BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Those Individuals as Listed on attached Certificate of Service

Please take notice that on August 31, 2006, the undersigned caused to be filed with the Clerk of the Illinois Pollution Control Board the attached Ameren's Response to Midwest Generation's Motion for Additional Hearings, a copy of which is herewith served upon you.

Dated this 31st day of August, 2006.

Respectfully submitted,

AMEREN ENERGY GENERATING COMPANY
AMERENENERGY RESOURCES GENERATING COMPANY
ELECTRIC ENERGY, INC.

By: _____
One of Its Attorneys

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	)	

AMEREN'S RESPONSE TO MIDWEST GENERATION'S MOTION FOR ADDITIONAL HEARINGS

Ameren Energy Generating Company, AmerenEnergy Resource Generating Company, and Electric Energy, Inc. (collectively "Ameren") submit this response to Midwest Generation, LLC's ("MWG") Motion to Schedule Additional Hearings and respectfully request the Board to deny MWG's Motion. MWG failed to meet the Board requirements necessary to request additional hearings and did not demonstrate that such additional hearings are necessary.

MWG claims that it needs additional hearings to review and respond to the Multi-Pollutant Strategy ("MPS"), jointly offered as an amendment to the IEPA's original proposal by the IEPA, Ameren, and Dynegy. MWG argues that the Board must grant an additional hearing to examine "issues and questions" (Motion, p. 2) arising from the MPS which were not explored despite eight days of hearings, three of which were focused almost solely on the MPS. MWG states that it needs additional time to study these issues and speak to its experts although it is a sophisticated company which has been involved in these proceedings from the start and, according to the IEPA, has been seeking to negotiate its own approach to the mercury regulations. MWG moves for an additional hearing to address the impact of the MPS on companies that have not opted in (most

prominently MWG) despite the fact that it chose not to present any evidence regarding the impact of the IEPA's rule on its own facilities and what steps it was taking to address mercury controls at its plants. In fact, MWG has had plenty of time to examine and address these issues and questions and, through its questions to IEPA and Ameren witnesses, appeared to comprehensively do so during the August hearings. As a result, nothing in MWG's motion justifies the additional expenditure in time and resources of having additional hearings.

In addition to its lack of practical justification, MWG fails to address the Board's Procedural Rules which contain clear standards for requesting additional hearings. Section 102.412(b) of the Procedural Rules, (35 Ill. Adm. Code 102.412) requires that:

> If the proponent or any participant wishes to request a hearing beyond the number of hearings specified by the hearing officer, that person must demonstrate, in a motion to the hearing officer, that failing to hold an additional hearing would result in material prejudice to the movant. The motion may be oral, if made at hearing, or written. The movant must show that he exercised due diligence in his participation in the proceeding and why an additional hearing, as opposed to the submission of written comments pursuant to Section 102.108 of this Part, is necessary.

MWG not only failed to reference these specific requirements, but also failed to address any of these conditions for obtaining its claimed relief. Nothing in MWG's motion demonstrates that MWG will suffer "material prejudice," that it exercised "due diligence" with respect to the issues raised in its motion, or that the issues it raises cannot be addressed in written comments. As a result the Board should deny MWG's motion for an additional hearing.

MATERIAL PREJUDICE

MWG does not and cannot demonstrate that it will suffer material prejudice without an additional hearing. MWG argues that ... "participants are not aware of what

issues the MPS creates, on its own and its impact on issues involving the original proposal..." (Motion, p. 3) but this statement is clearly disingenuous. In fact, MWG cannot claim any impact from the MPS because it is a voluntary program, which on its face imposes no additional obligations on companies which do not choose to be a part of it. As a result, MWG makes no actual claim that it will be prejudiced by the MPS, in any respect, only that an additional hearing is necessary to allow further time to analyze the MPS. This argument ignores the Board rules which specify that persons seeking additional hearings must claim some level of potential harm to their interests, not just that further information would be useful. Even assuming for the sake of this argument that MWG was somehow precluded from analyzing the MPS from the time it was filed on July 28 to the scheduled end of the August hearings on August 25 (as discussed below), MWG has had more than sufficient time to identify and present worst case scenarios that present some level of potential harm to MWG as a result of the MPS, if there were any. Having failed to do even this, MWG provides no basis to claim that it will suffer material prejudice. As a result, the Board must deny this motion.

DUE DILIGENCE

MWG also does not and cannot demonstrate that it exercised the level of due diligence necessary to support its claim for an additional hearing. While MWG's counsel presented a number of expert witnesses addressing different aspects of the IEPA's original proposal, it presented not one witness to testify as to the impact of that proposal specifically on MWG or what steps MWG planned to take regarding mercury control at its facilities. Sid Nelson introduced evidence that MWG was evaluating its ability to use HCl at its Crawford facility (Exhibit 43), but MWG chose not to share any of its plans or

evaluations regarding mercury. Certainly, MWG must have some plan for mercury control to comply with CAMR, if not the proposed IEPA rule, and some idea of the difference in control requirements between the two rules, but chose not to testify regarding these issues. While MWG claims that "MWG and possibly others, do not know what impact the MPS may have on its operations now and in the future," (Motion, p. 3) MWG presented no evidence as to what impact the IEPA rule or the MPS might have specifically on MWG and thus cannot claim that it exercised due diligence in identifying the potential impact of the MPS on MWG, if any.

Further, MWG does not and cannot specifically claim to have been unaware of the MPS such that it was unable to address these issues during the August hearings. As a major operator of large coal fired power plants, MWG must be assumed to be aware of the various federal and state discussions regarding control of mercury and the idea of a multi-pollutant strategy is not new to this Board proceeding. LADCO identified a multi pollutant strategy in its white paper on mercury control as was discussed in testimony by Mr. Ayers during the June hearings. A multi-pollutant strategy is the basis for the co-generation benefits expected to be achieved under the federal CAIR and CAMR regulations, is being currently reviewed by Congress, and is the basis for other state statutory and regulatory approaches. One of the witnesses presented by MWG, Ed Chicanowicz, spoke to the value of a multi-pollutant strategy in his testimony (Exhibit 84) during the August hearings and in response to questions.

Despite statements to the contrary during the hearings, MWG does not claim in its written motion to have been unaware of the MPS prior to the time it was filed with the Board. In fact, the inference that MWG was aware of the MPS is supported by testimony

and common sense. Jim Ross, testified numerous times that all of the companies, including MWG, had been negotiating with the IEPA regarding their proposal during the rulemakings. It strains credulity to believe that MWG was not aware of the MPS prior to its filing or that it was not negotiating for its own position with the IEPA. Despite this awareness, MWG did not see fit to present testimony regarding the potential impact of the MPS or address the issues that they describe in their motion.

Indeed, MWG, having made an almost identical oral motion for an additional hearing prior to the presentation of the MPS by Ameren witnesses, was able to ask extensive and informed questions of the IEPA and Ameren witnesses regarding the operation and impact of the MPS. Almost all of the factual issues which MWG identifies as needing more information were, in fact directly addressed by the IEPA or Ameren in response to MWG questions. Anne Smith specifically addressed the impact of opting in to the MPS for Ameren – at the time the only company opting in. Jim Ross specifically addressed the impacts on achieving state mercury caps under CAMR. The comparative impacts on mercury emissions of CAIR/CAMR and the Illinois proposal without the MPS were extensively addressed by the witness presented by MWG including Krish Vijayraghaven and Gail Charnley. Since the MPS requires controls on a shorter time frame than CAIR/CAMR, but on a longer time frame than the Illinois proposal, the issue of the environmental impact has been completely addressed.

Finally, the August hearings were adjourned on Wednesday morning, August 23. This left two and a half days in which MWG could have presented testimony regarding the MPS had it chosen to do so. But, again, MWG chose to present no testimony relating to the impact on MWG whatsoever. Having chosen not to include in the record any

information regarding the impact of the Illinois proposal on MWG, it cannot now complain that it had insufficient time to address the MPS.

WRITTEN COMMENTS

Finally, MWG has failed to show why the issues it raises cannot be addressed in written comments, currently due on September 20. As described above, many of the factual issues it raises were in fact addressed during the August hearings. To the extent that MWG believe that these issues were not sufficiently addressed, MWG can (and certainly will) identify these as reasons for the Board not to adopt the rule.

The legal issues MWG raises can plainly be addressed during the post-hearing comments. In general, legal issues are ill suited to being addressed during the hearing, since they do not require factual testimony for their resolution. Indeed MWG rejected an opportunity to have the post-hearing comments handled more as briefs, despite their statements here that yet another hearing needs to be held to address certain legal issues. Scheduling an additional hearing to address purely legal issues would be a substantial waste of public and private resources.

As will be discussed in the post-hearing comments, many of these legal issues would not withstand further scrutiny. MWG argues that the Board lacks authority to adopt rules directed at specific companies or operations in the context of a general rulemaking. Yet this argument is completely contradicted by the sweeping language of Section 27 of the Illinois Environmental Protection Act (415 ILCS 5/1, *et seq.*; "Act") which authorizes the Board to adopt regulations that "may make different provisions as required by circumstances for different contaminant sources and for different geographical areas... and may include regulations specific to individual persons or sites."

(415 ILCS 5/27(a)). It would be hard to imagine more direct statutory authority for the Board to adopt the MPS.

MWG's reliance on *Commonwealth Edison Co. v. Pollution Control Board*, 25 Ill. App. 3d 271 (1st Dist 1974) on this issue is similarly misplaced. That case involved a challenge to a rule of general applicability by a company (ironically a predecessor of MWG) which claimed that the Board's air rules were "arbitrary and capricious *as applied to it*." (25 Ill. App. 3d 271, 280, emphasis added.) The court rejected this "as applied" argument as a basis for challenging the rule pointing out that the Board could not be expected to adopt rules which fit every company and that the Act provided specific statutory relief for individual companies who could claim that the general rule imposed a specific and different hardship. Nothing in the opinion precludes the Board from doing what the Act authorizes, that is establishing different standards for different circumstances.

While the issues MWG raises with respect to the retirement of allowances are less clear cut, they are similarly ill founded. The challenged New York regulations which were the subject of the Clean Air Markets Group cases essentially precluded New York generators from selling lawfully obtained emission allowances to generators in certain other states, and these regulations were challenged by the New York generators themselves. These cases would be inapplicable to the MPS which involves a voluntary retirement of allowances obtained for reductions made in compliance with the rule itself. In this light, these retirements are similar to the allowance retirements approved in Clean Air Act consent decrees such as the one recently entered into by Dynegy in *U.S. v. Illinois Power*. Since these consent decree retirements are approved as legal by a federal

judge, and since the MPS retirements do not affect only a segment of upwind states, it is difficult to see how they burden commerce or would be illegal under the Clean Air Act.

Finally, MWG is simply wrong in identifying impacts on future NOx and SOx regulations as a matter which cannot be addressed without further analysis and hearings. This is another legal issues and the Hearing Officer herself directed that this be addressed by participants in their written comments. While these issues will be discussed further at that time, the Board should note that nothing in the MPS limits the Board in adopting NOx and SOx limits in future rulemakings. The MPS requires the commitment to achieve the specified NOx and SOx limits as a pre-condition to the extended schedule for mercury controls. The adoption of the MPS requires no determination by the Board that these preconditions are sufficient to attain CAIR or future non-attainment limits. The Board will have complete opportunity to evaluate and adopt appropriate CAIR limits during the upcoming CAIR hearings. As a result there is no reason to have further hearings in this proceeding regarding this issue.

CONCLUSION

The Board should deny MWG's motion for an additional hearing because MWG has failed to meet the Board's standards for justifying this request and no further hearings are necessary. MWG had ample time to prepare and present its case, and questioned Agency and Ameren witnesses extensively on the impact of the MPS. MWG has not shown that it would be prejudiced or that it exercised due diligence with respect to the MPS issue. Finally, all of the issues which MWG believes require an additional hearing have been discussed during the two hearings already held and can be easily discussed in written comments.

WHEREFORE, for the reasons stated in this Response, MWG's motion for an additional hearing should be denied.

AMEREN ENERGY GENERATING COMPANY, AMERENENERGY RESOURCE GENERATING COMPANY, and ELECTRIC ENERGY, INC.

By: _____
One of its Attorneys

Date: August 31, 2006

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Petitioners, hereby certifies that I served a copy of the attached document, Ameren's Response to Midwest Generation's Motion for Additional Hearings, upon those listed below on August 31, 2006 via First Class United States Mail, postage prepaid.

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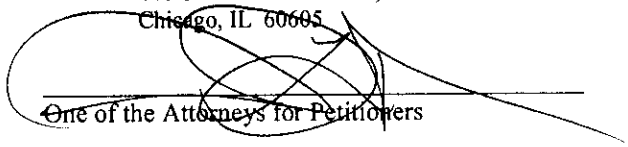

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