

ILLINOIS POLLUTION CONTROL BOARD  
July 20, 2006

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

ORDER OF THE BOARD (by G.T. Girard, A.S. Moore):

On July 12, 2006, Dynegy and Midwest Generation (Dynegy) filed a motion to strike the testimony of Dr. Gerald Keeler, presented at the first hearing in this proceeding, and a motion for expedited review (Mot.). On July 19, 2006, the Illinois Environmental Protection Agency (Agency) filed a response to the motion (Resp.). For the reasons discussed below, the Board grants the request for expedited review but denies the motion to strike.

**MOTION**

Dynegy asserts that Dr. Keeler's testimony discussing the deposition of mercury relied heavily on a study performed near Steubenville, Ohio (Steubenville Study). Mot. at 1-2. Dynegy notes that the Agency indicated that the report on the Steubenville Study cannot be released until the publication release date in late July or early August. Mot. at 2. Dynegy argues that without the Steubenville Study and related comments, Dynegy will be unable to fully examine the scope of the study and to cross-examine Dr. Keeler on the study. *Id.* Dynegy maintains that the Agency presented no other deposition evidence and thus the Steubenville Study is the basis for a very basic pillar of the Agency's proposal. *Id.*

Dynegy asserts that the lack of availability of the study "impinges upon the adequacy and fairness" of the proceeding. Mot. at 3. Dynegy argues that neither proponents nor opponents of the Agency's proposal have the opportunity to evaluate the Steubenville Study or cross-examine Dr. Keeler regarding the meaning and applicability of the Steubenville Study. *Id.* Dynegy asserts that opponents and the public are unfairly prejudiced in this matter and will be irreparably harmed. *Id.*

Alternatively, Dynegy asks that the Board consider rescheduling the second hearing and the prefiling deadline until 30 days after the date that the Steubenville Study becomes available. Mot. at 4. Dynegy argues that the Board should require Dr. Keeler to appear at that second hearing to be cross-examined on the content of the Steubenville Study. *Id.*

Dynegy points out that prefiled testimony for the next hearing must be filed by July 28, 2006, at the latest and asks that the Board rule expeditiously prior to the date by which Dynegy's testimony is due. Mot. at 4.

**RESPONSE**

The Agency has no objection to the Board granting the request for expedited decision; however, the Agency opposes the motion to strike. Resp. at 1. The Agency presents several arguments in opposition to striking the testimony. First, the Agency argues that ample opportunity was afforded Dynegy and other participants at the first hearing to cross-examine Dr. Keeler. Resp. at 2. Further, the Agency insists that the results of the Steubenville Study “are known” and Dr. Keeler has made several presentations on those results. *Id.* The Agency maintains that Dr. Keeler is an “internationally renowned authority” on mercury deposition with numerous peer-reviewed papers and studies that have been published. Resp. at 3.

The Agency takes issue with Dynegy’s claim that the lack of availability of the Steubenville Study impinges upon the adequacy and fairness of the hearings. Resp. at 3. The Agency asserts that argument is without merit as the Agency presented “its case at the first hearing and a complete record of the proceedings were made.” *Id.* The Agency further maintains that Dr. Keeler’s testimony stands on its own and was well-supported with exhibits and the substance of the testimony. Resp. at 4. The Agency argues that Dr. Keeler’s testimony was based not on one single study but the sum total of his experience in the field. Resp. at 5.

Finally the Agency opposes the rescheduling of the second hearing and argues that Dr. Keeler need not be compelled to appear for further questioning. Resp. at 5. The Agency asserts that participants were given their opportunity to cross-examine Dr. Keeler at the first hearing. *Id.*

### **DISCUSSION**

The Board finds that undue delay may result if the Board allows the standard 14-day response time to run before ruling on the motion to strike. *See* 35 Ill. Adm. Code 101.500(d). Therefore, the Board will grant the motion for expedited review.

Regarding the motion to strike Dr. Keeler’s testimony, the Board notes that the rules of evidence in rulemakings differ from those in a contested case. In a rulemaking “[a]ll information that is relevant and not repetitious or privileged will be admitted by the hearing officer.” 35 Ill. Adm. Code 102.426. Thus, Dr. Keeler’s testimony is admissible. Further, Dr. Keeler’s testimony also included testimony regarding other studies of the deposition of mercury performed in Detroit, Michigan, South Florida, and Vermont (*see e.g.*, June 16 transcript at 9, 121-22 and Exh.10 at 3).

The Board does not agree with Dynegy’s assertion that the opponents are unfairly prejudiced and irreparably harmed because of an inability to review the Steubenville Study and cross-exam Dr. Keeler on the conclusions of the Steubenville Study. Dr. Keeler’s initial testimony was filed several months ago and in addition to several prefiled questions for Dr. Keeler, numerous questions were asked of Dr. Keeler over a two-day period (June 15 and 16) at the first hearing concerning the preliminary findings and results of the Steubenville Study. During the questioning of Dr. Keeler, the Agency introduced an exhibit that includes a brief overview of the Steubenville Study along with some preliminary results (Exh. 32). In addition, the opponents also introduced information on the Steubenville Study findings (*see* Exh. 29 and 30). Thus, the record includes pertinent information regarding the Steubenville Study that the opponents may use to challenge Dr. Keeler’s testimony.

Opponents and the public may present testimony and comments that both challenge and support Dr. Keeler's positions regarding the Steubenville Study and deposition generally. At the conclusion of this proceeding, the Board will evaluate all the evidence presented. As a technically qualified Board (*see* 415 ILCS 5/5(a) (2004)), the Board can assign proper weight to the different types of testimony and comments entered into the record. The Board does give substantial weight to published, peer-reviewed studies.

Regarding submission of the finalized Steubenville Study report, the Board recognizes that the report will not be available until the completion of the peer review process. However, the Board expects the Agency to submit a copy into the record as soon as the report is released either by the United States Environmental Protection Agency or the University of Michigan. Further, the Board notes that Dr. Keeler stated at the first hearing that the Steubenville Study results would be published in a scientific journal for which the deadline for submission of the final version of the paper is July 1. Dr. Keeler indicated that he would be happy to share the scientific journal paper with the rulemaking participants around July 1 timeframe (*See* June 16 Tr. at 30-31). In this regard, the Board directs the Agency to submit a copy of Dr. Keeler's scientific journal paper concerning the Steubenville Study as soon as possible.

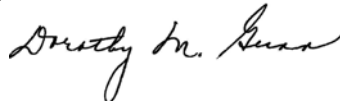
Based on all of these considerations, the Board finds that there will be no irreparable harm suffered nor will the participants be prejudiced. Also, the Board finds that any shortcomings in the adequacy of the evidence will be evaluated by the Board and factored into any final decision. Therefore, the Board will deny the motion to strike Dr. Keeler's testimony.

### **CONCLUSION**

The Board grants the request for expedited consideration but denies the motion to strike the testimony of Dr. Gerald Keeler. The Board further directs the Agency to provide a copy of the scientific journal paper concerning the Steubenville Study as soon as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 20, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board