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 the **APPEARANCE OF DANIEL McDEVITT** and **MOTION TO SCHEDULE ADDITIONAL HEARINGS**.

Daniel McDevitt

Dated: August 24, 2006

Daniel McDevitt
General Counsel
MIDWEST GENERATION, LLC
440 South LaSalle Street, Suite 3500
Chicago, Illinois 60605

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PROPOSED NEW 35 ILL.ADM.CODE PART 225	)	**PCB R06-25**
CONTROL OF EMISSIONS FROM	)	
LARGE COMBUSTION SOURCES	)	

APPEARANCE

I hereby file my appearance in this proceeding on behalf of Midwest Generation, LLC.

Daniel McDevitt
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Dated: August 24, 2006

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MOTION TO SCHEDULE ADDITIONAL HEARINGS

NOW COMES MIDWEST GENERATION, LLC, ("MWG"), by and through its attorney, Daniel McDevitt, and moves the Illinois Pollution Control Board ("Board") to schedule additional hearings to address amendments to proposed 35 Ill. Adm. Code 225, titled Multi-Pollutant Alternative, 35 Ill. Adm. Code § 225.233, proposed by Ameren Energy Generating Company, AmerenEnergy Resources Generating Company, and Electric Energy, Inc. (collectively "Ameren") and the Illinois Environmental Protection Agency ("IEPA") on July 28, 2006 and by Dynegy Midwest Generation, Inc. ("Dynegy") and IEPA on August 21, 2006.[1]

I. INTRODUCTION

On March 14, 2006, IEPA submitted to the Board proposed regulations seeking reduction in mercury emissions from electric generating units ("EGUs"). On May 23, 2006, IEPA filed a revised version to those regulations which provided, inter alia, a Temporary Technical Based Standard ("TTBS") (the original proposal and the TTBS collectively referred to as the "Proposal"). The Board held evidentiary hearings on the Proposal on June 12, 2006 through June 23, 2006.

[1] Such hearings should also include the latest revision proposed by IEPA and Dynegy and the Dominion proposal submitted at the hearing on August 23, 2006. Time did not permit addressing these further in this Motion.

As a result of those hearings and subsequent negotiations, in its Joint Statement filed July 28, 2006, Ameren asked the Board to consider and include with IEPA's Proposal an amendment to proposed 35 Ill. Adm. Code 225, titled Multi-Pollutant Standards, 35 Ill. Adm. Code § 225.233 (hereafter the proposed amendment filed jointly by Ameren and IEPA and proposed changes thereto submitted by Dynegy and IEPA are collectively referred to as the "MPS"). The MPS requires covered EGUs, among other things, to meet an emission rate of 0.11 lbs/mmBtu for NO_x by 2012, and 0.25 lbs/mmBtu for SO_2 by 2015. It also imposes different, more lenient mercury requirements than the Proposal.

MWG does not know what effect the MPS might have on its operations, the proposed regulations to implement the Clean Air Interstate Rule ("CAIR") in Illinois, and the Proposal. As a result, the MPS raises fundamental issues and questions for the Board and parties to this proceeding that have not been addressed in this rulemaking proceeding given the dates when the MPS was submitted to the Board. Therefore, MWG moves for additional hearings in order to address these issues and questions.

II. THE MPS CREATES FUNDAMENTAL ISSUES AND QUESTIONS THAT REQUIRE ADDITIONAL HEARINGS.

The MPS creates issues and questions that need further examination. First, without additional hearings, MWG and others ("participants") have no opportunity to present evidence regarding the MPS. Throughout the hearings held on June 12, 2006 through June 23, 2006, and August 14, 2006 through August 23, 2006, participants presented evidence regarding the Proposal to control mercury emissions from EGUs. The hearing schedule afforded participants the opportunity to investigate the effects of the Proposal and to prepare evidence for hearing. However, the current hearing schedule offers no time for participants to investigate the effects of the MPS and to prepare evidence or arguments concerning its effects. Because, at this time,

participants are not aware of what issues the MPS creates, on its own and its impact on issues involving the original Proposal, the Board should schedule additional hearings so that all interested persons can investigate the MPS further, delineate its independent effects as well as its effects on the Proposal and elsewhere, and prepare evidence and/or argument if necessary.

Along these same lines, currently, participants have not had adequate time to investigate and suggest alternatives to the MPS or, as a result thereof, to the Proposal. Additional hearings would allow participants to do so.

Without adequate time to analyze the MPS, participants cannot know whether or not the proposed amendment is technologically feasible, economically reasonable, how it impacts the Proposal, and its availability generally. Further, MWG, and possibly others, do not know what impact the MPS may have on its operations now and in the future. Furthermore, additional hearings will allow the Board to probe the impact of the MPS on other pending rule-makings (e.g., Illinois CAIR) or possible, necessary future rule-makings. With additional hearings, participants could investigate these issues and present their position regarding the MPS.

MWG also needs additional time for its experts to analyze the impacts of the MPS. Without expert analysis, MWG, and the Board, cannot adequately assess the following potential impacts of the MPS: 1) impacts of opting in or out of the MPS in terms of both the impact on companies that opt in and the impact of opt-ins on the broader proposal, including achieving required state caps under CAMR; 2) impacts on future SO_2 and NO_x regulations; and 3) impacts created by exchanging allegedly harmful, neurotoxic mercury emissions for particulate and ozone precursors. Without expert analysis, MWG and the Board are unable to determine why the MPS technology standards cannot be applied generally to reduce emissions from all EGUs. If the mercury controls in the MPS are sufficient for half the coal-fired power plants in Illinois

(Ameren and Dynegy), why are they not sufficient for all the plants in the state, irrespective of SO_2 and NO_x? Additional hearings would afford MWG, other participants and the Board an opportunity to investigate these questions.

Further, the MPS may not be a rule of general applicability or, alternatively, the Proposal may not be. Although opting in to the MPS is voluntary, Ameren and Dynegy may be the only companies that can technologically employ it. In other words, the MPS may not be a generally applicable standard. Alternatively, the reasons justifying the more relaxed mercury standard in the MPS for half the plants in the state may demonstrate that the Proposal is infeasible or uneconomic.

III. THE PROPOSED AMENDMENT RAISES STATE LAW ISSUES AND QUESTIONS.

The MPS also raises questions and issues under state law that need further examination. Under Illinois law, the Board must consider, when promulgating a rule, the "technological feasibility and economic reasonableness" of measuring or reducing the particular type of pollution proposed to be regulated. 415 ILCS 5/27. Docket R06-25 contains no evidence related to SO_2 or NO_x. As a result, the technological feasibility and economic reasonableness of regulating SO_2 or NO_x under the MPS remain unclear. Thus, MWG requests additional hearings so that the Board, MWG and other participants can consider these issues.

The proposed amendment may also violate section 10 of the Illinois Environmental Protection Act (the "Act"). Section 10 prohibits the Board from adopting SO_2 regulations and emission standards for existing fuel combustion stationary emission sources located outside the Chicago, St. Louis and Peoria Metropolitan areas unless those regulations are necessary to attain and maintain the Primary National Ambient Air Quality Standards ("NAAQS") for sulfur dioxide. 415 ILCS 5/10. There is no evidence in the record that the SO_2 portion of the MPS is

necessary for attaining and maintaining the SO_2 NAAQS. The MPS purports to be available to all EGUs in the state and many of the Ameren and Dynegy plants are outside the three metropolitan areas. Although participation in the MPS is voluntary, once a company volunteers, it is compelled to comply with the SO_2 requirements and it is at least an open question whether the Board can adopt such a requirement even if it only becomes applicable as a result of volunteering for the more lenient mercury requirements. The allegedly voluntary nature of the MPS may not relieve the Board from the proscription of Section 10. Again, this may comprise both legal and evidentiary issues that should be put before the Board through another hearing.

Further, the MPS may not be a rule of general applicability, but rather it may be an emission standard for Ameren and Dynegy only. If that is the case, then the wrong process under Illinois law is being followed. In *Commonwealth Edison Co. v. Pollution Control Board*, 25 Ill. App. 3d 271 (1st Dist. 1974), although arising in a somewhat different context, the Court stated:

> substantive rules of this nature are promulgated for general, not special application . . . . Where one [fails to challenge the rules generally and] seeks to relax their enforcement against him exclusively [due to arbitrary and unreasonable hardship], the legislature has determined that the appropriate remedy is for the aggrieved party to seek a variance in accordance with Title 9 of the Act.

Id. at 281. Since that decision, the General Assembly has added a second pathway for sources needing special consideration, the adjusted standard. 415 ILCS 5/28.1. Thus, if Ameren and Dynegy have company-specific coordination, financing and technology problems with the Proposal, as Ameren has already testified, and the MPS is effectively made available only to them to address these problems, then Illinois law may require Ameren and Dynegy to apply for a variance or adjusted standard, rather than adding a special provision purporting to be of general applicability.

On the other hand, if most or all EGUs have the same coordination, financing and technology problems with the Proposal, and there is significant evidence already in the record suggesting that is true, then the Proposal should be changed rather than trying just to "carve-out" half of the sources in the state. When so many sources appear willing to exchange SO_2 and NO_x emissions reductions for more lenient mercury timing and reduction/emission requirements, and IEPA is willing to accept more lenient mercury timing and reductions/emission requirements, that approach undermines any claimed validity to the appropriateness of the original Proposal. Hence, if the Proposal itself is unworkable and unmanageable for so many sources, then the Proposal itself may fail the statutory tests of economic reasonableness and technological feasibility. Additional hearings would allow the Board and participants to address these issues and, possibly, develop generally applicable solutions.

Moreover, the MPS may raise compliance problems for meeting both the mercury regulations and the proposed regulations of the Clean Air Interstate Rule. Currently, MWG and possibly others, do not know whether they can simultaneously comply with both regulations. By scheduling additional hearings, this issue could be addressed.

IV. THE PROPOSED AMENDMENT RAISES FEDERAL LAW ISSUES AND QUESTIONS.

The MPS also raises issues and questions under federal law that need further examination. The Supremacy Clause of the Constitution "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Clean Air Markets Group v. Pataki*, 194 F. Supp. 2d 147, 157 (N.D.N.Y. 2002), *affirmed* 338 F.3d 82 (2d Cir. 2003). As such, federal law preempts state law to the extent state law actually conflicts with the federal law. *Id.* In *Clean Air Markets*, New York passed a law that placed a trading restriction on SO_2 allowances. *Id.* at 154. The court found that "New York's restrictions on transferring allowances to units in the Upwind States is

contrary to the federal provision that allowances be tradeable to *any* other person." *Id.* at 158. As a result, the court held that New York's law was preempted by the Clean Air Act ("CAA") because it interfered with the CAA's "method for achieving the goal of air pollution control: a cap and nationwide SO_2 allowance trading system." *Id.*

Like New York's law in *Clean Air Markets*, the MPS mandates that a party opting into the MPS must surrender SO_2 allowances. As a result, the MPS effectively prohibits trading of SO_2 allowances and, as IEPA has indicated, it intends to retire the surrendered allowances thus reduces the size of the market as expressly determined by Congress in Title IV of the CAA. Under the Supremacy Clause and *Clean Air Markets*, state laws cannot impede on the CAA's cap and nationwide SO_2 allowance trading system. As such, the CAA may preempt the MPS, thus potentially invalidating, under federal law, its limitations on trading of SO_2 allowances. Additional hearings would allow a more thorough examination of these issues and unanswered questions.

The proposed amendment also may potentially violate the Commerce Clause of the Constitution. In *Clean Air Markets*, New York attempted to halt altogether "transfers of SO_2 allowances from New York units to units in Upwind States[,] . . . in spite of a federal system designed for free nationwide transferability of SO_2 allowances." *Id.* at 162. Thus, New York's law imposed a burden on interstate commerce. *Id.* And since New York failed to justify its law in terms of "local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake", the court invalidated New York's law under the Commerce Clause. *Id.* Like *Clean Air Markets*, the MPS may prohibit sources in Illinois from transferring SO_2 allowances in spite of the free-market federal system. Further, as noted above, by taking allowances off the market the MPS would change the scope of that

market, a scope that has been specifically defined by Congress. Even if there are local benefits from the MPS, there may be less discriminatory (as to interstate commerce) alternatives, and this raises yet another question that could be addressed through additional hearings.

Moreover, under the Clean Air Mercury Rule ("CAMR"), each state must demonstrate that it will meet the mercury cap. How Illinois will demonstrate compliance with CAMR if the Board adopts the MPS is unclear. Evidence in the record shows that if Ameren alone opts-in to the proposed amendment, a 500 pound increase in mercury emissions will occur. *See* Testimony of Anne Smith, Ph.D., Figure 3. If other sources opt-in, that raises the question of whether Illinois will be able to demonstrate compliance with the mercury cap. Thus, this issue, and inconsistencies in the Agency's testimony regarding this issue, need to be addressed through additional hearings with the Board.

V. *CONCLUSION*

WHEREFORE, for the reasons set forth above, MIDWEST GENERATION, LLC reasserts its Motion to Schedule Additional Hearings and requests that: the Board schedule additional hearings to address an amendment to proposed 35 Ill. Adm. Code 225, titled Multi-Pollutant Alternative, 35 Ill. Adm. Code § 225.233, proposed by Ameren Energy Generating Company, AmerenEnergy Resources Generating Company, and Electric Energy, Inc. and the Illinois Environmental Protection Agency on July 28, 2006 and as proposed to be revised by Dynegy Midwest Generation, Inc. and IEPA on August 21, 2006.

Dated: August 24, 2006

Respectfully submitted,

MIDWEST GENERATION, LLC

by: _____

One of Their Attorneys

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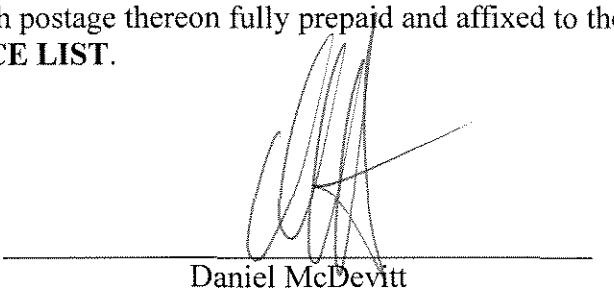
CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 24th day of August, 2006, I have served electronically the attached **APPEARANCE OF DANIEL McDEVITT** and **MOTION TO SCHEDULE ADDITIONAL HEARINGS** 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**.



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