BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R06-25
PROPOSED NEW 35 ILL. ADM. CODE 225	)	(Rulemaking – Air)
CONTROL OF EMISSIONS FROM	)	
LARGE COMBUSTION SOURCES (MERCURY)	)	

NOTICE

TO: Dorothy Gunn
Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Suite 11-500
Chicago, IL 60601-3218

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the RESPONSE TO DYNEGY AND MIDWEST GENERATION'S MOTION TO STRIKE THE TESTIMONY OF DR. GERALD KEELER AND MOTION FOR EXPEDITED REVIEW, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: ______________________

John J. Kim
Managing Attorney
Air Regulatory Unit
Division of Legal Counsel

DATED: July 19, 2006

1021 North Grand Avenue East
P. O. Box 19276
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by one of its attorneys, and, pursuant to the Illinois Pollution Control Board ("Board") Rules at 35 Ill. Adm. Code 101.500 and 101.504, hereby responds to Dynegy and Midwest Generation's Motion to Strike the Testimony of Dr. Gerald Keeler and Motion for Expedited Review. The Illinois EPA requests that the Board enter an order denying the Motion to Strike the Testimony of Dr. Gerald Keeler ("Motion to Strike"). The Illinois EPA has no objection to the Motion for Expedited Review, if the Board has sufficient time to review all of the arguments in the Motion to Strike. In support of this request, the Illinois EPA states as follows:

Petitioners' Dynegy Midwest Generation, Inc., and Midwest Generation, LLC ("Petitioners"), first argument is that they are not able to fully examine the scope of Dr. Gerald Keeler's study with data collected at Steubenville, Ohio ("Steubenville study"), and to cross-examine him on the Steubenville study. Petitioners state that they require the Steubenville study and related United States Environmental Protection Agency ("USEPA") comments in order to address and understand such study and to rebut it, as appropriate.

Contrary to the assertions of the Petitioners, there was ample opportunity afforded to the Petitioners and other participants at the hearing held on this proposed rulemaking that began on June 12, 2006, to examine and probe Dr. Keeler's involvement and work related to the Steubenville study. The testimony provided at hearing, along with the pre-filed testimony of Dr. Keeler, were more than sufficient to allow for a complete development of Dr. Keeler's experience and opinions.

Dr. Keeler has recently informed the Illinois EPA that the study is currently in press and he believes that the published study would be available prior to the start of the second hearing. As to the related USEPA comments, Dr. Keeler notified the Illinois EPA that counsel for the USEPA are reviewing the release of such comments. However, the short-term unavailability of the document notwithstanding, the results of the Steubenville study are known and Dr. Keeler has made numerous presentations on those results. In fact, the Petitioners, along with other parties, prefiled questions for Dr. Keeler resulting at hearing in nearly two days of testimony and over 300 pages of transcript. In addition, at the first hearing, the Illinois EPA submitted the Power Point Slide Presentation entitled "Mercury Deposition in the Great Lakes Region" by Dr. Keeler. *See*, Exhibit 32.

Further, even though the study is not available for filing with the Board, Dr. Keeler's testimony (either in part or in its entirety) should not be stricken as a result. An expert may give opinion testimony based upon information that has not been admitted into evidence, as long as the facts relied upon are sufficiently reliable. *R.J. Management Co. v. SRLB Development Corp.*, 346 Ill.App.3d 957, 969 (2nd Dist. 2004); 806 N.E.2d 1074, 1084.

Also, in a manner not inconsistent with Dr. Keeler's discussion of the Steubenville study, the study was discussed by the USEPA in its June 9, 2006 "Revision

of December 200 Clean Air Act Section 112(n) Finding Regarding Electric Utility Steam Generating Units; and Standards of Performance for New and Existing Electric Utility Steam Generating Units: Reconsideration." *See*, 71 Fed. Reg. 33388. Dr. Keeler participated in the current rulemaking, including providing both pre-filed and hearing testimony that the Petitioners were able to base questions upon. Finally, Dr. Keeler is an internationally renowned authority on mercury deposition and has published dozens of peer-reviewed papers and studies. His knowledge of the subject matter in question and his opinions related thereto are credible and should be accepted (as was done by the Board and the Hearing Officer at hearing) for consideration of the proposed rulemaking.

The Petitioners' second argument is that the lack of availability of the Steubenville study and USEPA's related comments seriously impinges upon the adequacy and fairness of this proceeding. The Petitioners claim that the Illinois EPA is requesting the Board to rely upon a key study that the Illinois EPA has failed to provide to the Board and the Petitioners. The Petitioners further claim that opponents and the public are unfairly prejudiced in this matter and will be irreparably harmed.

This argument also is without merit. The Illinois EPA presented its case at the first hearing and a complete record of the proceedings was made. No statement was made by the Hearing Officer that the record was lacking. Also, both at the conclusion of Dr. Keeler's testimony and the hearing itself, the Illinois EPA made clear that it could not guarantee that the Steubenville study would be able to be provided to the Board and Petitioners. The only commitment made, which has been followed through on, was that a good faith effort would be made to obtain the document for filing. Indeed, the Illinois EPA's interest in filing the document is clear, as it is supportive and consistent with the Illinois EPA's position as well as the testimony of Dr. Keeler.

However, as explained to the Board at hearing, the Steubenville study is not under the Illinois EPA's control. Considering the Petitioners', and other parties', extensive questioning of Dr. Keeler and the fore-mentioned lack of control over the Steubenville study, it is unreasonable for the Board to strike Dr. Keeler's testimony solely on the basis that the study has not been produced. Nor is there any reason to require Dr. Keeler to attend the second hearing for further questioning given the fact that he was available for questioning at the first hearing. Lastly, it would be most injurious, and totally out of proportion to any potential harm, to reschedule the second hearing until after the Steubenville study is published. As noted by the Hearing Officer, to allow the unknown future publication date of the Steubenville study to dictate the pace and outcome of this pending matter would not only disrupt the Board's handling of the rulemaking, but would also create a situation of uncertainty as to the timing of the Board's final decision.

The Petitioners' third argument is that the Illinois EPA 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 the Petitioners claim is contained only in the report of the Steubenville study. The Petitioners also state that the Board should strike Dr. Keeler's testimony, reasoning that the Illinois EPA presented such testimony and was unable or unwilling to provide its scientific underpinnings. This untimely argument was not raised prior to the first hearing when Dr. Keeler's testimony was pre-filed, nor was it raised during the first hearing itself. This belated attempt to assert an objection which should have been raised at the hearing should not be allowed. And, even if the Board does entertain the Motion to Strike, the relief requested should be denied.

Dr. Keeler's hearing testimony stands on its own, and was well-supported with exhibits and the substance of his pre-filed testimony. An expert may rely on his own

experience and "first-hand observation." *Hilgenberg v. Kazan*, 305 Ill.App.3d 197, 209 (1st Dist. 1999); 711 N.E.2d 1160, 1169. In addition, no rule prevents witnesses from making estimates based on their observations. *Id*. Dr. Keeler's testimony was based not on one single study, but rather the sum total of his experience in this field. The Illinois EPA presented Dr. Keeler and his opinions in support of the proposed rulemaking, not the Steubenville study alone.

Furthermore, it must be emphasized that the Petitioners are incorrect in their claim that the Illinois EPA was unwilling to provide the scientific underpinnings of the Steubenville study. It is not that the Illinois EPA is unwilling; to the contrary, the Illinois EPA, if able, would immediately provide the published study if it could do so.

The Petitioners also state, in the alternative, that the Board should reschedule the second hearing and the deadline for Petitioners' pre-filed testimony until 30 days after the Illinois EPA does provide the report of the Steubenville study and all comments received and considered during the peer review of that report. The Petitioners also state that 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. It is unnecessary to compel Dr. Keeler to appear for further questions at the second hearing, as the participants were given their respective chances to conduct cross-examination of him at the first hearing.

Under the federal Clean Air Mercury Rule ("CAMR"), states are required to submit plans to the USEPA to address the requirements of the CAMR by no later than November 17, 2006. *See*, 70 *Fed. Reg.* 28649; 40 CFR § 60.24(h)(2). Should the November 17 deadline be missed by even one day, the State will be forced to accept a federal rule wholly lacking in the protections needed by the State. Although the

Steubenville study should be published prior to the second hearing, it is not in the Illinois EPA's power nor Dr. Keeler's authority to affect the schedule of publication. And, as stated *supra*, Dr. Keeler's testimony provided to date stands on its own such that no delay is warranted. Thus, delay in the August hearing, or the holding of a third hearing, would be most injurious to the State's interest and provide little likely benefit to the Petitioners. Accordingly, the Petitioners' Motion to Strike should be denied.

WHEREFORE, for the reasons set forth above, the Illinois EPA requests that the Board enter an order denying the Motion to Strike.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/___________________
John J. Kim
Managing Attorney
Air Regulatory Unit
Division of Legal Counsel

DATED: July 19, 2006

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STATE OF ILLINOIS)
) **SS**
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)

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state that I have served electronically the attached RESPONSE TO DYNEGY AND MIDWEST GENERATION'S MOTION TO STRIKE THE TESTIMONY OF DR. GERALD KEELER AND MOTION FOR EXPEDITED REVIEW upon the following person:

Dorothy Gunn
Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Suite 11-500
Chicago, IL 60601-3218

and mailing it by first-class mail from Springfield, Illinois, with sufficient postage affixed to the following persons:

SEE ATTACHED SERVICE LIST

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

____

John J. Kim
Managing Attorney
Air Regulatory Unit
Division of Legal Counsel

Dated: July 19, 2006

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