

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PETITION OF MIDWEST GENERATION, LLC) AS24-06
FOR AN ADJUSTED STANDARD) (Adjusted Standard – Air)
35 Ill. Adm. Code PARTS 201 and 212)

NOTICE

TO:

Don Brown
Illinois Pollution Control Board
100 W. Randolph St., Suite 11-500
Chicago, IL 60601
Don.brown@illinois.gov

See attached service list.

PLEASE TAKE NOTICE that today I have electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the ILLINOIS EPA'S MOTION FOR STAY OF PROCEEDINGS, OR IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME TO FILE RECOMMENDATION, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Charles E. Matoesian
Charles E. Matoesian
Assistant Counsel
Division of Legal Counsel

DATED: September 5, 2023

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PETITION OF MIDWEST GENERATION, LLC) AS24-06
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**ILLINOIS EPA’S MOTION FOR STAY OF PROCEEDINGS, OR IN THE
ALTERNATIVE, MOTION FOR EXTENSION OF TIME TO FILE
RECOMMENDATION**

The Illinois Environmental Protection Agency (“Illinois EPA or Agency”), by one of its attorneys, and pursuant to 35 Ill. Adm. Code 101.514 and 101.522, provides this motion for a stay of the proceedings of Midwest Generation, LLCs, (“MWG” or “Petitioner”) regarding its adjusted standard petition (“Petition”), or in the alternative motion for an extension of time to file the Agency’s recommendation in this matter (“Motion”). The Illinois EPA requests that the Illinois Pollution Control Board (“Board”) stay this proceeding for 90 days while the Board considers the substantively similar rulemaking proposal filed in R23-18(A). If the Board is not inclined to issue a stay, the Agency requests that it grant a 90-day extension of time to file the Illinois EPA’s Recommendation. In support of its Motion, Illinois EPA states as follows:

Background and Status Report

On July 20, 2023, the Board adopted a rule removing the start-up, malfunction, and breakdown (“SMB”) affirmative defense provisions from the Illinois Administrative Code in Parts 201, 202, and 212 (specifically Sections 201.149, 157, 261-265, and 301; Sections 202.107, and 211; and, Sections 212.124, 324). *In the Matter of Amendment to 35 Ill. Adm. Code Parts, 201, 202, and 212*, R23-18. The Agency did not change any emissions limits, it only removed the affirmative defense which sources could raise in response to an enforcement action related to

exceedances during SMB periods.

In response to comments filed by interested parties in that rulemaking, the Board opened a sub-docket at R23-18(A) to consider proposals for alternative emissions limits during periods of startup, shutdown, or malfunction (“SSM”). In R23-18(A), the Petitioner submitted a rulemaking proposal jointly with Dynegy Midwest Generation, LLC, Illinois Power Generating Company, and Kincaid Generation, LLC (collectively “Dynegy”), seeking amendments to the opacity standards applicable to its coal-fired boilers during periods of SMB. Statement of Reasons of Dynegy and Midwest Generation, P-5. Four other rulemaking proposals were also filed in the docket: one by the Illinois Environmental Regulatory Group, one by East Dubuque Nitrogen Fertilizers LLC (“EDNF”), one by Rain CII Carbon LLC (“Rain Carbon”), and one by the American Petroleum Institute. R23-18(A), Board Order (August 17, 2023).

On August 17, 2023, the Board combined these proposals into a single proposal amending 35 Ill. Adm. Code 212, 215, 216, and 217 to establish alternative standards during periods of startup, shutdown, breakdown, and malfunction. R23-18(A), Board Order (August 17, 2023). The Board submitted the combined proposal for first-notice publication in the Illinois Register and scheduled public hearings. R23-18(A), Board Order (August 17, 2023) and R23-18(A), Hearing Officer Order (August 17, 2023).

On August 14, 2023, MWG petitioned the Board for an adjusted standard for relief from the same opacity standards at issue in MWG’s rulemaking proposal. AS 24-6, *In the Matter of: Petition of Midwest Generation, LLC for an Adjusted Standard from 35 Ill. Admin. Code Parts 201 and 212*. On August 14, 2023, ExxonMobil Oil Corporation, Marathon Petroleum Company, LLC, Dynegy, Rain Carbon, and EDNF also filed Petitions for Adjusted Standard with the Board that mirror rulemaking proposals in R23-18(A). *See*, AS 24-1, *In the Matter of:*

Petition of ExxonMobil Oil Corporation for Adjusted Standard from 35 Ill. Adm. Code 216.361, 35 Ill. Adm. Code 216.103, and 35 Ill. Adm. Code 216.104; AS 24-3, In the Matter of: Petition of Marathon Petroleum Company, LLC for an Adjusted Standard from 35 Ill. Adm. Code Part 201 and Section 216.361; AS 24-4, In the Matter of: Petition of Dynegy for an Adjusted Standard from 35 Ill. Admin. Code Parts 201 and 212; AS 2024-5, In the Matter of: Petition of Rain CII Carbon LLC for Adjusted Standard from 35 Ill. Adm. Code §§ 201.149, 212.123, and 212.322, 215.301; and, AS 24-2, In the Matter of Petition of East Dubuque Nitrogen Fertilizers, LLC, for Adjusted Standard.

MWG noted in the Petition that it did not wish to disrupt the R23-18(A) rulemaking. Petition at P-5. Furthermore, MWG stated that it “will not require the Proposed [adjusted standard] if the Board ultimately grants its rulemaking proposal *in full*.” Petition at P-5. MWG stated, “While MWG believes that its proposed [regulatory] amendments are an appropriate mechanism to obtain relief and will ultimately be approved by this Board, the severity of the impact of the SMB Repeal on MWG’s operations mandates that MWG avail itself of all available remedies from the Board. Section 28.1(f) of the Act, 415 Ill. Comp. Stat. 5/28.1, and 35 Ill. Admin. Code § 104.412(b) provide that any person who files a timely petition for an adjusted standard following any rulemaking implementing [Clean Air Act] requirements will be exempt from the new provisions while the petition is pending before the Board. Section 28.1(f) further instructs that in situations where the new regulation replaces a previously adopted regulation (such as occurred through the SMB Repeal), the previously adopted regulation will apply during the stay of the new rule.” Petition at P-3, 4. MWG indicated, “The revisions to Section 201.149 and the repeal of Sections 201.261-265 and 212.124(a) took effect on July 25, 2023; thus, the 20-day period under Section 28.1(f) of the Act concludes on August 14, 2023.

Because it is not possible for the Board to act upon the rulemaking proposals in advance of the statutory deadline under Section 28.1(f), and the outcome of R23-18A is not yet known, MWG has no choice but to file this Petition as a protective measure now. . . MWG is filing this Petition now to ensure that it does not waive any right to seek, and fully benefit from, the adjudicatory remedy of an adjusted standard in the event that the Board does not expeditiously codify MWG's proposed rulemaking in R23-18A." Petition at P-4.

Unless otherwise ordered by the Hearing Officer or the Board, the Illinois EPA is required to file its Recommendation within 45 days after the filing of MWG's Petition, *i.e.*, September 28, 2023, or where a hearing has been scheduled, at least 30 days before hearing, whichever is earlier. 35 Ill. Adm. Code 104.416(a). MWG waived a public hearing in this proceeding. Petition at P-20.

Request for Stay

The Board should stay this proceeding while the Board considers MWG's rulemaking proposal. As explained above, MWG's proposed rule amendments substantively mirror its requested adjusted standard; both regard changes to/relief from the same Board regulations. MWG itself explained that if the Board adopts MWG's proposed rule amendments, an adjusted standard is unnecessary and that its Petition was primarily intended to preserve its arguments regarding a stay under Section 28.1(f) of the Act.

Simultaneously participating in both an expedited rulemaking and MWG's adjusted standard proceeding will force the Agency, Board, MWG, and potentially other participants to expend significant resources in proceedings that seek similar relief. Conversely, issuing a stay here will conserve resources and allow participants to focus on MWG's rulemaking proposal first, and this proceeding second (and only if still necessary).

The Illinois EPA is not opining as to whether MWG is entitled to a stay under Section 28.1(f) of the Act, but acknowledges MWG's stated position in this regard and clarifies that this request for stay is not intended to have any impact on the legal posture of such position. The Illinois EPA is simply seeking to "hold" this proceeding while the rulemaking moves forward, to be resumed at a later date if necessary.

Request for Extension of time to File Recommendation

In the alternative, if the Board does not grant a stay, the Illinois EPA requests an extension of time of 90 days, up to and including January 10, 2023, to file the Agency Recommendation.

MWG's Petition and attachments total over 500 pages. The Illinois EPA is currently reviewing it but anticipates that it will need additional time to both review and develop recommendations. The Illinois EPA must address and respond to the Petition with respect to each issue raised by the requirements of Section 104.406(a) through (j). 35 Ill. Adm. Code 104.416(b). As such, Section 104.406(i) requires that the Agency Recommendation indicate whether the Board may grant the proposed adjusted standard consistent with federal law. 35 Ill. Adm. Code 104.406(i). Doing so here will entail consultation with USEPA to ascertain whether the requested adjusted standard is federally approvable, i.e., meets Clean Air Act requirements. Such consultation is likely not possible within the given time frame for the Illinois EPA to respond to the Petition.

Along with MWG's Petition, five other Petitions for Adjusted Standard were filed with the Board on the same day. Given the number of petitions received, the time it will take the Illinois EPA to review and consult with USEPA on each, and the Agency's limited resources, more time is necessary.

WHEREFORE, for the reasons set forth above, the Illinois EPA requests that the Board grant this Motion for Stay of Proceedings for 90 days up to and including December 4 (or a later date if deemed more appropriate by the Board), or in the alternative, grant this Motion for Extension of Time to File Recommendation for 90 days, up to and including January 10, 2023.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Charles E. Matoesian
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Assistant Counsel
Division of Legal Counsel
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DATED: September 5, 2023

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CERTIFICATE OF SERVICE

I, Charles E. Matoesian, Assistant Counsel, caused to be served on this 5th day of September, 2023, a true and correct copy of the **ILLINOIS EPA'S MOTION FOR STAY OF PROCEEDINGS, OR IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME TO FILE RECOMMENDATION** upon the persons listed on the Service List via electronic mail or electronic filing, as indicated.

Don Brown

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The number of pages in the e-mail transmission is 8

The e-mail transmission took place before 4:30 p.m.

/s/ Charles E. Matoesian

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