to the compliance plan requirement "where the variance requested is of a limited duration, the environmental impact is minimal and petitioner has made good-faith efforts to remain in compliance." *Illinois Power*, slip op. at 2 (citing *General Motors Corp. v. IEPA*, PCB 86-195 (February 19, 1987) granting a variance from VOM emissions requirements in the absence of a specific compliance schedule when the variance term was eight months, the variance was expected to have a minimal impact on overall VOM emissions, and the petitioners made good faith efforts to remain in compliance by exploring various avenues of achieving compliance).

As was the case in *General Motors*, Midwest Generation seeks this variance for a limited period of time, only two years, compared to the five years allowed by the Environmental Protection Act and the five-year extension of a compliance date that the Board granted Ameren. *Ameren Energy Resources v. Illinois EPA*, PCB 12-126 (Sept. 20, 2012). Moreover, Midwest Generation has proposed as part of its enforceable compliance plan the imposition of SO₂ mass emission limits that would begin prior to the start of the term of the variance (*i.e.*, Midwest Generation proposes that the Board impose mass emission limits in 2013 and 2014, while the term of the variance begins in 2015) to ensure that there is a net environmental benefit, and not just a minimal impact on the environment.

One final case deserves attention. In *ExxonMobil Oil Corp. v. IEPA*, PCB 11-86 (December 1, 2011), ExxonMobil sought a variance to delay compliance with the NO_x RACT Rule⁷ based on economic hardship, which opponents argued was self-imposed. ExxonMobil's compliance plan simply included a requirement to comply with applicable NO_x RACT rule provisions by the requested extended deadline without any specific timeline or control requirement. *See ExxonMobil's Petition for Variance*, PCB 11-86, slip op. at 32 (May 18, 2011). The Board accepted this compliance plan and granted the variance, finding that,

ExxonMobil did *not* delay in committing to a particular compliance option. Rather, once ExxonMobil determined that compliance with the R08-19 NO_x RACT Rule was not required to comply with federal law, ExxonMobil began its own discussions with the Agency. ExxonMobil initiated this variance proceeding, and did not solely rely on the uncertain outcome of the R11-24 rulemaking proceeding initiated by the Agency after discussions with [the Illinois Environmental Regulatory Group], later proponent of the R11-26 emergency rule proposal. Throughout that rulemaking and in this variance proceeding, ExxonMobil has consistently articulated that it would install the required controls as needed and has stated that it plans to comply with federal and state regulations.

⁷ "NO_x RACT" stands for reasonably available control technology for NO_x. The rule applies to oil refineries and is found at 35 Ill. Adm. Code 217.Subparts A, D, E, and F and Appendix H.

ExxonMobil v. IEPA, PCB 11-86 and 12-46 (cons.), slip op. at 29 (December 1, 2011) (emphasis in original).

Like ExxonMobil, Midwest Generation will do what is necessary to comply with the 2017 SO₂ emission rate and has repeatedly stated that it will. Pet., ¶¶ 7, 21, 72; Tr. p. 29-30, 27, 38-39, 43, 84-85. Indeed, Midwest Generation has demonstrated that it can comply with the 2017 SO₂ emission rate through its compliance plan and other evidence. Midwest Generation has already demonstrated that it complies with the CPS to date. It has spent over \$170 million on its CPS compliance efforts. Mr. McFarlan and Mr. McCluskey testified as to Midwest Generation's compliance with the CPS and its ability and intent to comply with the 2017 emission rate, and Mr. Petmecky testified as to why the variance would help Midwest Generation be in a better position in the future to fund controls. Tr. pp. 56-57.

In addition, like ExxonMobil, Midwest Generation's hardship was not self-imposed. Depressed markets are an issue that all electric power generators are facing and, thus, are not a hardship that Midwest Generation caused or faces alone. Pet. ¶ 59 (referencing Ameren Variance and noting that Exelon had publicly disclosed it was deferring significant capital expenditures from 2012 to 2015, when it expected the power market to recover). However, the depressed markets and other factors beyond Midwest Generation's control led to extreme financial difficulty and ultimately the commencement of a Chapter 11 case. Like other similarly situated power generators before it, and undoubtedly other power generators that will follow, Midwest Generation's Chapter 11 filing—while voluntary—was one of necessity in the face of the macro-economic hardships that have been impossible to avoid. These hardships are far from self-imposed and do not provide a basis for denial of this requested variance.

Midwest Generation has demonstrated that it should be afforded some flexibility in its compliance plan. Nonetheless, as detailed above, Midwest Generation has proposed substantial compliance plan elements that were not required of ExxonMobil.

In summary, the proposed enhanced compliance plan leads the fleet toward compliance in 2017 and assures that Midwest Generation will report to and, at the Agency's request, consult with the Agency on compliance strategies and related matters. It satisfies the Board's compliance plan requirements.

C. A Compliance Plan Containing Additional Unit-Specific Requirements At This Time Is Not Tenable For This Variance.

The proposed enhanced compliance plan satisfies the Board's requirements and is designed to address concerns raised by the Board while preserving the compliance flexibility that is a central tenet of the CPS. That flexibility is even more necessary today, in light of Midwest Generation's financial hardship, to allow Midwest Generation to cost-effectively reduce emissions. Midwest Generation has proposed material compliance activities in its enhanced compliance plan, including obligations to inform the Agency by December 31, 2014, of the controls it will install to achieve compliance with the CPS in 2017 and to promptly undertake related permitting, engineering and construction activities with respect to the units for which such controls are then planned. Imposing any additional unit-specific requirements or milestones at this time is unnecessary, would undermine the flexibility that was intentionally provided for in the CPS, and would run counter to the control requirements in and the spirit of the CPS.

There are multiple paths to compliance with the 2017 emission rate. These include various combinations of fuel types and add-on controls. Generation reductions and even unit shutdowns are also possible means of achieving compliance.

The company constantly strives to identify any new technologies and alternative plans that are technically and economically viable and which support its financial restructuring by deferring capital expense to the extent practical while ensuring regulatory compliance. In today's market, economic viability is a significant question for any control strategy, and the issue is even more acute for Midwest Generation given its current financial challenges. To meet its various obligations while developing and employing an economically viable compliance strategy, the company must defer until the latest point possible any final decisions that involve expenditures.

Imposing unit-specific control requirements by dates certain that are earlier than Midwest Generation has proposed in the enhanced compliance plan would interfere with Midwest Generation's ability to adjust plans as needed to address technical and economic challenges and developments. As mentioned above and in the affidavit and testimony of Mr. Petmecky, Midwest Generation's intent with the variance is to defer capital expense and provide time for more clarity and improved circumstances to develop through its ongoing financial restructuring efforts. Flexibility is needed to maximize the chances for financial stability and recovery. Given current questions about funding, imposing additional unit-specific control deadlines could leave Midwest Generation with no alternative but to shut down units subject to such deadlines. Such additional requirements are also not necessary to assure compliance with annual emission rate and mass emission requirements. Midwest Generation has already added to its compliance plan deadlines for engineering, planning, permitting and commencing construction of any controls it plans to utilize to comply with the CPS SO₂ rate in 2017.

Finally, imposing unit-specific control requirements beyond what is contained in the enhanced compliance plan would run counter to the flexibility negotiated into the CPS when it

was adopted and would be inconsistent with the FGD equipment deadlines already codified in the rule.

1. The CPS does not impose unit-specific requirements with respect to achieving the system-wide average SO₂ emission rates.

The CPS itself does not impose unit-specific requirements of any type relative to the company's compliance with the system-wide average SO₂ emission rates.⁸ Indeed, a core tenet of the CPS was providing maximum flexibility to the company in selecting emission control strategies and scheduling the installation of new emission controls to achieve the CPS rates. Tr. p. 41-42. However, even that flexibility is constrained by date-certain requirements to install FGD equipment on individual generating units—requirements that remain unchanged under this variance with the exception of one five-month extension of the deadline to install such equipment on Waukegan Unit 8, accompanied by the condition that the unit could not run during the extension period until controls are installed.

The CPS and Multi-Pollutant Standard (“MPS”) both impose system rates that are company-specific; the CPS rates are more stringent than the MPS rates developed prior to but essentially contemporaneously with the CPS. *Compare* Section 225.233(e)(2)(B) and 225.233(e)(3)(C)(iv) with Section 225.295(b).⁹ There is nothing in Section 225.295 (which

⁸ By contrast, Midwest Generation believes it could be appropriate to include unit-specific conditions in a variance seeking relief from the hardware requirements of the CPS, because those requirements are, themselves, unit-specific. However, that is not the relief that Midwest Generation seeks in this variance (except for the extension of the time to have the FGD equipment installed and operational on Waukegan Unit 8). The relief that Midwest Generation seeks here is system-wide. Therefore, unit-specific requirements in a compliance plan related to system rates are inappropriate and not supported by the underlying rule.

⁹ The MPS at Section 225.233(e)(2)(B) requires Dynegy to comply with a system-wide annual average rate of 0.33 lb/mmBtu or 44% of a base rate in 2015 and thereafter. Section 225.233(e)(3)(C)(iv) requires Ameren to comply with a system-wide annual average SO₂ rate of 0.23 lb/mmBtu in 2017 and thereafter. By comparison, Midwest Generation must comply with system-wide annual average SO₂ rates of 0.15 lb/mmBtu in 2017, 0.13 lb/mmBtu in 2018, and 0.11 lb/mmBtu in 2019 and thereafter.

addresses NO_x and SO₂ emission standards) that applies on a unit-specific basis. The rule does not set forth unit-specific requirements that lead the company to compliance with the system-wide average rates. As Mr. McFarlan stated in his testimony, how the company achieves those rates was left entirely to the company. Tr. p. 41.

The express CPS requirement that Midwest Generation install and have operational FGD equipment on most of its electric generating units (“EGUs”) by certain dates is unrelated to compliance with the SO₂ system emission rates and is merely a hardware requirement. This is apparent from the dates of the hardware requirements versus the descending system emission rates. Midwest Generation agreed to inclusion of the hardware requirements in the CPS and has not sought relief from that requirement except for the brief relief in the 2012 Waukegan Variance to take advantage of the economies of scale and here for Waukegan Unit 8 to stagger outage schedules. Midwest Generation also notes that an alternative to installation and having operational FGD equipment is that it may shut down units.

For the Board to impose additional unit-specific requirements aimed at ensuring that the company complies with the 2017 system-wide annual SO₂ emission rate would effectively be rulemaking through a variance. First, it would effectively convert a system rate into unit-specific requirements, fundamentally changing the program and negating the flexibility that is inherent in the CPS. The rule from which Midwest Generation seeks relief provides considerable flexibility to the company to determine how it will comply. A variance condition that would remove that flexibility effectively would be a new rule. Second, the addition of FGD equipment requirements for specific units would change the dates for such equipment installations already set forth in the CPS. This would effectively amend those aspects of the rule through a variance, which Midwest Generation believes is unwarranted and would be improper.

3. *Seeking an amendment to a compliance plan is unworkable.*

Through questions at hearing, the Board suggested that Midwest Generation might be able to address its flexibility concerns by committing to a specific schedule for control installations or potential shutdowns but then seeking to amend dates in the plan, as needed, pursuant to Section 104.212. Tr. pp. 76-77. While the ability to seek an amendment of the milestones contained in a compliance plan is available to anyone with a variance, that ability is not a workable solution for Midwest Generation in this circumstance because there is no guarantee that relief would be granted if requested, time would need be needed to obtain any relief, and the extent of the available relief, even if granted, is not adequate.

First, assuming that the necessary relief could be obtained under Section 104.212, that does not guarantee that the relief would be provided by the Board. The Board could deny any request to adjust the plan. Consequently, this rule is no answer to Midwest Generation's need for flexibility.

Second, the rule addresses only the internal dates in a compliance schedule, *i.e.*, the milestones; it does not address the actual elements of the compliance plan, such as what controls are to be used where.¹⁰ Based on its language, this rule cannot be used to change, for instance, where a control must be installed. Midwest Generation needs flexibility to determine at which units FGD systems will be added during the term of the variance or what other measures might be taken to reduce system-wide SO₂ emissions to comply with the 2017 SO₂ system-wide

¹⁰ Section 104.212(a) provides as follows:

The petitioner may request, by written motion, modification of internal dates within a compliance schedule of an existing variance, so long as the modification does not extend the length of the existing variance period. . . . The Agency must, and any joined parties may, file a response to that motion. Any response must be filed within 14 days after receipt of the motion.

emission rate. Midwest Generation may decide it is prudent to shut down still more units, but that decision is also impacted by financial and various air, water and other regulatory drivers and developments and cannot be made at this time. There are too many external variables at play that will affect such a decision. Because the regulation addresses only the internal dates, not the actual elements of the compliance plan, Section 104.212 does not offer Midwest Generation a viable solution.

Further, seeking such an amendment of milestones in a compliance plan would take time, at least 30 days and probably longer. Once a request for amendment is filed, the rule allows 14 days for the Agency to respond to the request. Section 104.212(a). Then the Board must review the petition and response and come to a decision. Reaching a decision probably requires at a minimum two weeks and probably three or four weeks, and of course a decision could take longer. Midwest Generation, however, may need to adjust its compliance plans quickly. In this case, relief delayed would be relief denied.

D. Ameren's Compliance Plan Should Not Be A Model For Midwest Generation's Compliance Plan.

The relief that Midwest Generation seeks from the CPS is much narrower than the relief that Ameren sought from the MPS. Midwest Generation seeks brief relief in the rate of decline of the system-wide SO₂ emission rates for only two years, 2015 and 2016. Midwest Generation will comply with the CPS 2017 emission rate and notes that there are further step-downs in system-wide rates in 2018 and 2019 that are not affected by this requested variance. That is, the end point of the step-downs in system-wide emission rates remains the same. Ameren, on the other hand, sought to extend the dates by which it must comply with two system-wide SO₂ rates, thus extending the end point of the step-downs in emission rates from 2017 to 2020. Ameren Variance, Post-Hearing Brief ("Ameren Brief"), p. 1.

Ameren stated in the Ameren Brief that it required the additional time to comply with the 2015 and 2017 emission rates because it had insufficient cash flow to finance and maintain the construction of the scrubber to be installed at the Newton Energy Center.¹¹ Ameren Brief, p. 1. Midwest Generation, by comparison, identified no single generating station where funding or maintaining cash flow for construction was of concern. Midwest Generation's concern is funding generally across the CPS system. Because Ameren identified specific construction at a single generating station as pivotal to its compliance with the MPS system-wide SO₂ emission rates and apparently had already expended considerable resources for that construction and determined that construction needed to be completed, perhaps specific milestones for that unit in the variance compliance plan were justifiable, appropriate, and reasonable in that case. That is not the case with Midwest Generation, however, where no single station or unit has been identified as pivotal for its compliance with the CPS 2017 system-wide emission rate. Thus, unlike Ameren, Midwest Generation may continue to adjust where and when it employs controls and other possible compliance strategies.

III. MIDWEST GENERATION'S BANKRUPTCY FILING WAS NEITHER A SELF-IMPOSED HARDSHIP NOR A "PASS" FROM COMPLIANCE WITH THE CPS.

Midwest Generation voluntarily filed a petition under Chapter 11 of the Bankruptcy Code on December 17, 2012. The automatic stay provisions of the Bankruptcy Code, pursuant to Section 362(a), took effect immediately upon Midwest Generation's Chapter 11 filing to protect it from, among other things, actions by creditors to collect pre-petition debts or to enforce pre-petition judgments. Midwest Generation's commencement of its Chapter 11 case was not a self-

¹¹ Some commenters suggested at hearing that Ameren had no intention of investing for compliance. Whether that allegation is accurate or not, and Midwest Generation has no knowledge about the allegation but it seems dubious, it is irrelevant. Midwest Generation and Ameren are entirely separate companies and whatever Ameren does or does not do does not predict Midwest Generation's actions or intent.

inflicted hardship and it should not undermine this variance request. Further, contrary to suggestions by some commenters, the commencement of a bankruptcy case does not excuse a debtor in possession from complying with environmental laws. 28 U.S.C. § 959(b). Thus, Midwest Generation must comply with CPS requirements and waiting for the bankruptcy case to be completed before making a determination lacks merit in light of Midwest Generation's state law obligations during the Chapter 11 case.

A. The Bankruptcy Is Not A Self-Inflicted Hardship.

As discussed above in Section II, the Board has found in some instances that petitioners are not entitled to variances because the hardship that has caused them to seek those variances is self-inflicted. Such is not the case with respect to Midwest Generation. Although Midwest Generation voluntarily filed its Chapter 11 case in December 2012, it was a measure of last resort driven by its financial circumstances. In turn, those circumstances were caused by changes in market conditions, such as energy prices, and other external drivers. For example, as Mr. Petmecky testified, "market energy prices for the first nine months of 2012 were roughly 45 percent lower than for the first five months of 2008." Tr. p. 56. Lower energy prices lead to lower generation and lower revenues. *Id.*; Exh. 4, ¶¶ 10-11. At the same time, average delivered fuel costs were approximately 60% higher during the first nine months of 2012 than during the same period in 2008. *Id.* Similarly situated companies have faced these same issues and utilized Chapter 11 to restructure their obligations in the face of macro-economic circumstances that are outside of anyone's control.

B. The Bankruptcy Does Not Enable Midwest Generation To Avoid Compliance With The CPS.

The commencement of a bankruptcy case does not excuse a debtor in possession from complying with environmental laws. 28 U.S.C. § 959(b). *Int'l Assoc. of Machinists v.*

Continental Airlines, Inc. and National Mediation Board, 754 F. Supp. 892 (D.D.C. 1990) (action seeking injunctive and declaratory relief with respect to post-petition conduct not barred by automatic stay). See *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1576 (1994) (debtor must comply with environmental protection laws); *In re Motel Investment, Inc.*, 172 B.R. 105 (Bankr. M.D. Fla. 1994) (chapter 7 trustee must comply with wetlands statutes). Moreover, certain governmental actions are exempt from the automatic stay, including any effort to enforce the government's police or regulatory power. 11 U.S.C. § 362(b)(4).

The fact that Midwest Generation filed for bankruptcy underscores the reason it sought this variance in the first place: its financial difficulties make it virtually impossible for it to pay for all necessary compliance actions, either directly or through external funding, in the next two years, when construction activities must take place in order for the company to comply with the 2015 and 2016 emission rates. Therefore, Midwest Generation had no choice but to seek relief offered by the Illinois Environmental Protection Act—as well as relief from other of its stakeholders—a purely legal action that is available to any source in Illinois needing regulatory relief.

C. The Board Should Not Delay Granting This Requested Variance To See What Results from the Bankruptcy.

Some commenters suggested that Midwest Generation's request for variance was premature and that the Board should wait and see what results from the bankruptcy. Tr. p. 181. The bankruptcy proceeding cannot, however, provide Midwest Generation the relief it needs. Midwest Generation would need funding in place by April 2013 in order to move forward with construction of controls to comply with the 2015 and 2016 SO₂ rates without substantial generation curtailments. Midwest Generation requested relief from those rates because it does

not currently have sufficient funding in place to perform that construction. Indeed, Mr. Petmecky testified that the bankruptcy proceeding “is a complicated process and it could take as much as two years.” Tr. p. 52. Waiting for the completion of that process would take too long. On the contrary, Midwest Generation needs relief now so that it can work through the bankruptcy process and seek funding for work necessary for CPS compliance. The bankruptcy, similarly, will do nothing to address the challenges posed by the current, overlapping outages schedules for installation of controls on Waukegan Unit 7 and Unit 8. Only this variance could address those challenges.

To be sure, Midwest Generation’s variance request is but one piece of a larger puzzle that Midwest Generation must work to resolve in the course of its bankruptcy proceeding and to ensure long term stability and viability. Among other things, Midwest Generation is in constructive dialogue with many of its major stakeholders in its bankruptcy proceedings concerning all aspects of its restructuring, including its business, operations, finances, and liquidity, in addition to its environmental compliance and this variance application. That restructuring is in its early stages and will ultimately require consensus with, and potentially concessions from, a number of those stakeholders. This variance application is one important step among many that must be achieved to ensure a successful restructuring and emergence from Chapter 11 as a sustainable enterprise for the benefit of all stakeholders.

IV. THE REQUESTED VARIANCE PROVIDES NECESSARY TIME AND RELATED BENEFITS.

As Mr. Petmecky testified, while there are no guarantees, there are reasons to believe that Midwest Generation’s financial situation can improve with time. Tr. pp. 56-57; Exh. 4, ¶¶ 9, 31-34. Midwest Generation needs time to comply with the CPS rates in 2015 and 2016. Absent the requested additional time, CPS compliance could require significant generation reductions, even

plant shutdowns, at a time that Midwest Generation needs to maximize revenues. Power generating companies like Midwest Generation depend on power generation for revenues. Thus, generation reductions would threaten the future of Midwest Generation, its plants and those who rely on the plants, including company employees.

To be clear, Midwest Generation could make no guarantees concerning which units it will operate in the future, either under the CPS as codified or under this variance. The company recognizes that it could simplify its argument in this proceeding if it could commit to a single, specific compliance scenario today—one that specifies which units will be controlled, by what means and by which dates—and, conversely, by stating that if the variance is denied, it will shut down specific units by specific dates. In reality, the variability of significant factors in the competitive marketplace, and the ongoing financial restructuring the company is undertaking through the Chapter 11 bankruptcy process, would make such statements irresponsible. What the company can say is that cash flows are at their lowest ebb and the need to conserve cash is at its greatest during the two years in which this variance would impact capital expenses—2013 and 2014. The expense deferral sought by Midwest Generation through this variance would, if granted, enhance the prospects for its plants, its employees and others who benefit from plant operations.

The men and women who work for Midwest Generation are proud of the work they do. Tr. pp. 88-90, 140, 143. They are proud of the fact that they are able to provide a necessary service to so many residents and businesses in Illinois. *Id.*; Tr. pp. 105-107. At the same time, these men and women are concerned that their jobs are in jeopardy. Tr. pp. 140-43. Similarly, vendors and others who rely on revenues or taxes or donations from the plants and Midwest Generation's employees are concerned. *See, e.g.*, Tr. pp. 13-14. As Mike Hennessy from the

United Way of Will County mentioned, “[s]o many wonderful programs benefit from the generosity of employees [] of Midwest Generation.” Tr. p. 100. Midwest Generation and its employees have put in countless efforts to raise funds to support the United Way’s “homeless centers, emergency shelters for women and children . . . after school initiatives. . . [and] [h]ospice care.” Tr. p. 100. A representative from the Joliet Chamber of Commerce noted that the variance would “benefit our communities with continued jobs and with dollars that are injected into our economy, and tax revenues for our schools and services.” Tr. pp. 97-98.

They are all aware that Midwest Generation has filed for bankruptcy. They are also aware that a consequence of not getting the variance could be that Midwest Generation would have to curtail operation or shut down units in order to comply with the CPS in 2015 and 2016 and beyond. They know that curtailment and especially shutdowns threaten jobs and the economic benefits from operation that flow to others in the State.

Midwest Generation recognizes, as a commenter noted at hearing, that this variance is not only about financial hardship and jobs; it is also about whether the relief that the company requests threatens the environment. Tr. pp. 27-28. And the answer to that is no, it does not. In light of the proposed compliance plan the variance, if granted, would ensure an environmental benefit.

Some commenters tried to characterize this variance as renegeing on an agreement. Tr. p. 151. Midwest Generation and the Agency negotiated the CPS, and the Board adopted the rule. The Environmental Protection Act and the Board’s rules provide relief from rules under certain circumstances and that is what Midwest Generation seeks here. Midwest Generation has complied with all terms of the CPS since 2007, it will be fully compliant in 2013 and 2014, it

seeks temporary, modest relief in 2015 and 2016, and it will resume full compliance with the original rule in 2017 until all requirements of the rule are completed in 2019.

Midwest Generation believes it has made a compelling case for the variance based on the positive economic and community impacts of its operation, combined with emission reductions achieved to date under the CPS, ongoing reductions in the variance years and a return to the original CPS schedule in 2017. The company respects that there is a passionate debate in this country about the future use of fossil fuels to generate electricity. That passion is evident in the numerous comments to the Board that environmental advocates have facilitated from their members and that Midwest Generation has facilitated from its employees, members of building and construction trades who work in the plants, and community and business leaders. However, this variance is not a referendum on the use of coal. It is a request for the State to weigh and balance environmental impact, a company's financial hardship, and potential impact on the economy of the State and several communities and on jobs.

The company would draw particular attention to the joint letter of support for the variance received from State Senator Don Harmon and State Representative Elaine Nekritz. There arguably have been no two other legislators in Springfield as committed to environmental advocacy in recent years, as they note in their comments by stating, "... we strongly support the movement toward less reliance on fossil fuels in this country." The legislators also captured the essence of this variance when they added, "...were it not for the challenging economic and financial conditions in which Midwest Generation finds itself, we would not be engaged in seeking relief from emission reductions that this board approved in 2007."

This is a request of last resort, reflecting unforeseen circumstances, which seeks to provide the company with the opportunity to manage through its financial hardship. Midwest

Generation has satisfied the requirements for issuance of the requested variance. Requiring compliance would cause an arbitrary and unreasonable hardship. Granting the variance would provide benefits to the environment, the company and others who rely on company operations.

CONCLUSION

WHEREFORE, for the reasons set forth in its Petition for Variance, in its testimony at hearing, in its Response to the Board's Questions for Petitioner, and in this brief, Midwest Generation respectfully requests that the Board grant its Petition for Variance.

Respectfully submitted,

MIDWEST GENERATION, LLC

by:



One of Its Attorneys

Dated: 2/19/13

Kathleen C. Bassi
Stephen J. Bonebrake
Andrew N. Sawula
SCHIFF HARDIN LLP
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
312-258-5500
Fax: 312-258-5600
kbassi@schiffhardin.com
sbonebrake@schiffhardin.com
asawula@schiffhardin.com

Christopher M. Foley
Managing Director and Senior Counsel
Midwest Generation EME, LLC
500 West Madison Street, Suite 2640
Chicago, Illinois 60661
312-583-6003
cfoley@mwgen.com

EXHIBIT A

Compliance Plan

<u>Date</u>	<u>Activity</u>
2013-2016	Midwest Generation will not operate the coal-fired boilers at the Crawford Station.
January 1-December 31, 2013	Midwest Generation will limit system-wide ¹ emissions of SO ₂ to no more than 57,000 tons.
By the end of each calendar quarter, beginning with the second quarter of 2013 and continuing through the fourth quarter of 2016	Midwest Generation will submit a quarterly progress report to the Agency, and upon request, meet with the Agency to apprise the Agency of actions taken related to compliance with the variance, and in particular its progress toward compliance with the CPS annual average system-wide 2017 SO ₂ emission rate. In the first such quarterly report, Midwest Generation will discuss the compliance scenarios outlined in its post-hearing brief in support of its Petition for Variance, including in Exhibit C to that brief.
On or before December 31 of each year from 2013 through 2016	Midwest Generation will submit annual progress reports to the Agency generally describing the work completed that year (<i>i.e.</i> , the progress report due by December 31, 2013, shall describe work completed in 2013) and progress made to comply with the timelines specified in the compliance plan. The annual progress report will also include a general description of the activities related to installation of the Trona systems and related PM control work Midwest Generation anticipates will be conducted the following year, including the status of the engineering for the projects and whether such projects have been included in the year's budgeting.
January 1-December 13, 2014	Midwest Generation will limit system wide emissions of SO ₂ to no more than 54,000 tons.
On or before May 1, 2014	Midwest Generation will report to the Agency its system wide mass SO ₂ emissions for 2013 with its Annual Emissions Report.
On or before December 31, 2014	Midwest Generation will inform the Agency of the compliance scenario, including any emission controls, that Midwest Generation will implement in order to achieve compliance with the CPS system-wide SO ₂ rate in 2017 (the "Compliance

¹ The "system" for purposes of this compliance plan table is comprised of the following coal-fired units: Joliet Units 6, 7, and 8, Powerton Units 5 and 6, Waukegan Units 7 and 8, and Will County Units 3 and 4.

<u>Date</u>	<u>Activity</u>
	Scenario”), and will initiate any preliminary engineering and project planning for the installation of any such controls.
On or before January 1, 2015	Midwest Generation will initiate preliminary engineering and project planning for the installation of all emission controls identified in its Compliance Scenario (as defined above).
January 1, 2015, and thereafter until completion of installation of FGD equipment	Midwest Generation will not operate Waukegan Unit 8.
2015 and 2016	Midwest Generation will comply with a system-wide annual average SO ₂ emission rate of 0.38 lb/mmBtu.
January 1-December 31, 2015	Midwest Generation will limit its system-wide mass emissions of SO ₂ to no more than 39,000 tons.
On or before March 31, 2015	Midwest Generation will file permit applications, as necessary, for the installation of any emission controls identified in its Compliance Scenario (as defined above).
On or before May 1, 2015	Midwest Generation will report to the Agency its system-wide mass SO ₂ emissions for 2014 with its Annual Emissions Report.
May 31, 2015	Midwest Generation must have completed the installation of and have operational FGD equipment on Waukegan Unit 8 or permanently shut down the unit.
On or before December 31, 2015	Midwest Generation will commence construction of all emission controls identified in its Compliance Scenario (as defined above).
On or before May 1, 2016	Midwest Generation will report to the Agency its system-wide mass SO ₂ emissions for 2015 with its Annual Emissions Report.
January 1-December 31, 2016	Midwest Generation will limit its system-wide mass emissions of SO ₂ to no more than 37,000 tons.
On or before May 1, 2017	Midwest Generation will report to the Agency its system-wide mass SO ₂ emissions for 2016 with its Annual Emissions Report.

<u>Date</u>	<u>Activity</u>
2017	Midwest Generation will comply with the rate set forth in Section 225.295(b) for 2017 of 0.15 lb/mmBtu. ²
Continuously during the pendency of the variance	<p>a. Midwest Generation will comply with the CAIR and any replacement rule for CAIR.</p> <p>b. Midwest Generation will comply with the Acid Rain Program at 40 CFR § 72.</p> <p>c. Midwest Generation will comply with all other applicable requirements.</p> <p>d. Midwest Generation shall promptly provide the Agency with additional information related to the compliance plan upon request.</p>
	Midwest Generation will notify the Agency if completion of the Trona system installations and associated PM controls necessary for compliance with the CPS becomes infeasible.

² In the alternative, if the Board believes that the emission rates for 2015 and 2016 that are set forth in Section 225.295(b) must be in effect for some time period, Midwest Generation will comply with a system-wide annual SO₂ emission rate of 0.38 lb/mmBtu in 2015 and 2016, a rate of 0.28 lb/mmBtu from January 1 through January 15, 2017, a rate of 0.195 lb/mmBtu from January 16 through January 31, 2017, and will comply with a system-wide annual rate of 0.15 lb/mmBtu from February 1 through December 31, 2017. Midwest Generation may demonstrate compliance with these requirements, however, through a rate of 0.15 lb/mmBtu for the period of January 1 through December 31, 2017.

EXHIBIT B

Compliance Plan

<u>Date</u>	<u>Activity</u>
2013-2016 and 2014	Midwest Generation will not operate the coal-fired boilers at the Crawford Station.
January 1-December 31, 2013	Midwest Generation will limit system-wide ¹ emissions of SO ₂ to no more than 57,000 tons.
<u>By the end of each calendar quarter, beginning with the second quarter of 2013 and continuing through the fourth quarter of 2016</u>	<u>Midwest Generation will submit a quarterly progress report to the Agency, and upon request, meet with the Agency to apprise the Agency of actions taken related to compliance with the variance, and in particular its progress toward compliance with the CPS annual average system-wide 2017 SO₂ emission rate. In the first such quarterly report, Midwest Generation will discuss the compliance scenarios outlined in its post-hearing brief in support of its Petition for Variance, including in Exhibit C to that brief.</u>
<u>On or before December 31 of each year from 2013 through 2016</u>	<u>Midwest Generation will submit annual progress reports to the Agency generally describing the work completed that year (i.e., the progress report due by December 31, 2013, shall describe work completed in 2013) and progress made to comply with the timelines specified in the compliance plan. The annual progress report will also include a general description of the activities related to installation of the Trona systems and related PM control work Midwest Generation anticipates will be conducted the following year, including the status of the engineering for the projects and whether such projects have been included in the year's budgeting.</u>
January 1-December 31, 2014	Midwest Generation will limit system wide emissions of SO ₂ to no more than 54,000 tons.
<u>On or before May 1, 2014</u>	Midwest Generation will report to the Agency its system wide mass SO ₂ emissions for 2013 with its Annual Emissions Report.
<u>On or before December 31, 2014</u>	<u>Midwest Generation will inform the Agency of the compliance scenario, including any emission controls, that Midwest Generation will implement in order to achieve compliance with the CPS system-wide SO₂ rate in 2017 (the "Compliance</u>

¹ The "system" for purposes of this compliance plan table is comprised of the following coal-fired units: Joliet Units 6, 7, and 8, Powerton Units 5 and 6, Waukegan Units 7 and 8, and Will County Units 3 and 4.

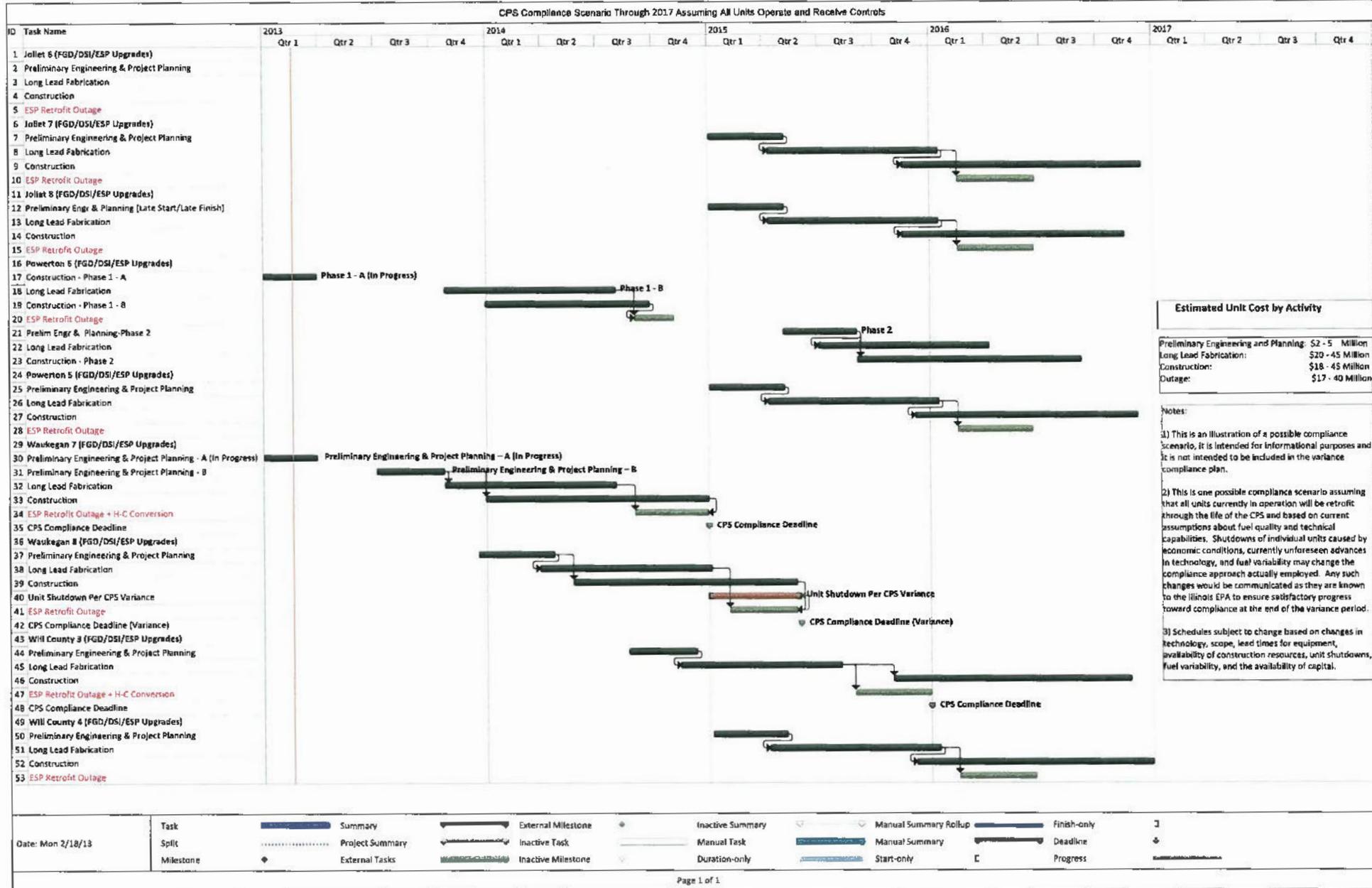
<u>Date</u>	<u>Activity</u>
	<u>Scenario</u> ”), and will initiate any preliminary engineering and project planning for the installation of any such controls.
<u>On or before January 1, 2015</u>	<u>Midwest Generation will initiate preliminary engineering and project planning for the installation of all emission controls identified in its Compliance Scenario (as defined above).</u>
January 1, 2015, and thereafter until completion of installation of FGD equipment	Midwest Generation will not operate Waukegan Unit 8.
2015 and 2016	Midwest Generation will comply with a system-wide annual <u>average</u> SO ₂ emission rate of 0.38 lb/mmBtu.
January 1-December 31, 2015	Midwest Generation will limit its system-wide mass emissions of SO ₂ to no more than 39,000 tons.
<u>On or before March 31, 2015</u>	<u>Midwest Generation will file permit applications, as necessary, for the installation of any emission controls identified in its Compliance Scenario (as defined above).</u>
<u>On or before May 1, 2015</u>	Midwest Generation will report to the Agency its system-wide mass SO ₂ emissions for 2014 with its Annual Emissions Report.
May 31, 2015	Midwest Generation must have completed the installation of and have operational FGD equipment on Waukegan Unit 8 or permanently shut down the unit.
<u>On or before December 31, 2015</u>	<u>Midwest Generation will commence construction of all emission controls identified in its Compliance Scenario (as defined above).</u>
<u>On or before May 1, 2016</u>	Midwest Generation will report to the Agency its system-wide mass SO ₂ emissions for 2015 with its Annual Emissions Report.
January 1-December 31, 2016	Midwest Generation will limit its system-wide mass emissions of SO ₂ to no more than 37,000 tons.
<u>On or before May 1, 2017</u>	Midwest Generation will report to the Agency its system-wide mass SO ₂ emissions for 2016 with its Annual Emissions Report.

<u>Date</u>	<u>Activity</u>
January 1, 2017	<u>Beginning January 1, 2017</u> , Midwest Generation will comply with the rate set forth in Section 225.295(b) for 2017 of 0.15 lb/mmBtu. ²
Continuously during the pendency of the variance	<p>a. Midwest Generation will comply with the CAIR <u>and any replacement rule for CAIR.</u></p> <p>b. Midwest Generation will comply with the Acid Rain Program at 40 CFR § 72.</p> <p>c. Midwest Generation will comply with all other applicable requirements.</p> <p>d. <u>Midwest Generation shall promptly provide the Agency with additional information related to the compliance plan upon request.</u></p>
	<u>Midwest Generation will notify the Agency if completion of the Trona system installations and associated PM controls necessary for compliance with the CPS becomes infeasible.</u>

² In the alternative, if the Board believes that the emission rates for 2015 and 2016 that are set forth in Section 225.295(b) must be in effect for some time period, Midwest Generation will comply with a system-wide annual SO₂ emission rate of 0.38 lb/mmBtu in 2015 and 2016, a rate of 0.28 lb/mmBtu from January 1 through January 15, 2017, a rate of 0.195 lb/mmBtu from January 16 through January 31, 2017, and will comply with a system-wide annual rate of 0.15 lb/mmBtu from February 1 through December 31, 2017. Midwest Generation may demonstrate compliance with these requirements, however, through a rate of 0.15 lb/mmBtu for the period of January 1 through December 31, 2017.

EXHIBIT C

CPS Compliance Scenario Through 2017 Assuming All Units Operate and Receive Controls



Estimated Unit Cost by Activity

Preliminary Engineering and Planning:	\$2 - 5 Million
Long Lead Fabrication:	\$20 - 45 Million
Construction:	\$18 - 45 Million
Outage:	\$17 - 40 Million

Notes:

- 1) This is an illustration of a possible compliance scenario, it is intended for informational purposes and it is not intended to be included in the variance compliance plan.
- 2) This is one possible compliance scenario assuming that all units currently in operation will be retrofit through the life of the CPS and based on current assumptions about fuel quality and technical capabilities. Shutdowns of individual units caused by economic conditions, currently unforeseen advances in technology, and fuel variability may change the compliance approach actually employed. Any such changes would be communicated as they are known to the Illinois EPA to ensure satisfactory progress toward compliance at the end of the variance period.
- 3) Schedules subject to change based on changes in technology, scope, lead times for equipment, availability of construction resources, unit shutdowns, fuel variability, and the availability of capital.

Date: Mon 2/18/13

Task	Summary	External Milestone	Inactive Summary	Manual Summary Rollup	Finish-only
Split	Project Summary	Inactive Task	Manual Task	Manual Summary	Deadline
Milestone	External Tasks	Inactive Milestone	Duration-only	Start-only	Progress

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 19th day of February, 2013, I have served electronically the attached **PETITIONER'S POST-HEARING BRIEF**, upon the following persons:

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

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601
brad.halloran@illinois.gov

Dana Vetterhoffer
Assistant Counsel
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
dana.vetterhoffer@illinois.gov



Andrew N. Sawula

SCHIFF HARDIN LLP
Attorneys for Midwest Generation, LLC
Kathleen C. Bassi
Stephen J. Bonebrake
Andrew N. Sawula
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
Phone: 312-258-5567
Fax: 312-258-5600
kbassi@schiffhardin.com
sbonebrake@schiffhardin.com
asawula@schiffhardin.com

Christopher M. Foley
Managing Director and Senior Counsel
Midwest Generation EME, LLC
500 West Madison Street, Suite 2640
Chicago, Illinois 60661
312-583-6003
cfoley@mwgen.com