

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

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 DYNEGY AND MIDWEST GENERATION'S MOTION TO STRIKE THE TESTIMONY OF DR. GERALD KEELER AND MOTION FOR EXPEDITED REVIEW, copies of which are herewith served upon you.

/s/ **Kathleen C. Bassi**

Kathleen C. Bassi

Dated: July 12, 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

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 |) | |

DYNEGY AND MIDWEST GENERATION'S
MOTION TO STRIKE THE TESTIMONY OF DR. GERALD KEELER AND
MOTION FOR EXPEDITED REVIEW

NOW COME Petitioners DYNEGY MIDWEST GENERATION, INC., and MIDWEST GENERATION, LLC, by and through their attorneys, SCHIFF HARDIN LLP, pursuant to 35 Ill.Adm.Code § 101.500(a), and move the Board to strike and to not consider the written and oral testimony of Dr. Gerald Keeler, the Illinois Environmental Protection Agency's ("Agency") witness testifying on matters involving deposition of mercury emissions in the above-captioned matter. Further, Petitioners move the Board for expedited review of this Motion to Strike because of the date by which Petitioners' testimony must be filed. In support of the Motion to Strike, Petitioners state as follows:

1. In support of its proposal to require a 90% reduction of mercury emissions from coal-fired power plants in the State of Illinois, the Agency has argued that mercury emitted in Illinois by the affected sources is deposited in Illinois and that, therefore, such a level of reductions of those emissions would result in a corresponding reduction in mercury deposited in Illinois and ultimately in mercury levels found in tissue of Illinois fish. In support of its proposition that mercury emitted by power plants in Illinois is deposited in Illinois, the Agency has relied upon the written and oral testimony of Dr. Gerald Keeler. Dr. Keeler's testimony

relied heavily upon a study of wet deposition that he performed at a site near Steubenville, Ohio. Although Dr. Keeler has made numerous presentations of the results of the Steubenville study, sponsors of the final report had not yet released it for publication as of the dates of Dr. Keeler's testimony before the Board. Petitioners, other participants, and the Board requested the final study in order to understand the full scope of Dr. Keeler's work at Steubenville and its implications, if any, for the Agency's proposed mercury rule. In addition, Dr. Keeler referred to lengthy written comments on the Steubenville study by the U.S. Environmental Protection Agency ("USEPA"), which petitioners also requested at the hearing in Springfield. The comments could be significant to understanding the meaning and import of the study, and Dr. Keeler was requested to provide them, as well.

2. The Agency informed the Board in a document called "Post-Hearing Comments of the Illinois Environmental Protection Agency" ("Post-Hearing Comments"), electronically filed on July 7, 2006, of the following with respect to the final Steubenville study report:

As confirmed through discussions with United States Environmental Protection Agency (USEPA) and Dr. Gerald Keeler, the publication release date for the study will not be until sometime in late July or early August at the earliest. The pre-publication release of the study will not be approved by USEPA or Dr. Keeler's employer, the University of Michigan. Such pre-publication release is contrary to the code of scientific peer-review.

Post-Hearing Comments, p. 2. (Emphasis added.) The Agency failed to explain when and whether USEPA's comments on the study would be made available.

3. Without the actual peer-reviewed Steubenville study report and related USEPA comments, Petitioners are not able to fully examine the scope of the study and to cross-examine the Agency's witness on this study. The Agency has presented no other deposition evidence; therefore, this study serves as the basis for a very basic pillar in the Agency's proposal – that

mercury emitted by Illinois power plants is deposited in Illinois and so there will be a reduction in deposition in Illinois corresponding to reductions in emissions by Illinois power plants.

Petitioners require the study and related USEPA comments in order to address and understand the study and to rebut it, as appropriate.

4. Petitioners' testimony is due July 28, 2006, at the latest. The Agency has stated that the Steubenville study will not be available even before Petitioners' testimony is due, let alone far enough in advance for Petitioners to adequately evaluate the report, cross-examine Dr. Keeler on the study, including the applicability of the study's findings to Illinois, and to prepare a proper rebuttal of the study. The Agency cannot even state that the study will be available by the time of the start of the second hearing in this matter. Nor has the Agency indicated that USEPA's comments will be available prior to the second hearing.

5. The lack of availability of the study and USEPA's related comments seriously impinges upon the adequacy and fairness of this proceeding. The Agency is requesting the Board to rely upon a key study that the Agency has failed to provide to the Board and the Petitioners. Indeed, it appears that not even the Agency has a copy of the study, and thus the Agency is really asking the Board, the Petitioners, and the public to rely on one witness's description of a study that cannot be adequately addressed, even though it is critical to the Agency's claims of benefit from the proposed rule. Because the study is not available and because, as a result, both proponents and opponents of the proposed rule do not have the opportunity to evaluate it and cross-examine its author and the Agency regarding its meaning and applicability to Illinois' circumstances, opponents and the public are unfairly prejudiced in this matter and will be irreparably harmed. The Agency should not have presented the testimony of Dr. Keeler in support of its theory of local deposition without providing the scientific basis of

that testimony, which is contained only in the report of the Steubenville study. Nevertheless, the Agency having presented such testimony and being unable or unwilling to provide its scientific underpinnings, the Board should strike Dr. Keeler's testimony and not consider what he has said as it evaluates the Agency's proposal.

6. Alternatively, the Board should reschedule the second hearing and the deadline for Petitioners' prefiled testimony until 30 days after the Agency does provide the report of the Steubenville study and all comments received and considered during the peer review of that report. The Board should require that Dr. Keeler appear at any reconvened second hearing to be cross-examined on the content of the report of the Steubenville study and the comments received during the peer review process.

7. Finally, Petitioners request that the Board rule on this Motion to Strike expeditiously, prior to the date by which Petitioners' testimony must be filed. The Board's decision regarding this Motion to Strike could seriously affect Petitioners' testimony.

WHEREFORE, for the reasons set forth above and because to allow Dr. Keeler's testimony to remain in the record would be grossly unfair and would irreparably harm Petitioners, Petitioners DYNEGY MIDWEST GENERATION, INC., and MIDWEST GENERATION, LLC, move the Board to strike the written and oral testimony of Dr. Gerald Keeler from the record in this matter at its next Board meeting and to not consider any of his testimony in its evaluation of this proposed rule. In the alternative, Petitioners DYNEGY MIDWEST GENERATION, INC., and MIDWEST GENERATION, LLC, move the Board to reschedule the deadline for prefiled testimony and the second hearing 30 days after the Agency

delivers the report of the Steubenville study and the peer review comments to the Board and all parties in this proceeding. Additionally, Petitioners move the Board for expedited review.

Respectfully submitted,

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

by:



One of Their Attorneys

Dated: July 12, 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

CH2\1469428.4

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 12th day of July, 2006, I have served electronically the attached DYNEGY AND MIDWEST GENERATION'S MOTION TO STRIKE THE TESTIMONY OF DR. GERALD KEELER AND MOTION FOR EXPEDITED REVIEW, 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 persons listed on the **ATTACHED SERVICE LIST**.

/s/ **Kathleen C. Bassi**

Kathleen C. Bassi

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
(R06-25)

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

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

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

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

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

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

SERVICE LIST
(R06-25)

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

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

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

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

Dianna Tickner
Prairie State Generating Company, LLC
701 Market Street, Suite 781
St. Louis, Missouri 63101