BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL.ADM.CODE PART 225	)	PCB R06-25
CONTROL OF EMISSIONS FROM	)	
LARGE COMBUSTION SOURCES	)	

NOTICE OF FILING

To:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Marie Tipsord
Hearing Office
Illinois Pollution Control Board
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Gina Roccaforte, Assistant Counsel
Charles Matoesian, Assistant Counsel
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Springfield, Illinois 62794-9276

Office of Legal Services
Illinois Department of Natural Resources
524 South Second Street
Springfield, Illinois 62701-1787

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board DYNEGY, MIDWEST GENERATION, and SIPC'S MOTION TO REJECT REGULATORY FILING; and the APPEARANCES of SHELDON A. ZABEL, KATHLEEN C. BASSI, STEPHEN J. BONEBRAKE, JOSHUA R. MORE and GLENNA L. GILBERT, copies of which are herewith served upon you.

/s/ Kathleen C. Bassi
Kathleen C. Bassi

Dated: March 15, 2006

SCHIFF HARDIN LLP
Attorneys for Dynegy Midwest Generation, Inc, Midwest Generation, LLC, and Southern Illinois Power Cooperative
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CH2\ 1391614.1

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 15th day of March, 2006, I have served electronically the attached DYNEGY, MIDWEST GENERATION, and SIPC'S MOTION TO REJECT REGULATORY FILING; NOTICE OF FILING; and APPEARANCES of SHELDON A. ZABEL, KATHLEEN C. BASSI, STEPHEN J. BONEBRAKE, JOSHUA R. MORE, and GLENNA L. GILBERT, upon the following persons:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
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Chicago, Illinois 60601

and by first-class mail with postage thereon fully prepaid and affixed to the following persons:

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/s/ **Kathleen C. Bassi**
Kathleen C. Bassi

Dated: March 15, 2006

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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Dynegy Midwest Generation, Inc., Midwest Generation, LLC, and Southern Illinois Power Cooperative.

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Dated: March 15, 2006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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LARGE COMBUSTION SOURCES	)	

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Dynegy Midwest Generation, Inc., Midwest Generation, LLC, and Southern Illinois Power Cooperative.

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Dated: March 15, 2006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Dynegy Midwest Generation, Inc., Midwest Generation, LLC, and Southern Illinois Power Cooperative.

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Dated: March 15, 2006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Dynegy Midwest Generation, Inc., Midwest Generation, LLC, and Southern Illinois Power Cooperative.

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Dated: March 15, 2006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
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PROPOSED NEW 35 ILL.ADM.CODE PART 225	)	PCB R06-25
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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Dynegy Midwest Generation, Midwest Generation, LLC, and Southern Illinois Power Cooperative.

/s/ Glenna L. Gilbert

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Dated: March 15, 2006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL.ADM.CODE PART 225	)	**PCB R06-25**
CONTROL OF EMISSIONS FROM	)	
LARGE COMBUSTION SOURCES	)	

PARTICIPANTS DYNEGY, MIDWEST GENERATION, AND SIPC'S MOTION TO REJECT REGULATORY FILING

NOW COME DYNEGY MIDWEST GENERATION, INC., MIDWEST GENERATION, LLC, and SOUTHERN ILLINOIS POWER COOPERATIVE (the "Group"), by and through their attorneys, Schiff Hardin, LLP, and move the Illinois Pollution Control Board ("Board") to reject the Illinois Environmental Protection Agency's ("Agency") proposal to add certain new rules to be included in 35 Ill.Adm.Code Part 225, Subpart B and pertinent sections of Subpart A ("Mercury Proposal") purportedly to implement Section 9.10 of the Illinois Environmental Protection Act ("Act") and allegedly authorized by Sections 27 and 28.5 of the Act. The Mercury Proposal does not implement or qualify under Section 9.10, does not meet the statutory prerequisites of Section 28.5 necessary to allow fast-track rulemaking under Section 28.5, and should be rejected with leave to refile under Section 27. Alternatively, if the Board accepts the Mercury Proposal under Section 27 at this time, the Board should request that the Department of Commerce and Community Affairs ("DCCA") perform a full and formal economic impact study of the Mercury Proposal pursuant to Section 27(b)(1) of the Act.

INTRODUCTION

The Agency's efforts to fast-track the Mercury Proposal under Section 28.5 and purportedly to "implement" Section 9.10 are fatally flawed. The proposal fails to satisfy key

statutory prerequisites that would permit the Board to accept and proceed with a rulemaking under those sections. The Board must therefore reject the Agency's request to do so.

Not only is that result compelled by the Act, but it makes good sense under the circumstances. The Agency's Mercury Proposal deviates radically from the recently promulgated federal mercury rule, *i.e.*, the Clean Air Mercury Rule ("CAMR") promulgated at 70 Fed.Reg. 28605 (May 18, 2005). The CAMR does not justify nor compel the Agency's very different proposal. Under these circumstances, the proposal should be subject to a comprehensive and deliberate rulemaking proceeding under Section 27 of the Act.

On May 18, 2005, the United States Environmental Protection Agency ("U.S. EPA") issued the CAMR, which establishes "standards of performance" limiting mercury emissions from new and existing coal-fired electric steam generating units, as defined in 42 U.S.C.A. § 7411, and creates a market-based cap-and-trade program that will reduce nationwide emissions of mercury from such sources in two distinct phases. *See* 70 Fed. Reg. 28605 (May 18, 2006). The first phase national cap is 38 tons, and the U.S. EPA anticipates that most emissions reductions during this first phase will result from "co-benefits" of the Clean Air Interstate Rule ("CAIR") (70 Fed.Reg. 25161 (May 12, 2005)) – that is, mercury reductions achieved by reducing sulfur dioxide ("SO2") and nitrogen oxides ("NOx") emissions under CAIR. 70 Fed.Reg. at 28606. The first phase becomes effective in 2010. *Id.* In the second phase, due in 2018, coal-fired power plants will be subject to a second cap, which will further reduce mercury emissions to 15 tons nation-wide upon full implementation. *Id.*

In the CAMR, U.S. EPA has assigned each state and two tribes emissions "budgets" for mercury based upon the criteria described in the Preamble to the rule. Each state must submit a

state plan to the U.S. EPA for approval detailing how it will meet its budget for reducing mercury from coal-fired power plants. 70 Fed. Reg. at 28621.

CAMR includes a model trading program which states may join by adopting the model trading program in state regulations or by adopting regulations that mirror the necessary components of the model trading program. 70 Fed. Reg. at 28624. The model trading program is intended to reduce the overall amount of emissions by requiring sources of mercury emissions to hold allowances to cover their emissions on a one-for-one basis, by limiting overall allowances so that total emissions cannot exceed specified levels (the cap) and by reducing the cap to less than the amount of emissions actually emitted, or allowed to be emitted, at the start of the program. *Id.* The model trading program gives regulated sources flexibility in attaining compliance as compared to a conventional command and control approach.

Not only does the Mercury Proposal fail to adopt CAMR's model trading program, however, but it also changes the emissions reduction percentages and the timeline of the carefully conceived CAMR. On January 5, 2006, Illinois' Governor Blagojevich announced a proposal that would mandate reductions in mercury emissions from coal-fired power plants by 90 percent by mid-year 2009, an eighteen-month acceleration of the CAMR timetable and a dramatic increase in the reduction levels. Subsequently, the Agency commenced a brief two-month outreach with affected companies and other interested persons. On March 14, 2006, approximately two months after the Governor's announcement, the Agency filed the Mercury Proposal. The Mercury Proposal effectively imposes more stringent, less flexible, and more costly requirements than the CAMR, primarily because it does not include the trading program that is the centerpiece of the CAMR. In fact, the Mercury Proposal raises significant technical achievability and cost concerns that were addressed but could not be solved in the federal

rulemaking record for the CAMR. Those differences and related concerns should be carefully evaluated during a comprehensive and deliberative rulemaking process. The Agency attempts to fast-track the proposal, however, citing Section 28.5 as authority for its proposal. Proceeding under this section could have the effect of reducing the time and opportunity for adequate consideration of and challenges to the proposal.

The Agency's reliance upon Sections 9.10 and 28.5 is erroneous. The Mercury Proposal does not qualify under Section 9.10, nor does it meet the statutory requirements that are prerequisites to proceeding as a rulemaking action under Section 28.5. Although the Mercury Proposal could be processed under Section 27, because it is improperly premised upon and incorrectly contains references to Sections 9.10 and 28.5, it should be rejected with leave to refile only under Section 27. Alternatively, the Board could accept the filing but for proceedings only under Section 27, striking all references to Sections 9.10 and 28.5 and requiring an economic impact study.

ARGUMENT

The Board should reject the Agency's Mercury Proposal. To qualify under Section 9.10, the Mercury Proposal must effectuate a finding of the report completed by the Agency pursuant to that section. It does not.

For a rulemaking proposal to proceed pursuant to Section 28.5 of the Act, the proposal must be a regulation that is "required to be adopted" by the federal Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q. Nothing in the Mercury Proposal meets that test as it is defined in the Act. Thus, as explained in more detail below, the Mercury Proposal should be rejected, with leave to refile under only Section 27 or, alternatively, treated as a proposal exclusively under Section 27. If the Board selects the alternative, all references to Sections 9.10 and 28.5 should

be stricken and the Board should request DCCA to conduct a study of the economic impact of the proposed rulemaking pursuant to Section 27(b)(1) of the Act.

I. THE AGENCY'S MERCURY PROPOSAL DOES NOT EFFECTUATE ANY FINDINGS IN ITS REPORT PREPARED PURSUANT TO SECTION 9.10 OF THE ACT.

The Agency erroneously relies upon Section 9.10 as implementation authority for its Mercury Proposal. *See* "AUTHORITY" in proposed rule. Yet, in the Statement of Reasons filed as part of the Mercury Proposal, the Agency does not state that it is implementing Section 9.10 as set forth in the AUTHORITY for the rule. In fact, Section 9.10 does not apply to the proposal, and there is no basis to conclude that any rulemaking proceeding with respect to the proposal could proceed pursuant to Section 9.10, as stated in the Statement of Reasons at page 1.

Addressing various concerns regarding impending requirements applicable to coal-fired power plants, the General Assembly adopted Section 9.10 of the Act in 2001 in order to ensure that the state proceeded with control requirements only after carefully considering the impacts of the facilities on public health as well as the potential impact of the requirements on energy supply, reliability, and costs. *See* 415 ILCS 5/9.10(a)(10). Consistent with this policy, the General Assembly ordered the Agency to study these impacts and to report back to the House and Senate Committees on Environment and Energy. 415 ILCS 5/9.10(b). With respect to proceeding with controls in Illinois, Section 9.10 of the Act states, "The Agency may file proposed rules with the Board to effectuate its findings provided to the Senate Committee on Environment and Energy and the House Committee on Environment and Energy in accordance with subsection (b) of this Section." 415 ILCS 5/9.10(d). (Emphasis added.)

The Agency made no "findings" regarding mercury in its report to be implemented under Section 9.10 for its Mercury Proposal. In September of 2004 the Agency submitted its report, *Fossil Fuel-Fired Power Plants: Report to the House and Senate Environment and Energy*

Committees[1] (the "*9.10 Report*"), to the House and Senate Environment and Energy Committees pursuant to Section 9.10. The *9.10 Report* discussed whether Illinois should address "further potential restrictions" on certain specified emissions from power plants, including mercury. After considering a broad range of issues such as health benefits, the impact on the reliability of the power grid, the impact on consumer utility rates, and the impact on jobs and Illinois' economy, the Agency made no finding that there should be further state restrictions on power plant mercury emissions beyond federal requirements. Indeed, the Agency stated that it would be "irresponsible" to "mov[e] forward with a state-specific regulatory or legislation strategy without fully understanding all of the critical impacts on jobs and Illinois' economy overall as well as consumer utility rates and reliability of the power grid." *9.10 Report* at p. ix. Furthermore, the Agency recommended that, in order to fully assess the appropriate timing and scope of emission reductions from power plants in Illinois, it was necessary to conduct "independent, full and complete economic assessments . . . on the full economic impacts in Illinois. . . . The impact to Illinois' coal jobs and power industry jobs must be fully understood." *Id.* at 70.

The Agency formulated no final recommendations or findings regarding potential new restrictions on power plant emissions. More specifically, the Agency formulated no recommendation or finding related to mercury emissions from coal-fired power plants that would make it necessary or appropriate for the state to impose state regulations for mercury emissions from coal-fired power plants, let alone at a level requiring a 90 percent reduction in mercury emissions. Nor was there a finding to support the Agency's rejection of the CAMR cap and

[1] Illinois Environmental Protection Agency, *Fossil Fuel-Fired Power Plants: Report to the House and Senate Environment and Energy Committees.* (September 2004).

trade program. Thus, there was no "finding" in the *9.10 Report* concerning mercury emissions that can be "effectuated" in the Mercury Proposal.

For this reason, the Agency cannot rely on the Section 9.10 report as the authority for the proposed rules to reduce mercury emissions from coal-fired power plants. The Board must reject the proposal to the extent the proposal relies on or is premised upon Section 9.10 as authority.

II. THE AGENCY DOES NOT HAVE THE AUTHORITY TO FILE NOR DOES THE BOARD HAVE AUTHORITY TO ACCEPT THE PROPOSAL PURSUANT TO SECTION 28.5 OF THE ACT.

In its proposal, the Agency incorrectly states the rule is authorized pursuant to Section 28.5 of the Act. Statement of Reasons, pp. 1, 17-23. The proposal fails to satisfy the clear and express statutory prerequisites to proceed under Section 28.5, and the Agency's filing under and reliance upon Section 28.5 should be rejected by the Board.

Section 28.5 of the Act governs so-called "fast-track" rulemaking proceedings. A "fast-track" rulemaking proceeding "is a proceeding to promulgate a rule that the CAAA requires to be adopted." 5 ILCS § 415/28.5(c). The term *requires to be adopted*, as defined by the Act, "refers only to those regulations or parts of regulations for which the United States Environmental Protection Agency is empowered to impose sanctions against the State for failure to adopt such rules." *Id.* (Emphasis added.) Failure to adopt the Mercury Proposal, which purports to satisfy the state's mercury emission reduction requirements mandated by the CAMR, would not be grounds for U.S. EPA sanctions. Accordingly, the Mercury Proposal cannot proceed under Section 28.5.

The CAMR was finalized by U.S. EPA pursuant to Section 111 of the CAA. U.S. EPA can issue standards of performance for existing sources in a source category only if it has established standards of performance for new sources in that same category under Section 111(b) and only for certain pollutants. *See* 42 U.S.C. § 7411(d)(1). Section 111(d) authorizes U.S. EPA

to promulgate standards of performance that states must adopt through a state implementation plan-like process, which requires state rulemaking action followed by review and approval of state plans by U.S. EPA. *Id.* If a state fails to submit a satisfactory plan, U.S. EPA has the authority to prescribe a plan for the state. *See* 42 U.S.C. § 7411(d)(2)(A). The prescription of a plan by U.S. EPA is not a sanction under the CAA or under Section 28.5 of the Act, as discussed in more detail below.

Use of the procedures in Section 28.5 of the Act is limited to regulations for which U.S. EPA "is empowered to impose sanctions." Any power or authority of U.S. EPA to impose sanctions against a state for failure to adopt an air quality rule is derived from the CAA. Therefore, to understand the limitation on the use of the Section 28.5 rulemaking procedure, one must refer to the sanction provisions of the CAA.

Sanctions under the CAA may be imposed by U.S. EPA only as set forth in Section 179(b) or 110(m) of the CAA. 42 U.S.C. §§ 7509(b) and 7410(m), respectively. Neither of those provisions authorizes U.S. EPA to impose sanctions if the Board does not promulgate as a final rule the Mercury Proposal, or for that matter, any other mercury emission limits as required by the CAMR.

Pursuant to Section 179(b), sanctions may be imposed for a state's failure to implement a "plan or plan revision under [subpart D of the CAA] (or required in response to a finding of substantial inadequacy as described in section 7410(k)(5) of [the CAA])." 42 U.S.C. § 7509(a). Subpart D addresses issues regarding nonattainment and the criteria pollutants, not mercury. Under Section 110(k)(5) of the CAA (42 U.S.C. § 7410(k)(5)), if U.S. EPA finds that the applicable implementation plan is inadequate to attain or maintain the relevant national ambient air quality standard ("NAAQS"), then sanctions may be imposed under Section 179(b) of the

CAA. There is no NAAQS for mercury. Moreover, U.S. EPA has made no findings of substantial inadequacy as described in Section 110(k)(5) of the CAA, nor does it have the authority to do so with respect to mercury. Mercury is not a criteria pollutant. Controlling mercury does not come within the parameters of Subpart D of the CAA and, therefore, is not subject to the provisions of Section 110. Accordingly, U.S. EPA does not have authority to impose sanctions under Section 179(b) should the Board not adopt the Mercury Proposal as a final rule.

Nor could U.S. EPA impose sanctions under Section 110(m). Section 110(m) authorizes U.S. EPA to impose the sanctions listed in Section 179 for failing to implement a state implementation plan ("SIP"). *See* 42 U.S.C. § 7410(m). However, Section 110(m) is irrelevant here because, contrary to the Agency's assertions in the Statement of Reasons, the Mercury Proposal is not a SIP or part of a SIP.

Under Section 111, the Administrator may "prescribe regulations which shall establish a procedure similar to that provided by section [110 of the CAA]. . . ." 42 U.S.C. § 7411. (Emphasis added.) Section 111 is a "SIP-like" process but not a SIP as defined under Section 110. Rather, Section 111 is in subchapter 1, Part A of the CAA. Federal regulations adopted pursuant to Section 111 are subject to neither Section 110 nor Section 179. Section 111, unlike Section 110, does not empower U.S. EPA to impose sanctions under Section 179 for a state's failure to implement a plan. Pursuant to Section 111, the only remedy that U.S. EPA has against a state that fails to implement a plan is to prescribe a plan for the state. *See* 42 U.S.C. § 7411(d)(2). That is not a sanction as defined by the CAA or within the meaning of Section 28.5 of the Act.

The Agency asserts three arguments why, in its view, U.S. EPA has the authority to impose sanctions if the Mercury Proposal is not adopted. Statement of Reasons, pp 20-22. These arguments are without merit.

First, the Agency makes a vague and general assertion that, if the Mercury Proposal is not adopted, U.S. EPA may reduce grants under Section 105 of the CAA and, according to the Agency, that any such reduction is a sanction within the meaning of Section 28.5 of the Act. Statement of Reasons, p. 20. The Agency, however, fails to explain what portion of the grant would be reduced, why any such reduction is considered a sanction under the CAA, or the authority for any such reduction. The cases cited by the Agency do not address Section 105. The Agency seems to imply that U.S. EPA would reduce grants under Section 105(a)(1) for administering a mercury program if the Board does not adopt the Mercury Proposal. That argument, however, is both speculative and flawed. The Agency already administers other federal NSPS[2] programs under a delegation agreement with U.S. EPA. The Agency has failed to explain why it could not implement the CAMR under the existing delegation agreement with U.S. EPA or under an amendment to it. Finally, as discussed above, the availability of sanctions for state failures to act are specifically addressed in Section 179(a) of the CAA, and applicable sanctions, when triggered under Section 179(a), are set forth in § 179(b). For the reasons discussed above, none of the sanctions under Section 179 can be imposed for failure to adopt regulations implementing programs under Section 111(d).

The Agency argues next that the power of U.S. EPA to implement the CAMR, if the Mercury Proposal is not adopted, is the power to impose a sanction. Statement of Reasons, p. 21. The Agency relies upon *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996), but that case

[2] New Source Performance Standards, 40 CFR Part 60.

provides no support for the Agency's argument. The *Virginia* court's focus was on constitutional questions related to a state's failure to implement a permitting program under Title V of the CAA, a program separate and distinct from Section 111. In the context of constitutional arguments concerning the ramifications of that failure, the court used the term *sanction* in connection with its description of U.S. EPA's power to implement the permitting program under Section 502(d) of the CAA. *Virginia*, 80 F.3d at 882. Section 502(d) of the CAA, however, specifically addresses "sanctions" for a state's failure to implement a Title V permitting program, and it specifically refers to the sanction provisions of Section 179. As discussed above, Section 111(d) does not use the term *sanctions* or refer to Section 179. Further, even if possible U.S.EPA action under Title V, an entirely separate program, were relevant to whether sanctions could be imposed in connection with implementing the CAMR under Section 111(d), the question before the court was not whether U.S. EPA action to implement a Title V program was a "sanction" as defined by the CAA and Section 28.5, the question before the Board. The court, instead, addressed whether the effect of such action was constitutional. Whatever the court may have labeled the impact of such action in assessing constitutional arguments concerning that action under a different CAA program, that label is not relevant to, and is certainly not controlling on, whether sanctions, as defined by the CAA, may be imposed by U.S. EPA if the Mercury Proposal is not adopted.[3]

Finally, the Agency cites to two rulemakings required by U.S. EPA pursuant to Section 111(d) of the CAA: *In the Matter of: Municipal Solid Waste Landfills – Non-Methane Organic Compounds 35 Ill.Adm.Code 201.103, 201.146, and Part 220* (R98-28) and *In the Matter of: Hospital/Medical/Infectious Waste Incinerators Adoption of 35 Ill.Adm.Code 229* (R99-10),

[3] Moreover, the Fourth Circuit's decision is not controlling in Illinois, which is within the Seventh Circuit.

which were proposed by the Agency pursuant to Section 28.5. Both rulemakings were accepted by the Board and proceeded as Section 28.5 rulemakings. However, in neither rulemaking did the Board specifically address the issue of sanctions. The Board never found that the imposition of a federal program where Illinois failed to adopt regulations comprised a sanction. Moreover, the question never arose in those rulemakings. Those rulemakings do not serve as precedent here, as the questions raised here were never addressed. Had they been raised in R98-28 and R99-10, the Board should have found, as it must here, that rules required under Section 111(d) of the CAA are not properly before the Board pursuant to Section 28.5 of the Act because they do not satisfy the statutory prerequisites for a rulemaking to proceed under Section 28.5.

The Agency also lists, in footnote 4 of the Statement of Reasons, perhaps the entire gamut of rules proposed and adopted under Section 28.5 of the Act. Of the rulemakings listed, only one is not SIP-related and required pursuant either to Subchapter 1, Part D or to Section 110 of the CAA[4]: *In the Matter of: Categories of Insignificant Activities or Emission Levels at CAAPP Source (Amendments to 35 Ill.Adm.Code 201 and 211)*, R94-14 (October 17, 1994). Moreover, though R94-14 was not a SIP-related requirement, CAA Section 179 sanctions applied in that case pursuant to Section 502(d), which is discussed above. The fact that so many rules were filed and adopted pursuant to Section 28.5 is irrelevant to the Mercury Proposal. Clearly, it is not appropriate for the Board to accept the Mercury Proposal pursuant to Section 28.5. That the Board accepted the R98-28 and R99-10 rulemakings pursuant to Section 28.5, where the was not raised, does not provide precedent or guidance for the Board's actions relative to the Mercury Proposal where the issue has been raised.

[4] 42 U.S.C. §§ 7501-7515 and 7411, respectively.

For these reasons, no sanction may be imposed by U.S. EPA for a state's failure to adopt a regulation to comply with CAMR or otherwise control mercury emissions. Therefore, the Mercury Proposal is not "required to be adopted" under Section 28.5 of the Act. The Board has no authority to accept that filing pursuant to Section 28.5 of the Act, because a non-discretionary statutory prerequisite for utilizing Section 28.5 – that U.S. EPA have authority to impose sanctions for the state's failure to comply – does not exist pursuant to Section 111 of the CAA.

In the alternative, if the Board determines that the "sanction" requirement under Section 28.5 is satisfied, Section 28.5(j) of the Act provides that the Board "shall adopt rules in the fast-track rulemaking docket under the requirements of this Section that the CAAA requires to be adopted and may consider a non-required rule in a second docket that shall proceed under Title VII of the Act." 415 ILCS 5/28.5(j). The plain reading of this language means that only the portion of a proposal that satisfies the federal requirement can proceed under Section 28.5. Indeed, the Agency concedes that only rules that are in fact required by the CAA may be subject to Section 28.5. Statement of Reasons, pp. 17-19. The Board is not required to consider anything beyond the federal requirement pursuant to Section 28.5, and if it determines that the non-required portion of a proposal should proceed, it can consider it under Section 27. Therefore, the increment between what is federally required and what the Agency has proposed is what the Board should consider pursuant to Section 27 rather than Section 28.5. However, in this case, where the Agency's proposal is radically different from and beyond the federal requirements, which the Agency readily admits in the Statement of Reasons,[5] it would be virtually impossible for the Board to separate the increment beyond what is federally required from the federal requirement. The Mercury Proposal in no way reflects what is federally

[5] For instance, the Agency concedes that its "regulatory proposal imposes standards stricter than CAMR . . . ." Statement of Reasons, p. 18.

required. Therefore, because the Mercury Proposal exceeds the federal requirement, any federally required portion of the Mercury Proposal cannot be separated from what is not required by the CAMR, and there is no agreement on the part of the regulated community to this proposal, the Board must consider the entirety of the proposal under Section 27.

Proceeding under Section 27 of the Act, rather than under Section 28.5's "fast-track" approach, is not only compelled under the Act but also entirely appropriate under the circumstances. The federal CAMR was promulgated in rulemaking proceedings by U.S. EPA addressing the costs, benefits, and feasibility of mercury control strategies and requirements, which led U.S. EPA to propose a model cap and trade program. The Agency in its Mercury Proposal, however, rejects that cap and trade program and instead, after a mere two months of outreach, seeks to impose a very different program that would place more rigorous and less flexible requirements on Illinois' coal-fired power plants that raise significant cost and achievability concerns. The Mercury Proposal should be subject to a comprehensive and deliberative rulemaking process under Section 27 of the Act that provides an adequate opportunity for industry to assess and comment on and for the Board to evaluate the Mercury Proposal. U.S. EPA concluded that CAMR was technically and economically feasible, as well as environmentally necessary, and only through the rigorous process under Section 27 can it be determined if the more extensive, restrictive, and costly nature of the Mercury Proposal is statutorily and factually justifiable This result is compelled by the Act and makes good sense under the circumstances.

WHEREFORE, for the foregoing reasons, Dynegy Midwest Generation, Inc., Midwest Generation, LLC, and Southern Illinois Power Cooperative respectfully request that:

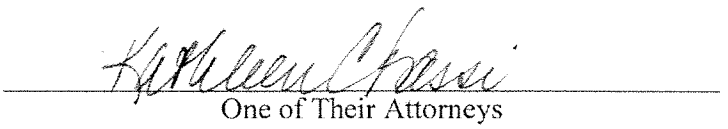
1. The Board reject the Agency's Mercury Proposal as being improperly premised on Sections 9.10 and 28.5 of the Act and dismiss the Mercury Proposal proceeding, with leave to refile under Section 27 of the Act; or

2. In the alternative, if the Board decides to accept for hearing the Mercury Proposal pursuant to Section 27 of the Act, the Board order the deletion of all references to Sections 9.10 and 28.5 and request the Department of Commerce and Community Affairs to conduct a full and formal economic impact study of the Agency's proposal pursuant to Section 27(b)(1) of the Act.

Respectfully submitted,

DYNEGY MIDWEST GENERATION, INC.,
MIDWEST GENERATION, LLC, and
SOUTHERN ILLINOIS POWER COOPERATIVE

by:



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Dated: March 15, 2006

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