

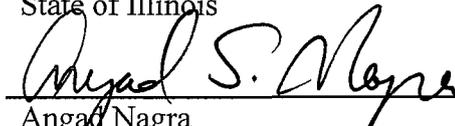
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
AMENDMENTS TO 35 ILL. ADM.)	PCB 15-21
CODE PART 214, SULFUR)	(Rulemaking – Air)
LIMITATIONS, PART 217, NITROGEN)	
OXIDES EMISSIONS, AND PART 225,)	
CONTROL OF EMISSIONS FROM)	
LARGE COMBUSTION SOURCES)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 28th day of August, 2015, I have filed with the Office of the Clerk of the Pollution Control Board the foregoing INITIAL COMMENTS OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE on behalf of the People of the State of Illinois, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois. Copies of the documents are attached hereto and served upon the persons listed on the attached Service List.

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Dated: August 28, 2015

CERTIFICATE OF SERVICE

I, ANGAD NAGRA , an attorney, do certify that I caused the INITIAL COMMENTS OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE in this matter to be served upon the persons listed in the attached Service List by U.S. Mail.


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Dated: August 28, 2015

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INITIAL COMMENTS OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE

Pursuant to 35 ILL. ADM. CODE § 102.108 (2014), and the Hearing Officer Order dated August 5, 2015, the Illinois Attorney General's Office, on behalf of the People of the State of Illinois (the "People"), hereby submits the following comments to the Illinois Pollution Control Board (the "Board") for its consideration in the above-referenced matter.

INTRODUCTION

The Board should reject the portion of the proposed rule amending the Combined Pollutant Standard, 35 ILL. ADM. CODE § 225 (2014) ("CPS" or "Part 225"). Amending the CPS—and making related changes to Nitrogen Oxides limitations (codified at 35 ILL. ADM. CODE § 217 (2014) and hereinafter referred to as "Part 217")—is unnecessary to accomplish the purpose of this rulemaking, which is to develop a state implementation plan for the federal sulfur dioxide ("SO₂") standard. According to the Illinois Environmental Protection Agency's ("Illinois EPA" or "Agency") modeling work, which assumes a pollution control exemption for the Will County 4 unit, the Lemont area reaches attainment based in part on reductions from Midwest Generation's Joliet plant and the Will County 3 unit. Midwest Generation is moving forward with converting the Joliet plant to natural gas and has already retired Will County 3.

The reductions are not contingent on amending the CPS and are not contingent on the company receiving an exemption for Will County 4.

Alternatively, if the Board decides to include changes to the CPS and Part 217 in this rulemaking, the Will County 4 exemption should not be among them. Approving the exemption in the current context would be procedurally improper. If Midwest Generation desires more relief from the CPS—in addition to all of the relief it has already asked for and received—it should petition for it separately so it can be properly considered on its own merits. The Board should not allow Midwest Generation to obscure within this rulemaking docket for SO₂ standards yet another request for altering the CPS.

DISCUSSION

I. Illinois Does Not Need Amendments To The CPS For Its SO₂ Implementation Plan.

Midwest Generation and its predecessors have fought for decades to avoid and delay cleaning up coal-fired power plants such as Joliet and Will County.¹ Recently, however, shifts in energy economics led Midwest Generation to a business decision, announced in August 2014, to convert the Joliet plant to natural gas and to retire Will County 3. These decisions were made to increase the company's profits after careful consideration and analysis.²

¹ *United States of America v. Midwest Generation, LLC*, 781 F. Supp.2d 677, 682 (N.D. Ill. 2011) (dismissing portions of an enforcement action alleging violations of the Clean Air Act, including (1) alleged failures to obtain Prevention of Significant Deterioration ("PSD") construction permits and to comply with Best Available Control Technology requirements in connection with maintenance, repair, or replacement projects at six Midwest

² NRG Energy Quarterly Earning Call Transcript, *available at* <http://seekingalpha.com/article/2396845-nrg-energys-nrg-ceo-david-crane-on-q2-2014-results-earnings-call-transcript> (August 7, 2014) ("[T]he investments required to implement will be completed with an attractive economic profile, driven by optimizing the cost structure of the remaining coal plants, driving out fixed costs through fuel conversions and by taking advantage of improved market fundamentals. We believe our investment will be completed at a very low multiple, driving significant accretion to you, our shareholders."). *See also* NRG Energy, Second Quarter Results Presentation, at 12, *available at* <http://investors.nrg.com/phoenix.zhtml?c=121544&p=irol-presentations> (August 7, 2014) ("NRG's optimization plan significantly enhances the value of MWG.").

The People are not aware of any statements of Midwest Generation, in this docket or otherwise, that its decisions to repower Joliet and to retire Will County 3 are contingent on amending the CPS and receiving an exemption for Will County 4. The People are also not aware of any realistic scenario in which Midwest Generation would decide to stop conversion of Joliet and to “un-retire” Will County 3 as a coal-burning unit.³

Yet, Illinois EPA claims that modification of the CPS is “inextricably linked” to this rulemaking. See Illinois EPA’s Responses to Board’s Third Set of Questions at 8, *In re: Amendments to 35 Ill. Adm. Code Part 214, Sulfur Limitations, Part 217, Nitrogen Oxides Emissions, and Part 225, Control of Emissions from Large Combustion Sources*, R 2015-021 (Aug. 14, 2015). The Agency apparently believes that the Joliet conversion or the Will County 3 retirement would not happen absent modification of the CPS. See Transcript of Third Rulemaking Hearing (“Third Hearing Transcript”) at 190-91, 192-93 & 212-14, *In re: Amendments to 35 Ill. Adm. Code Part 214, Sulfur Limitations, Part 217, Nitrogen Oxides Emissions, and Part 225, Control of Emissions from Large Combustion Sources*, R 2015-021 (Aug. 6, 2015). The Agency also appears to believe that Midwest Generation would not follow-through on the Joliet conversion or Will County 3 retirement unless it receives an exemption for Will County 4’s required installation of flue gas desulfurization (“FGD”). Neither of these assumptions is true.

Now, in response to questions from the Board as to why an SO₂ rulemaking is looping in other provisions from other regulations, the Agency states that “Parts 214, 217, and 225 were

³ See, e.g., Form 10-Q, NRG Energy, Inc., August 4, 2015, at 59 (*available at* <http://www.sec.gov/Archives/edgar/data/1013871/000101387115000015/nrg2015063010q.htm>) (NRG’s “[c]oal generation portfolio does not include 251 MW related to Will County, which was retired April 15, 2015.” NRG targets completion of the Joliet conversion to natural gas in Summer 2016. Form 10-K, NRG Energy, Inc., February 27, 2015, at 90 (*available at* <http://www.sec.gov/Archives/edgar/data/1013871/000101387115000004/a201410-k.htm>)).

proposed by the Agency as a package that, at this point, cannot be feasibly bifurcated.” Illinois EPA’s Responses to Board’s Third Set of Questions at 8. But this reasoning is circular, and the Agency has not offered any specific reasons for why the rulemaking needs to be structured this way. Accordingly, the Board should not accept the rationale as sufficient or convincing.

While there is nothing inherently wrong with reflecting Midwest Generation’s decision to stop burning coal at Joliet and Will County 3 in the CPS through a rulemaking dedicated to that purpose, there is also no reason to “inextricably link[]” it to SO₂ implementation planning. Likewise, the Will County 4 standards are not required to change since Illinois EPA’s modeling is showing attainment regardless of whether it receives an exemption (in other words, Illinois EPA would not need to re-do its modeling or SO₂ implementation plan if the Board later approves Midwest Generation’s request to exempt Will County 4 from the CPS).⁴ Changes to the CPS can be requested and, if approved by the Board, accomplished in a separate rulemaking focused on those requests.

In sum, the Board was correct to question the structure of Illinois EPA’s proposed rulemaking. The changes to Parts 217 and 225 should be removed from the proposed rule and should be pursued, if at all, in separate proceedings and on their own merits.

II. Alternatively, The Will County 4 Exemption Should Be Removed From The Rule.

As stated above, the People are not opposed to formally reflecting Midwest Generation’s decision to cease coal burning at Joliet and Will County 3 in the CPS. Our argument is simply that it is unneeded for purposes of the SO₂ implementation plan. However, should the Board decide that it is necessary to include the Joliet and Will County 3 changes, the Board should

⁴ Transcript of Second Rulemaking Hearing at 67, *In re: Amendments to 35 Ill. Adm. Code Part 214, Sulfur Limitations, Part 217, Nitrogen Oxides Emissions, and Part 225, Control of Emissions from Large Combustion Sources*, R 2015-021 (Jul. 29, 2015); Third Hearing Transcript at 193.

nonetheless reject the Will County 4 exemption on the grounds that it is (1) irrelevant to the rulemaking and (2) procedurally improper.

Illinois EPA has indicated its concern that it would be unjustified in allowing the FGD requirement to stay in place for Will County 4. Third Hearing Transcript at 214 & 219. But SO₂ implementation planning and the CPS are separate and distinct. Just because an area is showing attainment for the federal SO₂ standard does not mean that the Agency and the Board must relax other, independent standards like the CPS. The CPS was enacted for its own reasons and is a state standard. When it comes to air quality and air pollution, our General Assembly has found that:

[P]ollution of the air of this State constitutes a menace to public health and welfare, creates public nuisances, adds to cleaning costs, accelerates the deterioration of materials, adversely affects agriculture, business, industry, recreation, climate, and visibility, depresses property values, and offends the senses.

415 ILCS 5/8 (2014). And further that:

It is the purpose of this Title [II] to restore, maintain, and enhance the purity of the air of this State in order to protect health, welfare, property, and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution.

Id. (emphasis added). All of these declarations from the General Assembly are consistent with the right of “each person,” pursuant to the Constitution of the State of Illinois, Article XI, Section 2, “to a healthful environment.”

Midwest Generation, Ameren, and Dynegy have several times sought variances to the CPS and the Multi-Pollutant Standard (“MPS”).⁵ This is worrisome because the CPS and MPS

⁵ *Illinois Power Holdings, LLC et al. v. Illinois EPA*, PCB 14-10 (Variance-Air); *Midwest Generation, LLC v. Illinois EPA*, PCB 13-24 (Variance-Air); *Dynegy Midwest Generation, LLC v. Illinois EPA*, PCB 12-135 (Variance-Air); *Ameren Energy Resources v. Illinois EPA*, PCB 12-126 (Variance-Air); *Midwest Generation, LLC-*

are themselves alternatives to other emission standards, an item of concern not lost on the Board. *See Midwest Generation, LLC v. Illinois EPA*, PCB 13-24, 2013 WL 1492676, at *2 (Ill. Pol. Control Bd. Apr. 4, 2013) (D. Glosser, concurring) (expressing “grave concern” over Midwest Generation’s proclivity to request “alternative[s] to the alternative”). The opinion and order in PCB 13-24 noted the Board’s “cognizan[ce] that Midwest Generation is receiving its second grant of variance relief from the CPS in less than a year” and that “these grants delay regulatory requirements that were adopted as a direct result of the joint request made by Midwest Generation and [Illinois EPA] during the Board’s R06-26 [Clean Air Interstate Rule (“CAIR”)] rulemaking.” *Midwest Generation, LLC v. Illinois EPA*, PCB 13-24, 2013 WL 1492675, at *81 (Ill. Pol. Control Bd. Apr. 4, 2013). The Board stated further that “the CPS is itself ‘an alternative to compliance . . .’ into which Midwest Generation opted. Midwest Generation has therefore been given multiple opportunities to comply with SO₂ emission requirements.” *Id.* (citations omitted).

In light of these statements by the Board, it is not surprising that Midwest Generation is attempting to usher through another request for an “alternative to the alternative” in a rulemaking docket—versus making, yet another, direct request for relief from the CPS. The Board should reject this gambit. It has taken similar action in the past when one coal plant owner attempted to “transfer” variance relief one to another without a separate docketed proceeding and public process. *Ameren Energy Resources v. Illinois EPA*, PCB 12-126, 2013 WL 2480946, at *9-10 (Ill. Pol. Control Bd. Jun. 26, 2013) (concluding that, for a new owner of coal plants to obtain a

Waukegan Generating Station v. Illinois EPA, PCB 12-121 (Variance-Air), *Dynegy Midwest Generation, Inc. v. Illinois EPA*, PCB 09-48 (Variance-Air).

variance, the new owner must file its own petition and make its own showing of arbitrary or unreasonable hardship).⁶

In this case, just two years after the Board stated its concerns about Midwest Generation's pattern of variance requests, the company is seeking to permanently be free of the requirement in the CPS, set forth at 35 ILL. ADM. CODE § 225.296(b), to install FGD on Will County 4 or to shut the unit down by 2018. The Illinois Supreme Court has found that "the concept of a variance which permanently liberates a polluter from the dictates of a [B]oard regulation is wholly inconsistent with the purposes of the Environmental Protection Act." *Monsanto Co. v. Pol. Control Bd.*, 67 Ill. 2d 276, 286 (1977) (emphasis added). The people who breathe pollution from the Will County 4 unit deserve to have a full and fair consideration of Midwest Generation's desire for permanent liberation of that unit's specific requirements under the CPS.

As discussed above, the Will County 4 exemption is not needed for an Illinois SO₂ implementation plan and does not need to be in this rulemaking docket. Midwest Generation should file a separate petition for the Will County 4 exemption in an adjusted standard or site-specific rulemaking proceeding. The Board, Illinois EPA, and the public can then examine and debate the merits of that request in a procedurally appropriate forum that is not unnecessarily couched within, and among, technically complex modeling issues for non-attainment areas.

In questioning Illinois EPA witnesses, counsel for Midwest Generation suggested that rejecting the Will County 4 exemption from this rulemaking would have a "chilling effect" on

⁶ See also Comments of the Illinois Attorney General's Office at 1, *Illinois Power Holdings, LLC v. Illinois EPA*, PCB 14-10 (Sept. 24, 2013) ("The People strongly support the Board's decision in PCB 12-126 to require Dynegy's subsidiary, Illinois Power Holdings, LLC ("IPH"), to make its own independent showing of need for a variance and to require that IPH file its request in a new docket to undergo the public process requirements set forth in 35 Ill. Adm. Code 104, Subpart B.").

the willingness of industries to make voluntary pollution reductions.⁷ But the role of the Board is not to simply accept deals negotiated between regulators and industries. The Board has been reviewing rulemaking proposals for 45 years in Illinois—the Agency and regulated industries are well aware that the Board can change or reject proposals and will act to ensure the proper sequence and process of enacting or amending regulations.

CONCLUSION

For the reasons set forth above, the People urge the Board to reject amendments to the CPS, 35 ILL. ADM. CODE § 225.291 *et seq.* (2014), from the proposed rule. In the alternative, if the Joliet and Will County 3 changes are accepted into the CPS here in this proceeding, the Will County 4 exemption should be stricken from the rulemaking as unrelated and procedurally improper.

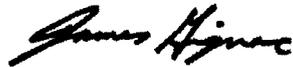
⁷ Third Hearing Transcript at 214. This question also assumes that Midwest Generation's decision to repower Joliet and retire Will County 3 was done for pollution reduction reasons; but, as discussed above, the decision was for financial business reasons and the pollution reduction comes as an additional benefit for which the company is now trying to extract additional value (*i.e.*, receiving an exemption for Will County 4).

Dated: August 28, 2015

Respectfully submitted,

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