

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
Chicago, Illinois 60601

Marie Tipsord
Hearing Office
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, Illinois 60601

Gina Roccaforte, Assistant Counsel
Charles Matoesian, Assistant Counsel
John J. Kim, Managing Attorney, Air
Regulatory Unit
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276

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 RESPONSE OF DYNEGY AND MIDWEST GENERATIONS TO THE AGENCY'S MOTION TO AMEND RULEMAKING PROPOSAL, copies of which are herewith served upon you.

/s/ **Kathleen C. Bassi**

Kathleen C. Bassi

Dated: June 6, 2006

ELECTRONIC FILING, RECEIVED, CLERK'S OFFICE, JUNE 6, 2006

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
Joshua R. More
Glenna Gilbert
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 6th day of June, 2006, I have served electronically the attached RESPONSE OF DYNEGY AND MIDWEST GENERATIONS TO THE AGENCY'S MOTION TO AMEND RULEMAKING PROPOSAL, upon the following persons:

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

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

Marie Tipsord
Hearing Office
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, Illinois 60601
tipsorm@ipcb.state.il.us

Gina Roccaforte, Assistant Counsel
Charles Matoesian, Assistant Counsel
John J. Kim, Managing Attorney
Air Regulatory Unit
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
john.kim@epa.state.il.us
charles.matoesian@epa.state.il.us
gina.roccaforte@epa.state.il.us

the participants listed on the
ATTACHED SERVICE LIST

/s/ **Kathleen C. Bassi**

Kathleen C. Bassi

ELECTRONIC FILING, RECEIVED, CLERK'S OFFICE, JUNE 6, 2006

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
Joshua R. More
Glenna Gilbert
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500

SERVICE LIST

William A. Murray
Special Assistant Corporation Counsel
Office of Public Utilities
800 East Monroe
Springfield, Illinois 62757
bmurray@cwlp.com

Christopher W. Newcomb
Karaganis, White & Mage., Ltd.
414 North Orleans Street, Suite 810
Chicago, Illinois 60610
cnewcomb@k-w.com

Faith E. Bugel
Howard A. Learner
Meleah Geertsma
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1300
Chicago, Illinois 60601
fbugel@elpc.org

David Rieser
James T. Harrington
McGuireWoods LLP
77 West Wacker, Suite 4100
Chicago, Illinois 60601
drieser@mcguirewoods.com
jharrington@mcguirewoods.com

Bruce Nilles
Sierra Club
122 West Washington Avenue, Suite 830
Madison, Wisconsin 53703
bruce.nilles@sierraclub.org

N. LaDonna Driver
Katherine D. Hodge
Hodge Dwyer Zeman
3150 Roland Avenue, P.O. Box 5776
Springfield, Illinois 62705-5776
nldriver@hdzlaw.com

Bill S. Forcade
Katherine M. Rahill
Jenner & Block
One IBM Plaza, 40th Floor
Chicago, Illinois 60611
bforcade@jenner.com
krahill@jenner.com

Keith I. Harley
Chicago Legal Clinic
205 West Monroe Street, 4th Floor
Chicago, Illinois 60606
kharley@kentlaw.edu

S. David Farris
Manager, Environmental, Health and Safety
Office of Public Utilities, City of Springfield
201 East Lake Shore Drive
Springfield, Illinois 62757
dfarris@cwlp.com

James W. Ingram
Senior Corporate Counsel
Dynergy Midwest Generation, Inc.
1000 Louisiana, Suite 5800
Houston, Texas 77002
Jim.Ingram@dynergy.com

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PROPOSED NEW 35 ILL.ADM.CODE PART 225) PCB R06-25
CONTROL OF EMISSIONS FROM)
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**RESPONSE OF DYNEGY AND MIDWEST GENERATIONS TO
THE AGENCY'S MOTION TO AMEND RULEMAKING PROPOSAL**

NOW COME Participants Dynegy Midwest Generation, Inc., and Midwest Generation, LLC (collectively "Respondents"), by and through their attorneys Schiff Hardin LLP, and respond to the Illinois Environmental Protection Agency's ("Agency") Motion to Amend Rulemaking Proposal ("Motion to Amend"). Respondents do not object to the amendment to the rulemaking proposal, provided that the Board recognizes that the amendment appears to fundamentally change the initial proposal and likely necessitates reconsideration of the purpose of the second scheduled hearing (in August 2006) and the scheduling of at least one additional hearing. In support of their Response, Respondents state as follows:

1. On March 14, 2006, the Agency filed a proposal with the Board to add new Part 225 to 35 Ill.Adm.Code, entitled "Control of Emissions from Large Combustion Sources."
2. On April 27 and 28, 2006, the Agency filed written testimony of its witnesses relating to that initial proposal.
3. On May 4, 2006, the Hearing Officer ordered participants in the rulemaking to file written questions for the Agency's witnesses by May 19, 2006. The Hearing Officer also set hearing dates for the rulemaking, as follows:

- First hearing, devoted to the Agency's case and the Agency's supporters' cases: June 12-23, 2006;
- Second hearing, concluding any presentations left over from the first hearing and then devoted to opponents' cases: August 14-25, 2006.

4. On May 18, 2006, the Agency informed Respondents' attorneys by telephone that it needed to revise Dr. James Staudt's testimony (first amended testimony, second version). Dr. Staudt is the Agency's witness addressing the technology available and necessary for compliance with the proposed rule and the cost of that technology.

5. On May 22, 2006, Respondents filed written questions, along with a Motion to File Instantly, for all of the Agency's witnesses except Dr. Staudt. The Hearing Officer granted the Motion for Leave to File Instantly during a pre-hearing teleconference on May 24, 2006, which is confirmed in the Hearing Officer's May 24, 2006, written order.

6. On May 23, 2006, the Agency filed the Motion to Amend the rule. Additionally, it filed the second revised (third version) testimony of Dr. Staudt.

7. Respondents and their experts have not yet been able to fully evaluate the impact and implications of the proposed amendment to the rule. As the proposed amendment is purported to provide compliance "flexibility" and to make the proposed rule more "palatable," the proposed amendment, depending on its interpretation, may have fundamentally changed the technological feasibility and economic reasonableness of the proposed rule. However, the impact of the proposed amendment, if the Motion to Amend is granted, cannot be fully assessed until Respondents have an opportunity to question the Agency's witnesses concerning the meaning of the proposed amendment language and its implications.

8. The Agency has provided no support or testimony for the proposed amendment other than a very limited amount in Dr. Staudt's second revised (third version) testimony. If the proposed amendment does impact the technological feasibility and economic reasonableness of the proposed rule, the extent to which this is true is not reflected in the Agency's initial proposal and the testimony of its witnesses, with the very limited exception noted. Because there is no significant, detailed prepared testimony explaining the proposed amendment, assuming the Motion to Amend is granted (and the earliest that can occur is June 15), Respondents will not be able to fully understand the impact of the proposed amendment until they have the opportunity to examine the Agency's witnesses to obtain clarification of the meaning, intent, and ambiguities of the amendment. This cannot even begin to occur until June 16, at the earliest.

9. Respondents request that the Board, if it grants the Motion to Amend, acknowledge that an amendment of the sort that the Agency has proposed – *i.e.*, essentially a variance procedure¹ – potentially has much further-reaching implications to the rulemaking than appears to be addressed in the latest version of the testimony of Dr. Staudt and that these implications need to be thoroughly explored and evaluated. Because the Board will not rule on the Motion to Amend before June 15, 2006, well after the start of the scheduled June hearings in this matter, and because Respondents will not know what the Board's ruling will be, Respondents will not be able to fully develop and pursue their examination of the proposed amendment and its implications until after the first hearing is well underway.

10. Respondents do not believe that the Agency's and supporters' cases will be completed during the first hearing, particularly if the Motion to Amend is granted, given the

¹ We note that this variance procedure bypasses the Board's authority to review and take action on proposed variances.

number of written questions already posed, the necessary follow-up to those questions, the questions to be filed for or otherwise asked of Dr. Staudt, and the questions (not filed) regarding the impacts of the proposed amendment. Respondents are cognizant that the Hearing Officer's May 4, 2006, Order recognized that the Agency's case might carry over into the August hearing. Respondents did not object because they would have the complete proposed rule, the Statement of Reasons, the Technical Support Document, and the Agency's prepared testimony all available for their analysis and preparation. Now, however, if the Motion to Amend is allowed, the Respondents face a 15-page amendment to the proposed rule, unsupported by any substantive statement of reasons, any new or supplemental technical support document, and virtually no prepared testimony. Thus, at least until Respondents have had an opportunity to explore the meaning, intent, and ambiguities of the amendment by cross-examination, understanding the impact of the amendment and preparing to respond to it are almost impossible.

11. Therefore, Respondents request that the Board act now and redesignate the scheduled August hearing for completion of the Agency's and supporters' cases and direct the Hearing Officer, at the conclusion of the August hearing, to schedule a date at least 30 days after the conclusion of the August hearing for the opponents to submit their prepared testimony and to schedule such other dates as the Hearing Officer determines is appropriate. This would clarify the flow of the proceeding and allow the Respondents some time after completing the presentation and examination of the Agency's and supporters' cases to present their responses in a coherent and clear manner. Otherwise, because of the very high probability the Agency's and supporters' cases will continue into the August hearing dates, Respondents will be forced to evaluate portions of those presentations and responses to questions "on the fly," resulting in a less concise, complete, and coherent reply and, ultimately, record in this case. Moreover,

requiring Respondents to address portions of the Agency's and supporters' cases "on the fly" unfairly disadvantages Respondents in the preparation of their case both because of the loss of time to evaluate and properly respond to the Agency's and supporters' cases and because of the likely splitting of the presentation of Respondents' and other opponents' cases if and when time runs out at the end of the August hearing.

12. Alternatively, Respondents request that the Board recognize the high probability of the scheduling impact of the amendment and direct the Hearing Officer to be prepared, at the end of the June 2006 hearing, to re-characterize the purpose and content of the scheduled August hearing to be the continuation of the Agency's and rule supporters' cases and to set a new date after the scheduled August hearing for a hearing dedicated to opponents' cases.

WHEREFORE, for the reasons set forth above, Participants Dynegy Midwest Generation, Inc., and Midwest Generation, LLC, do not object to the Agency's proposal to amend the rulemaking but do request that the Board recognize and acknowledge that the proposed amendment, if the Motion to Amend is granted, may be fundamentally change the technological feasibility and economic reasonableness of the proposed rule and that the Board redesignate the August hearing to be for the conclusion of the proponents' case and direct the Hearing Officer to set a date at least 30 days after the end of the August hearing for the opponents to submit their prepared testimony and such other dates as the Hearing Officer determines are appropriate.

Respectfully submitted,

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

by:

Kathleen C. Bassi

One of Their Attorneys

Dated: June 6, 2006

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
Joshua R. More
Glenna L. Gilbert
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500
Fax: 312-258-5600

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