

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) Rulemaking - Air
LARGE COMBUSTION SOURCES)

NOTICE OF FILING

To:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
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Persons included on the
ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board PARTICIPANTS DYNEGY MIDWEST GENERATION, INC., KINCAID GENERATION, L.L.C., and MIDWEST GENERATION, LLC'S **REQUEST TO CANCEL HEARINGS AND RESCIND SCHEDULE**, copies of which are herewith served upon you.

/s/ Kathleen C. Bassi

Kathleen C. Bassi

Dated: May 2, 2006

SCHIFF HARDIN LLP

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IN THE MATTER OF:)	
PROPOSED NEW 35 ILL.ADM.CODE PART 225)	PCB R06-25
CONTROL OF EMISSIONS FROM)	Rulemaking - Air
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REQUEST TO CANCEL HEARINGS AND RESCIND SCHEDULE

NOW COME Participants, DYNEGY MIDWEST GENERATION, INC., KINCAID GENERATION, L.L.C., and MIDWEST GENERATION, LLC, (collectively "Participants"), by and through their attorneys Schiff Hardin, LLP, and Jenner & Block LLP, and request that the Board cancel the hearings and rescind the schedule established for this matter in the Board's Order of March 16,2006, and the Hearing Officer's Order of March 16,2006 (collectively, the "March 16 Orders"). In support of their request, Participants state as follows:

1. Participants filed a complaint in the Circuit Court, Sangamon County, Illinois, seeking injunctive and other relief with respect to the March 16 Orders. In a Motion for Preliminary Injunction, attached hereto as Exhibit 1, Participants moved the Circuit Court to enjoin both the Board and the Illinois Environmental Protection Agency ("Agency") from proceeding in this matter under Section 28.5 of the Act, 415 ILCS 5128.5, and from proceeding under the hearing schedule established by the Board and Hearing Officer in this matter on March 16,2006. The Circuit Court's May 1,2006, Order granted Participants' Motion for Preliminary Injunction, attached hereto as Exhibit 2.
2. Consistent with the Court's Order, Participants submit that the Board and the Agency are prohibited from proceeding pursuant to the March 16 Orders and hereby request that

the Board cancel the hearings and rescind the schedule established for this matter in the March 16 Orders

WHEREFORE, for the reasons set forth above, Participants DYNEGY MIDWEST GENERATION, INC., KINCAID GENERATION, L.L.C., and MIDWEST GENERATION, LLC, request that the Board cancel the hearings and rescind the schedule established in this matter by the March 16 Orders.

Respectfully submitted,

DYNEGY MIDWEST GENERATION, INC., and
MIDWEST GENERATION, LLC

by:

/s/ Kathleen C. Bassi

One of Their Attorneys

KINCAID GENERATION, L.L.C.

by:

/s/ Bill S. Forcade

Bill S. Forcade

Dated: May 2, 2006

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Exhibit 1

Motion for Preliminary Injunction

**(Circuit Court, 7th Judicial Circuit,
Sangamon County, No. 2006-CH-213)**

**IN CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS**

Dynegy Midwest Generation, Inc., Kincaid
Generation, L.L.C., and Midwest Generation, L.L.C.,)
)
)
) Plaintiffs,)
)
)
) vs.)
)
)
) Illinois Pollution Control Board and Illinois
)
) Environmental Protection Agency,)
)
)
) Defendants.)

No. 2006-CH-213
Judge Londrigan

MOTION FOR PRELIMINARY INJUNCTION

FILED

APR 13 2006

NOW COME PLAINTIFFS Dynegy Midwest Generation, Inc., Kincaid Generation, L.L.C., and Midwest Generation, L.L.C. ("Plaintiffs"), by and through their attorneys, and City of Chicago for a preliminary injunction and state as follows:

Anthony P. Schuff
Clerk of the
Circuit Court

1. Pursuant to Section 11-102 of the Injunction Act (735 ILCS 5/11-102), Plaintiffs pray for entry of a preliminary injunction restraining and enjoining Defendants, the Illinois Pollution Control Board ("PCB") and the Illinois Environmental Protection Agency ("IEPA"), from proceeding to consider and adopt the proposed mercury emission regulation described in Paragraph 2 hereof pursuant to Section 28.5 of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5128.5, and conducting hearings pursuant to the schedule adopted by the PCB on March 16, 2006 (the "Schedule"), until further order of the Court

2. As discussed more fully in the attached Memorandum in Support of Motion for Preliminary Injunction and the Complaint, the IEPA has submitted the "Proposed new 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury)" (the "Mercury Proposal") to the PCB for review and approval under the expedited "fast track" procedures provided for in Section 28.5 of the Act.

3. Defendant IPCB has accepted and is proceeding to adopt the Mercury Proposal under Section 28.5 of the Act. Despite the filing of motions by Plaintiffs opposed to the application of the fast track rulemaking procedures as unauthorized as a matter of law, Defendant IPCB adopted the Schedule, which accelerates the hearing process, such that the first hearing must be on or before May 8, 2006; the second hearing must be on or before June 7, 2006; and the third and last hearing must be on or before June 21, 2006.

4. Plaintiffs are likely to prevail on the merits of their claims. Defendant IEPA, by filing the Mercury Proposal with the PCB and initiating fast track procedures under Section 28.5, and Defendant IPCB, by accepting the proposal under Section 28.5 and setting the expedited hearing Schedule, have acted outside their authority as the Mercury Proposal does not meet the statutory requirements for consideration under Section 28.5 of the Act.

5. Plaintiffs will suffer irreparable harm if the Defendants are allowed to proceed under Section 28.5 and the accelerated rulemaking Schedule. Defendants' actions under Section 28.5 are unlawful, and as such those actions cause irreparable harm. Further, Plaintiffs would be deprived of their rights to participation in a full rulemaking process with the procedural safeguards necessary to protect their interests as operators of electric generation stations. Absent preliminary injunctive relief from this Court, it is highly unlikely there would be any resolution on the Complaint in this case prior to June 21, 2006, the latest date of the last PCB hearing under the Schedule. The Mercury Proposal, if adopted, would have substantial and costly impacts on Plaintiffs' business and Plaintiffs should not be deprived of their right to participate and protect their interests in the face of such impacts


6. If fast track rulemaking under Section 28.5 is permitted to proceed, the Plaintiffs do not have an adequate remedy at law. The Plaintiffs will not be able to prepare adequately and present testimony for the administrative record that describes the individual harm that each will

incur. Because appeals of rulemakings are limited to the information developed in the administrative record, 415 ILCS 5/41(b), the record will be deficient. Moreover, there is no way to measure the damages that the Plaintiffs will incur should the rulemaking proceed, and Plaintiffs currently are unaware of any means to recover such damages from the IEPA or IPCB.

WHEREFORE, Plaintiffs request that this Court issue a Preliminary Injunction enjoining Defendants from proceeding to consider and adopt the Mercury Proposal pursuant to Section 28.5 of the Act, and conducting hearings and taking any other action pursuant to the Schedule adopted by the IPCB, until further order of this Court.

Dated: April 13, 2006

Respectfully submitted,

By. 
One of Its Attorneys

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ALL PLAINTIFFS

{S0505857 1 411312006CJN KAV}

Exhibit 2

Order on Motion for Preliminary Injunction

(Sangamon County No. 2006-CH-213, May 1, 2006)

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

Dynergy Midwest Generation, Inc.,)
Kincaid Generation, L.L.C., and)
Midwest Generation, L.L.C.,) Case No. Oh-CII-213
)
Plaintiffs.)
)
vs.)
)
Illinois Pollution Control Board and Illinois)
Environmental Protection Agency,)
)
Defendants.)

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

(The Court called for hearing on Motion for Preliminary injunction and [the Court finds as follows:

The parties agree that to prevail, the party requesting a preliminary injunction must show that:

1. it has a clear and lawful right for which it seeks protection,
2. it will suffer irreparable harm absent the preliminary injunction,
3. there is no adequate remedy at law, and
4. it is likely to be successful on the merits.

Grandberg v. Didrickson, 279 Ill. App. 3d 886, 216 Ill. Dec. 338
665 N. E. 2d 398 (1st Dist. 1996)

Vazquez v. City of Woodstock, 242 Ill. App. 3d 766, Ill. Dec. 191
661 N. E. 2d 44 (2nd Dist. 1993)

The party must also establish that the balance of the hardships between the parties weighs in favor of granting a preliminary injunction. In balancing the hardships, "the Court should also consider the effect of the injunction on the public." Grandberg v. Didrickson. The parties also agree that there is no question of fact, only a question of law for the Court to consider.

After review of the Petition, the response to the Petition, case law, corresponding authorities and oral argument, the Court finds as follows:

1. Likelihood of Success of the Merits. The Court finds that the Plaintiffs have

established a likelihood of success on their claim that the Illinois Environmental Protection Agency has filed and the Illinois Pollution Control Board has accepted the Illinois Mercury Proposal under Section 28.5 of the Act in violation of the law. The Illinois Mercury Proposal does not meet the statutory definition of "required to be adopted." A proposed rule qualifies for fast track procedures under Section 28.5 of the Act only if the United States Environmental Protection Agency has authority under the federal Clean Air Act to impose sanctions against Illinois if the rule is not adopted by the Illinois Pollution Control Board. The term "sanctions" is not defined by case law or the Act. This Court does not believe the imposition of a federal plan until such time as Illinois adopts rules governing mercury emissions would be a sanction under the Act.

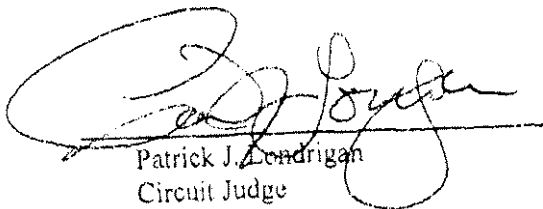
2) Balancing the hardships and the effect on the public. There appears to be little risk of harm to the environmental interests on the public since United States Environmental Protection Agency will impose the federal mercury constraints of the Clean Air Mercury Rule if Illinois rules are not in place. The interests of the public may be better served by a more formal and extensive rule making procedure under Section 27 of the Act. This would allow the public to weigh the cost benefit of the Illinois Environmental Protection Agency plan versus that of the United States Environmental Protection Agency.

3) Irreparable harm. How is this different than the unsuccessful bidder on the Keefe-Shea? Keefe-Shea Joint Venture v. City of 332 Ill. App. 3d 163. (First Dist. 2002). The Plaintiffs are entitled to a fair hearing as much as the bidder in Keefe-Shea wants to participate in a fair bidding process. In the present case, the use of Section 28.5 or fast track, prohibits the Plaintiff from participation in a fair hearing. In this case the Plaintiffs have established a prima facie case as to the element of irreparable harm.

4) Inadequate Remedy at Law The Court finds the Plaintiffs have established a prima facie case for the element of inadequate remedy at law. As in Keefe-Shea the harm to bidders, (the plaintiffs in the present case) and the public alike will likely continue unabated unless the government body is enjoined from maintaining an unfair hearing. Keefe-Shea, 332 Ill. App. 3d 163 at 176-177..

In conclusion the public and the Plaintiffs have an interest in ensuring that rule-making, in the State of Illinois complies with Illinois procedural requirements and that the public's participation rights are preserved. For the reasons above, the Court grants the Plaintiff's Motion for Preliminary Injunction.

ENTERED: 5/1/2006


Patrick J. Londrigan
Circuit Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 2nd day of May, 2006, I have served electronically the attached DYNEGY MIDWEST GENERATION, INC., KINCAID GENERATION, L.L.C., and MIDWEST GENERATION, LLC's **REQUEST TO CANCEL HEARINGS AND RESCIND SCHEDULE**, upon the following persons:

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

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