

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 OF FILING

PLEASE TAKE NOTICE that on this 16th day of February, 2018, I caused to be filed with the Clerk of the Illinois Pollution Control Board the Illinois Attorney General's Office Response in Support of the Environmental Organizations' Motion to Stay, a copy of which is hereby served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

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Dated: February 16, 2018

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CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an attorney, do certify that on February 16, 2018, I caused the Illinois Attorney General's Office Response in Support of the Environmental Organizations' Motion to Stay and the Notice of Filing to be served upon the persons listed in the attached Service List by email for those who have consented to email service and by U.S. Mail for all others.

/s/ Stephen J. Sylvester
STEPHEN J. SYLVESTER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AMENDMENTS TO) R18-20
35 ILL. ADM. CODE 225.233) (Rulemaking – Air)
MULTI-POLLUTANT STANDARDS)
(MPS))

**THE ILLINOIS ATTORNEY GENERAL’S RESPONSE IN SUPPORT OF
THE ENVIRONMENTAL ORGANIZATIONS’ MOTION TO STAY**

Pursuant 35 Ill. Adm. Code §§ 101.500(d) and 100.514, the Illinois Attorney General, on behalf of the People of the State of Illinois (the “People”), hereby submits its response in support of the Environmental Organizations’ Motion to Stay. In support of this Response, the People state as follows:

I. Introduction

Presently, Dynegy, Inc. (“Dynegy”)¹ is the only coal plant operator regulated by the Illinois Multi-Pollutant Standards (“MPS”). January 18, 2017 R18-20 Hearing Transcript, p. 81, lines 12-17. In November 2016, Dynegy approached the Illinois Environmental Protection Agency (“Illinois EPA”), requesting that changes be made to the MPS. Illinois EPA Statement of Reasons at 3. Dynegy and Illinois EPA then proceeded to “negotiate” the precise terms of those proposed changes, without input from any other stakeholders. January 17, 2017 R18-20 Hearing Transcript, p. 127, line 13 through p. 128, line 2. On October 2, 2017, Illinois EPA initiated this rulemaking, contending that the proposed amendments to the MPS are needed to allow Dynegy to “us[e] its entire fleet to meet emissions standards,” “to simplify compliance,” and to receive “additional

¹ Dynegy, Inc. through its wholly-owned subsidiaries, owns and operates the eight Illinois coal-fired power plants subject to the MPS. Dynegy Public Comment, R18-20 (October 31, 2017) PC No. 3 at 1. Illinois Power Generating Company owns and operates the Newton and Coffeen power stations. *Id.* Illinois Power Resources Generating, LLC owns and operates the Duck Creek and E.D. Edwards power stations. *Id.* Electric Energy, Inc. owns and operates Joppa Power Station. *Id.* Dynegy Midwest Generation, LLC owns and operates the Baldwin, Havana and Hennepin power stations. *Id.*

operational flexibility and economic stability.” Illinois EPA Statement of Reasons at 1, 3. During the January 17, 2018 hearing, the Illinois EPA testified that it has no knowledge as to how frequently Dynegy actually requires such “flexibility,” and deferred questions on Dynegy’s operations and economic performance to the witnesses Dynegy had brought to the hearing. *See, e.g.*, January 17, 2017 R18-20 Hearing Transcript, p. 57, line 14 through p. 58, line 4. Beyond providing “flexibility,” though, the People have testified that the current proposal will also remove an operational constraint on Dynegy’s “Old Ameren” (or “IPH”) Group, facilitating increased utilization of that MPS Group’s less-controlled—and therefore higher-polluting—plants. People’s Pre-Filed Testimony at 9.

Dynegy has sought to bolster Illinois EPA’s proposal through its own testimony and examination of the People’s witnesses. Indeed, during the January 18, 2018 hearing, Dynegy’s attorney requested input from the People’s witnesses regarding what MPS amendments they believed would be acceptable, “to the extent my client decides they want to discuss a proposal.” January 18, 2017 R18-20 Hearing Transcript, p. 21, lines 21-24. In short: from the genesis of the proposed MPS amendments, through their negotiation between Dynegy and Illinois EPA, through the hearings conducted in January, Dynegy has played the driving role behind the proposal and, as between Illinois EPA and Dynegy, the only witness capable of testifying as to its necessity.

Soon after Illinois EPA initiated the rulemaking, though, on October 31, 2017, Dynegy filed a public comment with the Pollution Control Board (“Board”) providing notice that it would be merging with Vistra Energy Corp. (“Vistra”) in the second quarter of 2018. Dynegy Public Comment, R18-20 (October 31, 2017) PC No. 3 at 1. During the January 18, 2018 hearing, it became clear that Dynegy, the Illinois EPA’s intended beneficiary of this rulemaking, would cease to exist. Also, it became apparent that Vistra had not been consulted by either Dynegy or the

Illinois EPA to ascertain Vistra's position on the proposed rulemaking. In short, the sole company that the proposed amendments to the MPS would apply to has not participated in this rulemaking proceeding, and therefore any record developed in its absence will be of questionable value.

The People continue to maintain that this rulemaking is unnecessary as it does not appear to restore, maintain, or enhance air quality in Illinois, but rather would immediately allow Dynegy to increase pollution from its fleet of coal power plants and weaken an important State public health program. Indeed, in its initial filing, the Illinois EPA plead for expedited approval by January 1, 2018, so that Dynegy would have the "flexibility" to run its dirtier coal plants more often; all without the full benefit of the very enlightening proceedings now underway. *See* Illinois EPA Motion to Expedite at 2. Correctly, the Board denied the Illinois EPA's request to expedite this deficient rule. However, if the proposed rulemaking proceeds, the MPS should be revised to only provide for the combination of the two MPS groups (i.e. the old Ameren units and the Dynegy units) under single rate-based standards. The Board should not consider any switch to exclusively mass-based caps for the MPS units.

Moreover, though, for the reasons set forth in the Environmental Groups' Motion to Stay and this Response in Support, the People ask that the Board enter a limited stay until Vistra is able to participate in this rulemaking, make its view known on the necessity of this rulemaking and the propriety in Dynegy's corporate philosophy of increasing emissions from uncontrolled coal power plants in the MPS fleet, and, if it wishes to support the rulemaking, subject itself to questioning by all participants.

II. The Board has discretion to issue a stay.

The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." *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, slip op. at 2 (July 25, 2013). But, the Board does not favor indefinite stays. *Id.* Where the effect of the proposed rule is in doubt, the Board has granted a stay and required a status update upon the termination of the limited stay. *In the Matter of: Coal Combustion Waste (CCW) and Surface Impoundments at Power Generating Stations: Proposed New 35 Ill. Adm. Code 841*, R14-10, slip op. at 14-15 (November 5, 2015) (stay granted where the proposed rules could be impacted by pending Congressional legislation and recently-filed appeals of the federal CCR rule). Finally, the Board has granted a stay specifically “to conserve the resources of the Board and the parties.” *In The Matter Of: Petition of Illinois Department Of Transportation, District 8, Bowman Avenue Pump Station and Deep Well System, for an Adjusted Standard from 35 Ill. Adm. Code 302.208(G) (NPDES Permit No. IL0070955)*, AS08-01, slip op. at 2 (December 20, 2007).

III. Dynegy, the sole intended beneficiary of this rulemaking, will cease to exist prior to any amendment of the MPS.

Dynegy has indicated that it “is in compliance with the current MPS and is able to demonstrate compliance with the MPS.” Ex. 18, Dynegy’s Responses to Pre-Filed Questions of the Illinois Attorney General’s Office for Dynegy’s Witnesses, R18-20 (January 18, 2018), p. 3, ¶ 11. On October 31, 2017, Dynegy filed with the Board its public comment advising the Board that “[o]n October 30, 2017, Dynegy Inc. (“Dynegy”), the ultimate parent company of the Companies,² and Vistra Energy Corp. announced plans to merge.” Dynegy Public Comment, R18-20 (October 31, 2017), PC No. 3 at 1. Dynegy also stated that its “planned merger is expected to be completed in the second quarter of 2018, subject to regulatory approvals.” *Id.*

During the January 18, 2017 hearing, the People expressed concern about Vistra’s position

² Dynegy, Inc., through its wholly-owned subsidiaries, owns and operates the eight Illinois coal-fired power plants subject to the MPS. Dynegy Public Comment, R18-20 (October 31, 2017) PC No. 3 at 1. *See also* footnote 1 above.

concerning the MPS units at issue in this proceeding. Specifically, the People asked Dynegey's Dean Ellis, "[i]s it possible that Vistra Energy may have a different corporate outlook than Dynegey on the merits of owning coal-fired power plants in Illinois?" Ex. 18, Dynegey's Responses to Pre-Filed Questions of the Illinois Attorney General's Office for Dynegey's Witnesses, R18-20 (January 18, 2018), p. 14, ¶ 35. Mr. Ellis answered: "I cannot speculate on what Vistra Energy's corporate outlook may be." *Id.* Moreover, when asked if any of Dynegey's testimony was developed in conjunction with Vistra. Mr. Ellis stated it had not been and "per antitrust guidelines, we are not to coordinate policy or other commercial activities with Vistra until the transaction closes." January 18, 2017 R18-20 Hearing Transcript, p. 118, lines 15-21. The record is also clear that Vistra has not made any evaluation of the MPS units or whether there is any need for these proposed amendments.

When asked whether "Vistra has taken a look to see if costs could be brought down in a way that would allow the [uneconomic electric generating] units to... economically operate," Mr. Ellis replied "I don't believe Vistra has looked at Dynegey's plants. Vistra has its own cost initiative to look at its own plants, but I'm not aware, nor would I believe, that Vistra has taken a look at Dynegey's plants." *Id.* 140:24-141:9.

Environmental Groups' Motion to Stay at 7.

Dynegey's responses to the foregoing questions underscores the crux of the problem with moving forward with this rulemaking, i.e. Dynegey will cease to exist during the second quarter of 2018 and has no knowledge concerning Vistra's position on this rulemaking.

Also, the merger of Vistra and Dynegey will result in a far different economic landscape than the one presented by Dynegey:

Vistra and Dynegey estimated that the merger will create nearly \$4 billion in equity value.³ This is a far cry from Dynegey's claims in this rulemaking that the MPS change is necessary

³ Quoted from footnote 4 of the Environmental Groups Motion to Stay: *Vistra Energy and Dynegey to Combine to Create Leading Integrated Power Company* (Oct. 30, 2017), available at <https://investor.vistraenergy.com/investor-relations/news/press-release-details/2017/Vistra-Energy-And-Dynegey-To-Combine-To-Create-Leading-Integrated-Power-Company/default.aspx>.

to “allow[] Dynegy to make economically rational decisions on how to run its plants ... given the uncertain economic and regulatory landscape the plants currently face.” *Prefiled Testimony of Dean Ellis* at 2 (Dec. 11, 2017). Those economic circumstances are changing in the near future.

Environmental Groups’ Motion to Stay at 2, 3. Any rationale provided by Dynegy to support this rulemaking will be of limited value, because by the second quarter of 2018, it will not be the one making decisions regarding the MPS units at issue. Notably, after Dynegy is merged into Vistra, the “Board of Directors is expected to have a total of 11 directors consisting of the current eight members of the Vistra Energy Board and three members from Dynegy's Board.”⁴

IV. Issuing a stay of the proceedings will allow for a fully developed record and conserve the resources of the participants.

In November 2016, Dynegy approached the Illinois EPA, requesting that changes be made to the MPS. Illinois EPA Statement of Reasons at 3. Specifically, Dynegy requested that “the NOx annual, NOx seasonal, and SO₂ annual emission rates be replaced with mass emission limits to provide the company with additional operational flexibility and economic stability.” *Id.* As a result, “the Illinois EPA developed proposed rule revisions that address Dynegy's requests.” *Id.* However, the situation at the time of Dynegy’s “requests,” and even at the time of Illinois EPA’s filing of its proposal, has drastically changed.

It is clear that Vistra has not appeared, testified, or filed any comments concerning this rulemaking, which is solely related to the MPS units—the very MPS units that it will be acquiring in the coming months. Without Vistra’s participation in this proceeding, it is impossible to determine if this rulemaking is even necessary, let alone what any amendments should include. At this point, without the ability to obtain a completely developed and meaningful record due to

⁴ *Vistra Energy and Dynegy to Combine to Create Leading Integrated Power Company*, (Oct. 30, 2017), available at <https://investor.vistraenergy.com/investor-relations/news/press-release-details/2017/Vistra-Energy-And-Dynegy-To-Combine-To-Create-Leading-Integrated-Power-Company/default.aspx>.

Vistra's absence from these proceedings and the questionable value of Dynegy's participation, granting a stay is appropriate to "conserve the resources of the Board and the parties." *In The Matter Of: Petition of Illinois Department Of Transportation, District 8, Bowman Avenue Pump Station and Deep Well System, for an Adjusted Standard from 35 Ill. Adm. Code 302.208(G) (NPDES Permit No. IL0070955)*, AS08-01, slip op. at 2 (December 20, 2007).

Further, granting a stay would not impact the Board's compliance with Section 5-40(e) of the Administrative Procedure Act ("APA"), 5 ILCS 100/5-40(e), which requires the Board to file with the Secretary of State a final rule or modification within one year of the First Notice Order. Once the Board terminates the stay, the Board could simply withdraw the First Notice Order, as the People argue is the best course, or it could proceed to a Second First Notice and restart the one-year clock to comply with Section 5-40(e) of the APA, as the Board sees fit. *See, e.g., Proposed Amendments to The Board's Special Waste Regulations Concerning Used Oil*, 35 Ill. Adm. Code 739, 808, 809, R07-20, slip op. at 1 (August 20, 2009), *Revisions to Radium Water Quality Standards: Proposed New 35 Ill. Adm. Code 302.307 and Amendments to 35 Ill. Adm. Code 302.207 and 302.525*, R04-21, slip op. at 1 (June 2, 2005).

V. The record does not demonstrate any compelling reason to rush to a decision without Vistra's participation.

Illinois EPA or Dynegy may contend that the Board should deny the Environmental Groups' Motion to Stay, based on a claim that the proposed rules are somehow vital to the economic performance of Dynegy, or of the plants it currently owns. While both parties have made conclusory statements that these rules are necessary to afford Dynegy "operational flexibility," no one has provided any evidence to back up these claims. Illinois EPA testified during the January 17, 2018 hearing that it has no knowledge as to how frequently Dynegy actually requires such "flexibility." January 17, 2017 R18-20 Hearing Transcript, p. 57, line 14 through p.

58, line 4. Dynege, asked repeatedly by participants for details on how often the MPS actually impacts its operations, repeatedly demurred to provide specifics, claiming commercial sensitivity. *See, e.g.*, January 18, 2017 R18-20 Hearing Transcript, p. 133, lines 7-21.

Several portions of Dynege's testimony actually cut against the notion that amendments are urgently needed, though. First: Dynege has testified that it "is in compliance with the current MPS and is able to demonstrate compliance with the MPS." Ex. 18, Dynege's Responses to Pre-Filed Questions of the Illinois Attorney General's Office for Dynege's Witnesses, R18-20 (January 18, 2018), p. 3, ¶ 11. Second: Dynege has identified only two plants that it purportedly is required to operate uneconomically, solely for purposes of MPS compliance: Coffeen and Duck Creek, which are both in Dynege's IPH Group. *See, e.g.*, January 18, 2017 R18-20 Hearing Transcript, p. 131, line 4, through p. 133, line 6. Third, Dynege testified that, of the two MPS groups—the IPH (or "Old Ameren") Group and the DMG Group—it is actually **the IPH Group** that generates a positive operating income—\$40 million, for the nine months ending September 30, 2017. *Id.* at 144, lines 17-24. In other words: the only MPS Group that purportedly is negatively impacted by MPS compliance performs better economically than the MPS Group that is not.

The Illinois EPA proposed this rulemaking at the behest, and for the benefit, of a single operator, Dynege, that, in a few months, will no longer exist. Neither Illinois EPA nor Dynege has propounded any record evidence that supports the Board adopting the sweeping amendments (which will immediately allow increased emissions of pollutants into Illinois communities) as proposed by Illinois EPA without hearing from the MPS plants' new intended owner, Vistra.

VI. Conclusion

For the reasons set forth in this Response and in the Environmental Groups' Motion for Stay, the People respectfully request that the Board enter a limited stay until Vistra is able to fully participate in this rulemaking, make its view known on the necessity of this rulemaking and the propriety in Dynegy's corporate philosophy of increasing emissions from uncontrolled coal power plants in the MPS fleet, and, if it wishes to support the rulemaking, subject itself to questioning by all participants.

Dated: February 16, 2018

Respectfully submitted,

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