

ILLINOIS POLLUTION CONTROL BOARD

February 22, 2018

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

ORDER OF THE BOARD (by K. Papadimitriou):

Five environmental organizations ask the Board to stay this rulemaking, in which the Illinois Environmental Protection Agency (Agency) proposes to amend the Multi-Pollutant Standard (MPS) (35 Ill. Adm. Code 225.233).¹ Adopted in 2006, the MPS regulates emissions of sulfur dioxide, nitrogen oxides, and mercury from coal-fired electrical generating units in central and southern Illinois owned by Dynegy.²

The Environmental Groups argue that the pending merger between Dynegy and Vistra Energy Corp. (Vistra) precludes the Board from developing a complete rulemaking record. They contend that the Agency intends the amended MPS to provide operational flexibility and economic stability, but without Vistra's input it is unknown whether, after the merger, Vistra will also wish to pursue these ends.

Finding a stay unnecessary, the Board denies the Environmental Groups' motion. The Agency is the proponent of the proposed amendments, and Dynegy remains the MPS plants' owner and permit holder. Additionally, it is unclear when or whether the pending merger will be completed. In the meantime, the Board is in the midst of developing an extensive record of written filings, testimony, and public comments, and of conducting several days of hearing—with more soon to come.

In today's order, the Board briefly summarizes this proceeding's procedural history and stay-related filings, and then rules on the Environmental Groups' motion.

¹ This order refers to the participants requesting a stay—the Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club—collectively as “the Environmental Groups.”

² This order refers to the owners and operators of the MPS-regulated plants—Dynegy Midwest Generation, LLC; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Electric Energy, Inc.—collectively as “Dynegy.”

BACKGROUND

Procedural History

On October 2, 2017, the Agency filed the rulemaking proposal along with statement of reasons and other documents including a motion for expedited review. On October 19, 2017, the Board accepted the proposal for hearing, denied the motion for expedited review, and sent the proposal to first-notice publication, without review of its merits. The first-notice proposal appeared in the *Illinois Register* on November 3, 2017.

On November 8, 2017, the hearing officer scheduled two hearings: one in Peoria, on January 17 and 18, 2018, and another in Edwardsville, on March 6 and 7, 2018. The Board conducted the first hearing and received related filings before and after that. For the second hearing, the hearing officer's January 29, 2018 order set pre-filing deadlines of February 6, February 16, and March 2, 2018.

Environmental Groups' Motion to Stay

The Environmental Groups state that Dynegy expects to merge with Vistra in the second quarter of 2018. Mot. at 1. They posit that the merger is effectively a buy-out, and that Dynegy will cease to exist as a "standalone company." *Id.* at 3. For instance, the post-merger company will retain Vistra's name, eight of the new entity's board members will be from Vistra, and 79% of the ownership will be current Vistra shareholders. *Id.* at 5. The Environmental Groups add that the merger will make Vistra the ultimate parent company of the Dynegy affiliates that own the generating stations. *Id.* at 5-6.

According to the Environmental Groups, federal antitrust law has "effectively prevented" Vistra from participating in this rulemaking. *Id.* at 1, 3, 5. Dynegy has not coordinated any aspect of this rulemaking with Vistra. *Id.* at 6, citing Jan. 18, 2018 trans. at 118-19. Yet, the Environmental Groups continue, the proposed MPS revisions are the result of negotiations between Dynegy and the Agency. *Id.* at 7. The Environmental Groups maintain that since Dynegy will not survive the merger, the "wrong company is at the table." *Id.* at 1

The Environmental Groups suggest that the post-merger Vistra may seek to maintain the MPS without change or pursue altogether different amendments. Mot. at 3. And without Vistra, the Board and the public cannot obtain "meaningful predictions and assurances" about the proposed amendments' consequences and future plant operations, according to the Environmental Groups. *Id.* at 8.

The Environmental Groups request that the Board stay this proceeding until Vistra can provide its input—they anticipate less than six months. Mot. at 8. A stay, the Environmental

Groups argue, would not be prejudicial because Dynegy anticipates no problems in maintaining compliance with the MPS. *Id.* at 9-10.

Attorney General's Office's Response in Support of Motion

The Attorney General's Office (AGO) supports the Environmental Groups' stay motion. AGO Resp. at 1-9. The AGO favors a "limited stay until Vistra is able to participate in this rulemaking" and "subject itself to questioning by all participants." *Id.* at 3. According to the AGO, the post-merger company's economic profile will be different than Dynegy's. *Id.* at 5-6. A stay would conserve Board resources and lead to a complete record, the AGO continues, and would not be prejudicial. *Id.* at 6-7. The AGO asserts that the MPS plants currently comply with the existing emission limits, and there is no record evidence that the amendments are necessary to safeguard the generating stations' economic performance. *Id.* at 7-8.

Responses in Opposition to the Motion

Seven participants filed responses opposing the motion to stay: the Agency, Dynegy, the Chemical Industry Council of Illinois (CICI), the Illinois Energy Association (IEA), the Illinois Manufacturers' Association (IMA), the Illinois Chamber of Commerce, and the IBEW Local 51 and Illinois AFL-CIO (collectively, Unions).

The Agency's Response

The Agency responds that it, not Dynegy or Vistra, is the proposed amendments' proponent. Agency Resp. at 3-4. And while stakeholders' views may assist the Board, they are not "required, legally binding, or enforceable." *Id.* at 4. The Agency adds that any MPS amendments that the Board may adopt will be binding on and enforceable against Dynegy and the post-merger owner of the MPS generating stations. *Id.* The post-merger owner of those plants must comply with applicable emission limits, but is not legally required to participate in this proceeding before or after the merger. *Id.*

The Agency further argues that a stay would be prejudicial. Agency Resp. at 5. For one, the Agency contends, a stay would delay affording Dynegy the operational flexibility that it seeks. *Id.* For another, a stay could jeopardize the Board's ability to adopt the amendments within the one-year period following their first-notice publication, on November 3, 2017. *Id.* Re-publishing proposed amendments for first notice would entail further delays. Additionally, the Agency states that if the merger does not close in the second quarter of 2018, the requested stay would become open-ended and indefinite, which the Board disfavors. *Id.* at 7. Such a delay would render meaningless the "extensive time and resources" to this rulemaking that the Agency and other rulemaking participants have already dedicated. *Id.* at 6-7.

Dynegy's Response

Dynegy argues that granting the motion would set a "dangerous and disruptive precedent," that the Board cannot act on a proposed rule until all potentially interested parties have provided opinions. *Id.* 1-2. That approach is contrary to law, Dynegy adds, and would

waste Board, Agency, and stakeholder resources. *Id.* at 2. Dynegy further contends that the Board should not grant a stay based on “mere possibilities and speculation.” *Id.* According to Dynegy the merger might not occur or could be delayed. *Id.* at 8.

Dynegy points out that the Board has provided all interested parties, including Vistra, the opportunity to participate in this rulemaking. There is no legal requirement for other parties to participate. Dynegy Resp. at 5-6. Although the Agency, because it proposed the MPS amendments, must participate in this rulemaking and submit supporting evidence, no others must participate, Dynegy adds. *Id.* at 6-7. Thus, Dynegy stresses, Vistra may elect to participate or not. Regardless, if it acquires the MPS plants, Vistra would be subject to the same emission limits and face the same market conditions. *Id.* at 7-8, 11.

Additionally, Dynegy maintains that a stay would materially prejudice it. Dynegy Resp. at 12-13. Delay would, Dynegy claims, cause it to “suffer additional high costs and severe economic constraints.” *Id.* at 12. According to Dynegy, although it can comply with the existing MPS limits, it is “severely burdensome for Dynegy to do so”; Dynegy regularly operates certain generating units at a loss. *Id.* at 12-13.

Other Responses

CICI, IEA, IMA, the Chamber, and the Unions oppose the motion. They argue that granting the motion would “chill” corporate acquisitions and set a “dangerous” precedent, that the Board may only complete a rulemaking where all current and potential stakeholders have participated. CICI Resp. at 1-3; *see also* IEA Resp. at 1-3; IMA Resp. at 1-3; Chamber Resp. at 1-3; Unions Resp. at 1-3.

DISCUSSION

The Board’s procedural rules provide that “[m]otions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed. . . .” 35 Ill. Adm. Code 101.514(a). The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” People v. State Oil Co., PCB 97-103, slip op. at 2 (May 15, 2003), *aff’d sub nom. State Oil Co. v. PCB*, 822 N.E.2d 876 (2nd Dist. 2004).

The Board finds that granting the motion would cause unnecessary delay. Vistra’s input is not needed to develop a complete rulemaking record on the proposed amendments to the MPS. The merger does not affect the identity of the amendments’ proponent: the Agency. Dynegy is not the proponent in this rulemaking. And Dynegy still owns, operates, and holds the permits for the MPS generating stations. The Board can determine whether and how to consider Vistra’s input if and when the merger occurs and Vistra offers its views.

Further, the Environmental Groups contend that a stay would be minimally disruptive, ending within six months. Mot. at 8. But there is no guarantee that the merger will be completed by then. And, even if the merger does go forward, when and to what extent, if any, Vistra may participate in this proceeding is unknown. Especially with these uncertainties, the Board shares the concern of the participants opposing the stay motion that a stay here risks setting a troubling

precedent: the Board may complete a rulemaking only if all current and potential stakeholders have participated in the proceeding.

The Board also finds the stay request tardy. The Vistra-Dynege merger was announced before the first-notice proposal was published. Yet, the Environmental Groups waited until proceedings were well underway to request a stay. The Agency initiated this rulemaking four months ago and requested expedited review. To avoid undue delays, the Board sent the proposed amendments to first-notice publication without substantive review. The proposal was published on November 3, 2017, starting the one-year period within which the Board may adopt final amendments based on the proposal. *See* 5 ILCS 100/5-40(e) (2016). And, since then, the Board scheduled and gave public notice of two hearings in different parts of the State, held the first hearing (lasting two days), and received thousands of public comments. The stay motion arrived when its disposition would occur, at the earliest, while the Board and participants are preparing and reviewing pre-filed testimony and other filings for the second hearing.

Under these circumstances, the Board finds no cause to suspend the rulemaking. Accordingly, the Board denies the motion for stay.

IT IS SO ORDERED.

Member Keenan abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 22, 2018, by a vote of 4-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive, flowing style.

Don A. Brown, Clerk
Illinois Pollution Control Board