

ILLINOIS POLLUTION CONTROL BOARD

November 1, 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):

Vistra Energy Corporation (Vistra) asks the Board to expedite review of this rulemaking’s second first notice proposal, which proposes to amend the Multi-Pollutant Standard (MPS) (35 Ill. Adm. Code 225.233). Adopted in 2006, the MPS regulates emissions of sulfur dioxide (SO<sub>2</sub>), nitrogen oxide (NO<sub>x</sub>), and mercury from coal-fired electrical generating units in central and southern Illinois owned by Vistra.<sup>1</sup> The Illinois Environmental Protection Agency (IEPA) initiated this proceeding by filing a proposal to amend the MPS, which the Board originally sent to first notice publication without substantive review. The Board recently proceeded to a second first notice with modifications to IEPA’s proposed amendments.

Vistra argues that expedited review is warranted to limit material prejudice that delay would cause Vistra, its employees, local communities, and wholesale electricity markets. Vistra contends that because the Board’s modified proposal is grounded in the record, expedited consideration would not prejudice any other rulemaking participant or the general public. Vistra proposes hearing and related deadlines and requests that the Board proceed to second notice as soon as possible on or after February 1, 2019.

The Board finds expedited review inappropriate and, therefore, denies Vistra’s motion. This rulemaking is not subject to a decision deadline under the Environmental Protection Act (Act) (415 ILCS 5 (2016)), and Vistra has not shown that it or others will be materially prejudiced absent expedited Board review. And the Board, while committed to avoiding unnecessary delays, will take the time necessary both to ensure that the Board’s and participants’ questions on the second first notice proposal are addressed and to review the record at second first notice.

In today’s order, the Board first briefly summarizes this rulemaking’s procedural history and the Board’s second first notice proposal. The Board then rules upon Vistra’s motion.

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<sup>1</sup> This order refers to the owners and operators of the MPS-regulated plants—Dynergy Midwest Generation, LLC; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Electric Energy, Inc.—collectively as “Vistra.” Vistra, having merged with these entities’ original parent company, Dynergy Inc. in April 2018, is now the entities’ ultimate corporate parent. Mot. at 1 n.1.

## **BACKGROUND**

### **Procedural History**

On October 2, 2017, IEPA 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 reviewing its merits. This original first notice proposal appeared in the *Illinois Register* on November 3, 2017.

The Board held three hearings in 2018, each lasting two days: January 17 and 18, in Peoria; March 6 and 7, in Edwardsville; and April 16 and 17, in Springfield. The Board heard testimony and a total of 119 oral public comments during the six hearing days.

The hearing officer set final filing deadlines at the third hearing, including a deadline of June 15, 2018, for all pre-second notice comments. While the record was open, the Board received 2,909 written public comments. The Board received an additional fourteen written public comments after the public comment period closed.

On October 4, 2018, the Board adopted an opinion and order proceeding to second first notice publication of a revised proposal. The primary differences between the original and second first notice proposals are summarized below. To avoid potential confusion, the Board published a notice of withdrawal of the original first notice publication. The Board directed the hearing officer to schedule and proceed to an additional hearing. The notice of withdrawal appeared in the *Illinois Register* on October 19, 2018. The Board's second notice proposal was published in the *Illinois Register* on October 26, 2018.

Also on October 4, 2018, the hearing officer issued an order scheduling a prehearing conference for October 22, 2018, to discuss hearing locations and dates and related matters. Additionally, the hearing officer's order posed sixteen questions, including subparts, from the Board and staff for participants to consider in prefiling testimony. The Board's questions concern reduction of the proposed mass caps for transfer of MPS electric generating stations, as well as temporary shutdown of units for an entire compliance period (mothballing) and permanent shutdown (retirement); and the compliance date for the proposed mass limits.

On October 12, 2018, Vistra filed its motion for expedited review, accompanied by an affirmation by counsel of the facts in the motion (Mot.).

After Vistra filed its motion to expedite, the hearing officer issued an order cancelling the October 22, 2018, prehearing conference and rescheduling it for November 8, 2018. The hearing officer's order explained that the timing of the motion and response deadline—after the original date for the prehearing conference—prompted the rescheduling, to allow for a complete review and consideration of the motion and responses.

On October 26, 2018, the Attorney General’s Office (AGO) filed a response opposing Vistra’s motion (AGO Resp.). On the same date, five environmental organizations<sup>2</sup> filed a joint response also opposing Vistra’s motion (Env. Grps. Resp.).

### **Board’s Second First Notice Proposal**

Originally, the Board published IEPA’s proposal for first notice without substantive review, one of the procedural steps that IEPA requested in its motion to expedite the Board’s review. In its rulemaking proposal, IEPA proposed changing the existing MPS rule primarily by combining the two existing MPS groups into one group and replacing the existing rate-based emissions standards for SO<sub>2</sub> and NO<sub>x</sub> with mass-based standards.

The Board’s second first notice differs from the original first notice proposal by: (1) reducing the annual mass caps for both SO<sub>2</sub> and NO<sub>x</sub>; and (2) requiring further reduction of those caps when units are permanently shut down (“retired”) or temporarily shut down (“mothballed”). Proposed Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standard (MPS), R18-20, slip op. at 1 (Oct. 4, 2018). The Board’s second first notice rule reduces the proposed annual mass-based caps for SO<sub>2</sub> from 55,000 tons per year (tpy) to 44,920 tpy and for NO<sub>x</sub> from 25,000 tpy to 22,469 tpy. *Id.* at 55-56. The Board retained the originally-proposed ozone season NO<sub>x</sub> mass-based cap of 11,500 tons. *Id.* at 56. Additionally, as with transfers of power plants under IEPA’s original proposal, the Board’s second first notice rule reduces the annual SO<sub>2</sub> and NO<sub>x</sub> mass caps when units are retired or mothballed. *Id.* at 58-60.

The Board noted that, based on the rulemaking record, the Board could have proceeded directly to second notice with the substantive changes to the IEPA’s original proposal. MPS, R18-20, slip op. at 1. Given participants’ continuing disagreements on fundamental issues and the high degree of public participation, however, the Board chose instead to publish the revised proposed amendments as a second first notice. This would afford all interested persons notice of and an opportunity to weigh in on the Board’s revisions. *Id.*

The Board stated that it anticipates holding an additional hearing. MPS, R18-20, slip op. at 1. The Board added that second first notice publication in the *Illinois Register* will begin a period of at least 45 days for interested persons to file public comments with the Board. *Id.*

### **DISCUSSION**

In deciding a motion for expedited review, the Board considers statutory requirements and whether material prejudice will result from the motion being granted or denied. 35 Ill. Adm. Code 101.512(b). The Board will only grant a motion for expedited review consistent with available resources and decision deadlines. *Id.* at 101.512(c).

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<sup>2</sup> This order refers to the environmental organizations opposing expedited review—the Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club—collectively as “the Environmental Groups.”

Specific considerations in this rulemaking weigh against expediting proceedings at this stage. For one, this rulemaking is not subject to a deadline under the Act. For another, the Board must tend to other pending matters that were given lower priority so that the Board could focus on this rulemaking. After the Board in October 2017 sent IEPA's proposal to first notice publication, without substantive review, the Board devoted substantial time and resources to conducting three hearings, developing the record, and receiving and considering public comments. The Board did this to meet the applicable one-year deadline under the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100/5-40(e) (2016)), and to proceed in a manner reasonably consistent with IEPA's initial request to expedite the Board's review. The Board is committed to avoiding unnecessary delays in this proceeding, as noted in the Board's October 17, 2017 order, and recognizes that second first notice publication restarts the one-year deadline under the IAPA. However, progress in this rulemaking cannot come at the expense of, certainly cases under statutory deadlines, but also of other matters not under statutory deadlines that have been and are awaiting the Board's deliberation.

Turning to material prejudice, Vistra claims that the MPS fleet faces substantial market pressures and that the existing rate-based MPS restricts Vistra's ability to respond to these market pressures. Mot. at 2. Although the Board recognizes that evidence in the record supports this assertion, *see, e.g.*, 3/6/18 Tr. at 33, 53-55, the Board is not convinced that the need to address wholesale *energy* market issues should control the substance or timing of proposed amendments to a substantive *environmental* regulation.

Under the Act, it is the Board's role to, among other things, "define and implement the environmental control standards in the State of Illinois. . . ." 415 ILCS 5/5(b) (2016). Accordingly, the Board's focus in proceeding to second first notice was on the proposed amendments' environmental and health impacts, not the need for operational flexibility. *See MPS*, R18-20, slip op. at 30-60. Indeed, in addressing key aspects of its decision, from setting mass-based cap levels to requiring cap reductions for unit retirement and mothballing, the Board gave paramount consideration to environmental and health impacts, including in particular the potential shift in generation from more- to less-controlled MPS units. *See id.* at 50-56, 58-60. Only after proposing these modifications to IEPA's original proposal did the Board consider the economic reasonableness of requiring the MPS fleet to comply with the second first notice proposal. *See id.* at 62-65. Only within this context did the Board find that, even with mass caps lower than those proposed by IEPA, the modified caps would still allow Vistra "considerable operational flexibility." *Id.* at 64. Thus, operational flexibility under the second first notice amendments may bear on economic reasonableness, but not on the amendments' merits in terms of pollution control.

The discussion above follows from the nature of this proceeding: an IEPA-initiated general rulemaking rather than a site-specific rulemaking or adjudicatory proceeding. This distinction, in turn, distinguishes most of the Board decisions that Vistra cites in support of expedited review. *See* Mot. at 1-2, 4. In adjudicatory proceedings and site-specific rulemakings, individualized impacts, including economic hardship, are highly relevant. *See RCRA Delisting Petition of Peoria Disposal Co.*, AS 08-10, slip op. at 3-4 (June 5, 2008); *Petition of Big River Zinc Corp.*, AS 08-09, slip op. at 2-3 (Aug. 7, 2008); *Petition of Big River Zinc Corp.*, AS 06-4, slip op. at 1-2 (Aug. 4, 2006); *Proposed Site-Specific Regulation Applicable to Ameren Energy*

Gen. Co. Amending 35 Ill. Adm. Code 901, R04-11, slip op. at 2 (Nov. 6, 2003). By contrast, as the Board explained in this general rulemaking, Section 27(a) of the Act (415 ILCS 5/27(a) (2016)) requires that the Board consider the cost, to the regulated entity, of complying with the proposed rule, “not whether the existing rule imposes unreasonable financial hardship on the regulated entity.” MPS, R18-20, slip op. at 63.

Vistra does point to potential impacts on others, including the “state and regional electricity market” as well as Vistra’s employees and local communities, beyond the MPS plants. Mot. at 3-4. Relevant to the first of these, Vistra cites the Board’s observation that “must run” operation of MPS units solely to comply with the MPS average annual emission rates may “distort[ ] the wholesale power market.” *Id.* at 2, citing MPS, R18-20, slip op. at 65. The Board made this qualified statement in finding that the proposed amendments will not have an adverse economic impact. MPS, R18-20, slip op. at 65. The Board allowed for the possibility that running controlled units at uneconomic prices, solely to comply with MPS rates, “may cause problems for more than just” the MPS plants. *Id.* The MPS plants “may displace electricity generation” from lower-emitting and less-costly sources, thereby “distorting the wholesale power market.” *Id.* at 64-65. The Board is unpersuaded that this possibility, while genuine, represents a threat of material prejudice justifying expedited consideration.

By contrast, the general rulemaking decisions that Vistra cites, while relevant here, involved compelling and concrete grounds for expediting review at the outset of the proceeding. *See* Amendments to Primary Drinking Water Standards 35 Ill. Adm. Code 611, R15-23, slip op. at 3, 5 (June 4, 2015) (delaying effectiveness of reduced fluoridation requirement by six months would cost community water supplies more than \$1 million); Amendments to 35 Ill. Adm. Code 205, Emissions Reduction Market System, and 35 Ill. Adm. Code 211, R05-11, slip op. at 1-2 (Dec. 2, 2004) (unless Board adopted proposed rule before federal applicability threshold changed, participation in State “cap and trade” program would decline, lessening required emissions reductions). Although the Board does not discount Vistra’s asserted need for operational flexibility, the Board is unpersuaded that Vistra’s need rises to the level of the exigencies in these other rulemaking decisions on which Vistra relies.

As to Vistra’s reference to economic impacts on Vistra employees and local communities, the record does not establish a clear link between the proposed amendments and either affected group. Dynegy, Inc. witness Dean Ellis stated that “the intent of why we’re here and why we support the rule isn’t necessarily to prevent shutdowns. It’s to be able to offer units at their short-run marginal costs.” 1/18/18 Tr. at 162. Accordingly, as Mr. Ellis further acknowledged, individual MPS units could be shut down whether or not the Board adopts MPS amendments. *See id.*; *see also, e.g.*, Exh. 24 at 6 (stating that “neither the MPS nor the MPS revision alone will determine whether any units are or are not mothballed or retired”). The overarching goal of the proposed MPS amendments, according to Vistra, is to “provide Vistra the regulatory certainty necessary to make investment decisions with regard to the MPS fleet.” Mot. at 2-3. The outcome of those decisions for the MPS plants is unspecified. The Board recognizes and does not discount the economic interests of Vistra employees and affected communities. However, absent any detail about how the timing of Board review affects these interests, the Board finds that the interests do not support expedited consideration of the second first notice proposal.

Vistra cites the statement at second first notice that the Board could have proceeded to second notice with the Board's substantive changes to the IEPA's original proposal. From this, Vistra concludes that expediting second first notice review would not be prejudicial. *See* Mot. at 3, citing MPS, R18-20, slip op. at 1. According to Vistra, one additional hearing should suffice to address the Board's questions as well as those of participants. *Id.* at 4. Although the Board intends to proceed without undue delay through second first notice, the Board cannot, at this time, rule out the possibility that more than one additional hearing will be required during second first notice. To be clear, the Board will conduct whatever further proceedings are necessary to obtain meaningful responses to its questions issued on October 4, 2018—which likely are not the only questions the Board will have—as well as questions by participants related to the changes in the second first notice to IEPA's original proposal.

And, although Vistra believes 30 days should suffice for the Board to review new evidence, *see* Mot. at 5, the Board declines to arbitrarily limit the amount of time to complete that review and, if appropriate, proceed to second notice. The Environmental Groups' response reflects participants' interest in "thoroughly analyz[ing]" and commenting on the projected impacts of the Board's "newly-proposed [rule] revisions." Env. Grps. Resp. at 7. The Board is committed to providing, as the AGO states, "a full opportunity for public comment and hearing prior to proceeding to second notice." AGO Resp. at 1.

Lastly, Vistra's proposed schedule hinges on scheduling the additional hearing for the week of November 26-30. *See id.* at 4-5. A cursory review of applicable regulatory requirements reveals, however, that this scheduling is not possible. Because the proposed amendments, if adopted, must be submitted as a revision to Illinois's Regional Haze State Implementation Plan, *see* SR at 9-10, the Board, consistent with federal law (40 C.F.R. § 51.102(a)) gives 30 days (not 21 days) notice of hearings in this proceeding. Moreover, the hearing officer postponed the previously scheduled prehearing conference in order to allow the response time on Vistra's motion to expire and the Board to rule upon the motion. The rescheduled prehearing conference, to establish hearing dates, will be held on November 8, 2018; with the federal 30-day notice requirement, insufficient time exists after the prehearing conference to notice a hearing for any day during the week of November 26-30.

In sum, although the Board intends to proceed without undue delay, the Board finds it inappropriate to expedite review of the second first notice proposal. Accordingly, the Board denies Vistra's motion for expedited review.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 1, 2018, by a vote of 5-0.



Don A. Brown, Clerk  
Illinois Pollution Control Board