

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
AMENDMENTS TO) R18-20
35 ILL. ADM. CODE 225.233,) (Rulemaking – Air)
MULTI-POLLUTANT STANDARDS (MPS))

NOTICE

TO: Don Brown
Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Suite 11-500
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SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO ENVIRONMENTAL ORGANIZATIONS' MOTION TO STAY, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Gina Roccaforte
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DATED: February 16, 2018

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**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
RESPONSE TO ENVIRONMENTAL ORGANIZATIONS' MOTION TO STAY**

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA” or “Agency”), by one of its attorneys, and, pursuant to the Illinois Pollution Control Board (“Board”) Rules at 35 Ill. Adm. Code 101.500 and 101.504, hereby responds to Environmental Organizations’ Motion to Stay (“Motion”). The Illinois EPA requests that the Board enter an order denying the Motion. In support of this request, the Illinois EPA states as follows:

I. The Reasons for a Stay Articulated by the Environmental Organizations are Inaccurate

In its Motion, the Environmental Organizations indicate that Vistra Energy’s “financial situation will be completely different” than Dynegy’s and that, as the Illinois EPA has asserted Dynegy’s financial situation as a “major basis” for this rulemaking, a stay is needed until the Dynegy/Vistra Energy merger is complete. Motion at 5, 2. This argument is without merit. It conflates the overall financial situations of Dynegy and Vistra Energy with the financial losses incurred at *individual electrical generating units* (“EGUs”) that this rulemaking is intended to address. It also incorrectly indicates that the Agency has made Dynegy’s overall financial situation a primary justification for this rulemaking. It has not. Nowhere in the Agency’s rulemaking proposal, testimony, responses to questions, etc. has the Agency made such an assertion. In fact, in the Agency’s responses to prefiled questions it clarified repeatedly that the “financial losses” it assessed were unit-level losses and that the Agency is making no

representations regarding Dynegy's overall finances. *Illinois EPA's Responses to Prefiled Questions* at 14-15, 21-23.

Rather, as the Agency has explained throughout this rulemaking, a main objective of the proposed amendments is to provide operational flexibility to Dynegy by combining the two MPS groups into one group that is subject to one mass limit for the entire fleet, thereby eliminating the need for Dynegy to operate some of its units at a financial loss in order to comply with the MPS. Illinois EPA's Technical Support Document at 5-6. Representatives of Dynegy explained at the first hearing that Dynegy must bid certain EGUs into the Midcontinent Independent System Operator energy market at offer prices below the EGUs' costs, thereby incurring a loss in operating these EGUs. *Prefiled Testimony of Dean Ellis* at 10-11; Transcript of January 18, 2018, Hearing, Mr. Dean Ellis at 102-104, 130-132, 137-140, 162-164; and *Responses to Pre-Filed Questions of the Illinois Attorney General's Office for Dynegy's Witnesses* at 10. This scenario is primarily a function of rate-based standards, the costs of unit operation, and the way electricity is dispatched. The proposed amendments therefore eliminate the rate-based standards and replace them with mass-based emission limitations, intended to provide the owner of the EGUs (whoever that owner ultimately is) with the flexibility to offer, bid, and dispatch these EGUs in an economically efficient manner while maintaining air quality.

Furthermore, contrary to the Environmental Organizations' arguments, the rulemaking process is not frustrated without Vistra Energy's input. The Environmental Organizations ask the Board to accept the premise that because Vistra Energy is a different company that may have different business plans from Dynegy, all rulemaking proceedings before this Board must grind to a halt until the merger is finalized. The Environmental Organizations argue that it is "impossible to develop an adequate record" without Vistra Energy's involvement, and that

without Vistra Energy, the Board “cannot obtain meaningful predictions and assurances about many of the effects of this rulemaking.” Motion at 8

The Agency, not Dynegy nor Vistra Energy, is the proponent of this rulemaking proposal. While stakeholders’ “predictions” or “assurances” may be helpful to the Board in a rulemaking proceeding, they are not required, legally binding, or enforceable. What is legally binding and enforceable, not only on Dynegy but on any potential future owner of the EGUs, are any MPS amendments adopted by this Board (for which an extensive record has been and will continue to be developed). A change of ownership, business strategy, or operations will not alleviate any applicable environmental requirements imposed in this rulemaking. Dynegy, and if the merger is finalized, Vistra Energy, must comply with all environmental regulations adopted by this Board. Dynegy acknowledged this in filings with the Securities and Exchange Commission, stating:

[b]ecause Vistra Energy, Dynegy and their respective subsidiaries are regulated in the U.S. at the federal level and in several states, the two companies have been and will continue to be affected by legislative and regulatory developments. After the Merger, the combined company and/or its subsidiaries will be subject in the U.S. to extensive federal regulation as well as to state regulation in the states in which the combined company will operate.

Dynegy’s Current Report to the SEC, Form 8-K at 14 (Dec. 19, 2017).

As the surviving company and owner of the EGUs subject to the MPS, Vistra Energy will be required to comply with the rule, whether it participated in its development or not. It will also be required to comply with the terms of the operating permits applicable to these EGUs. Failure to do so could result in enforcement.

Vistra Energy, on the other hand, is not and will not be legally required pre- or post-merger to participate in this rulemaking proceeding. Stakeholder input on or participation in a rulemaking proposed by the Agency is not required by the Act, Board regulations, or any authority cited in the Environmental Organizations’ Motion. Just as nothing will hinder Vistra

Energy from participating in this matter, nothing will require it to do so either, making a stay an ineffective “solution” to the Environmental Organizations’ alleged problem.

II. A Stay Will Create Prejudice

Despite Environmental Organizations’ argument to the contrary, Dynegey and the State will both be prejudiced by a stay. A stay of this proceeding will delay providing Dynegey operational flexibility, which is one of the main purposes of this rulemaking. In addition, there will be further prejudice if the rulemaking proceeding is not adopted in accordance with Section 5-40(e) of the Illinois Administrative Procedure Act that provides, in part, that no rule or modification or repeal of any rule may be adopted, or filed with the Secretary of State, more than one year after the date the first notice period for the rulemaking under subsection (b) commenced. 5 ILCS 100/5-40(e). The first notice period for this rulemaking commenced on November 3, 2017. *See*, 41 Ill. Reg. 13299 (Nov. 3, 2017). Simply put, if a stay is granted, the Board may be required to submit the proposed rule to first notice again, thereby further delaying adoption of the proposed amendments.

III. Insufficient Legal Basis Exists for a Stay

The Environmental Organizations cite to a Board opinion that states, “[t]he decision to grant or deny a motion for stay is ‘vested in the sound discretion of the Board.’” Motion at 4. The Illinois EPA does not dispute the Board’s authority to grant a stay; however, all the cases cited to by the Environmental Organizations involved unopposed motions for stay. In fact, in two of the cited cases the Illinois EPA, as proponent of the rule, requested the stay, and in the other the proponent company requested the stay.

The Environmental Organizations also state that “[t]he Board is known to grant motions to stay ‘in the interest of conserving resources’” and in rulemaking proceedings “in order for

proponents of a rulemaking to more thoroughly assess their proposal.” *Id.* A stay at this juncture would *not* conserve resources nor is there a need for the Illinois EPA to more thoroughly assess its proposal as its justifications for the rulemaking have not changed and are not impacted by Dynegy’s pending merger with Vistra Energy. The Illinois EPA filed this rulemaking proposal on October 2, 2017. The proposal satisfied the content requirements of the Board’s procedural rules, *see* 35 Ill. Adm. Code 102.202, and accordingly, the Board accepted the proposal for hearing. *See*, Board Order, dated October 19, 2017. The Board held two days of hearings in January, and the Illinois EPA answered numerous questions at those hearings and is filing today additional responses and information requested at those hearings. *See, Illinois Environmental Protection Agency’s Responses and Information Requested from January Hearings.* Additional hearings are scheduled next month in Edwardsville and, as stated above, no delay is needed for the Illinois EPA to more thoroughly assess its proposal. The Illinois EPA and the other participants have already dedicated extensive time and resources to this rulemaking. The rulemaking proposal now before the Board should therefore proceed as scheduled by the Notice of Hearing order dated November 8, 2017.

Finally, the Environmental Organizations “request this proceeding be stayed until the merger closes,” and indicate that, based upon Dynegy and Vistra Energy’s statements regarding the anticipated time frame of the merger, “the stay would be less than six months.” Motion at 10. However, the transaction is subject to certain regulatory approvals, including expiration or termination of the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act, and approval by the Federal Energy Regulatory Commission, the Federal Communications Commission, the Public Utility Commission of Texas, the New York Public Service Commission, and other customary closing conditions. *Vistra Energy and Dynegy to*

Combine to Create Leading Integrated Power Company, (2017), http://phx.corporate-ir.net/phoenix.zhtml?c=147906&p=irol-newsArticle_Print&ID=2312332 (last visited Feb.6, 2018). The transaction is also subject to approval by the shareholders of Vistra Energy and Dynegy. *Id.*

Therefore, while Dynegy and Vistra Energy anticipate closing the transaction sometime between April and June of this year, there is no guarantee of this occurring. If the closing instead takes place in the third or fourth quarter of 2018, or for some reason farther out into the future, essentially an indefinite stay is created, and the Board does not favor indefinite stays. *In the Matter of: Site-Specific Rule for the Closure of Ameren Energy Resources Ash Ponds: Proposed New 35 Ill. Adm. Code 840, Subpart B, R13-19, at 2* (July 25, 2013).

IV. Conclusion

The Agency opposes the Environmental Organizations' Motion and requests it be denied. The reasons for the stay articulated by the Environmental Organizations are inaccurate, and a stay will prejudice Dynegy and the State, as it will needlessly delay this proceeding.

WHEREFORE, for the reasons set forth above, the Illinois EPA requests that the Board enter an order denying the Motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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DATED: February 16, 2018

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