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 MIDWEST GENERATION'S MOTION TO SCHEDULE ADDITIONAL HEARINGS, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: _____
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DATED: August 31, 2006

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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RESPONSE TO MIDWEST GENERATION'S MOTION TO SCHEDULE ADDITIONAL HEARINGS

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by 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 Midwest Generation LLC's ("Midwest Generation") Motion to Schedule Additional Hearings ("Motion"). The Illinois EPA requests that the Board enter an order denying the Motion, and in support of this request, the Illinois EPA states as follows:

Midwest Generation's initial issue in support of its Motion is that without additional hearings, Midwest Generation and other participants have no opportunity to present evidence regarding the Multi-Pollutant Standards ("MPS") of proposed Section 225.233 of the Illinois EPA's proposed mercury rule. Motion at 2. However, this argument is without merit. The MPS language offered by Ameren Energy Generating Company, AmerenEnergy Resources Generating Company, and Electric Energy, Inc. ("Ameren," collectively), with the support of the Illinois EPA, was filed with the Board on July 28, 2006, when pre-filed testimony was due prior to the hearing held in this proceeding in Chicago. As such, Midwest Generation had sufficient time to prepare questions of Ameren and the Illinois EPA prior to and at hearing concerning the MPS language ("Ameren MPS").

Indeed, Midwest Generation did submit numerous pre-filed questions to Ameren's two witnesses that appeared at the Chicago hearing, and followed up the answers to those questions with additional follow up questions during the hearing. Furthermore, Midwest Generation took the opportunity at hearing to question the representatives of the Illinois EPA about the Ameren MPS. On August 21, 2006, Dynegy Midwest Generation, Inc. ("Dynegy") submitted an exhibit with the support of the Illinois EPA that included a slightly revised version of the Ameren MPS. This exhibit was resubmitted to the Board on August 23, 2006, in corrected form ("Dynegy MPS"). The Dynegy MPS was provided to the Board with redlines showing the slight changes from the Ameren MPS language. Given the questioning that was allowed for regarding the Ameren MPS, and the minor changes from that language found in the Dynegy MPS, there is no reason to conduct a separate hearing solely on either version of the MPS language. Given the minor distinctions between the Ameren MPS and Dynegy MPS, and the fact that the Dynegy MPS effectively supersedes the Ameren MPS, the Dynegy MPS will henceforth be referred to in this pleading as the MPS.

Furthermore, the hearing in Chicago was scheduled to end on August 25th. On August 23rd, when Midwest Generation indicated it had no further witnesses to present, the Hearing Officer properly adjourned the hearing. The failure of Midwest Generation to take advantage of the remaining time during the Chicago hearing to offer witnesses contesting the provisions of the MPS (which was in possession of Midwest Generation at least by July 28, 2006) highlights the lack of merit in the Motion. It is disingenuous of Midwest Generation to indicate it has no further testimony to present during the time allotted but then later file a request asking for just that, additional time and opportunity

for testimony. Indeed, many of the witnesses proffered by Midwest Generation during the Chicago hearing testified that they had either not read (presumably then they had not been provided with) the MPS or, if they had, they had no opinion or comment on the language.

Midwest Generation's second argument is that it needs additional time for its experts to analyze the impacts of the MPS. *Id.* at 3. Midwest Generation claims that "[w]ithout 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 [Clean Air Mercury Rule]; 2) impacts on future SO2 and NOx, regulations; and 3) impacts created by exchanging allegedly harmful, neurotoxic mercury emissions for particulate and ozone precursors." *Id.*

Neither the Board nor Midwest Generation needs worry that the MPS could adversely affect the broader proposal, especially since the MPS is intended and was written to be a key component of the underlying proposed rule. As written, the effect of both the proposed rule and the MPS is company specific. No averaging or trading between companies is allowed. The progress of one company, or system, toward compliance is thus independent of the progress of other systems. The Illinois EPA testified at hearing how compliance with the CAMR State cap will not be adversely affected by virtue of utilization of the MPS. This is primarily due to CAMR's weak cap prior to 2018. As the MPS ends in 2015, for all except a small fraction of the total EGUs that constitute the smallest EGUs, and the Illinois proposed rule is more stringent than

CAMR, the MPS will not seriously impact the 2018 Illinois cap. Only a very small percentage of Illinois electric generating units will be exempt from attaining the 90% reduction. Even then, these units will be required to install mercury control technology that will significantly reduce mercury emissions. In particular, calculations performed by the Illinois EPA indicate that the additional mercury emissions that would occur from the eligible Ameren and Dynegy units are approximately 1% of the total uncontrolled emissions, and therefore, the impact of the MPS on the ability to meet the CAMR caps is believed to be negligible. Considering that the Illinois proposed rule requires a 90% mercury emissions reduction, compared to a 70% reduction under CAMR, there should be no conflict. The Illinois EPA has also been and will continue to be in contact with the United States Environmental Protection Agency ("USEPA") to determine how the Illinois proposed rule will comply with the CAMR.

The impact of the MPS on future SO2 and NOx rules should best be discussed in those future rulemakings. Current rulemakings should not be side tracked over fears of what future regulations may bring. At present, only one other rulemaking has been proposed concerning SO2 and NOx, and that is the Illinois Clean Air Interstate Rule ("Illinois CAIR"). Hearings on that proposed rulemaking are scheduled for October and November of this year, and this issue is more properly presented there. However, the Illinois EPA does intend to respond to the Hearing Officer's request that guidance, suggestions and/or recommendations be provided in post-hearing comments as to how the MPS provisions of the Illinois mercury rule should be interpreted and applied in conjunction with the Illinois CAIR rule. The Illinois EPA has analyzed the interaction

between the proposed rule and the Illinois CAIR and believes that they will work together to ensure significant reductions in harmful pollutants.

Regarding Midwest Generation's concern that there will be an impact for substituting particulate and ozone precursor reductions for mercury reductions, Midwest Generation does not support the Illinois proposed rule and both the proposed rule and the MPS are far stricter than the Federal CAMR in reducing mercury emissions. If Midwest Generation fears for the safety of Illinois citizens, it can always choose to comply with the proposed rule.

Midwest Generation's third argument is that "[w]ithout expert analysis, MWG and the Board are unable to determine why the MPS technology standards cannot be applied generally to reduce emissions from all [electric generating units] EGUs." *Id.* In drafting or assisting in the drafting of proposed provisions of the Illinois rule that are intended to provide regulatory flexibility, the Illinois EPA's goal was to ensure that any alternative method of compliance did not violate the spirit of the Illinois proposed rule or the Federal CAMR cap. Therefore, the Illinois EPA has negotiated with all owners or operators that have approached it in good faith seeking to reach an accord on provisions intended to assist in compliance with the rule. Having said this, there are limits to what mercury emissions the Illinois EPA can allow to be offset. Keeping the focus on maintaining the integrity and effectiveness of the proposed rule as a whole resulted in the defined scope and eligibility of the MPS. Of note is that both Ameren and Dynegy anticipate, and the Illinois EPA is in agreement, that the installation of controls under the MPS will result in system-wide mercury emissions reductions of greater than 90% when fully implemented.

However, it cannot be said that the Illinois EPA has not provided great flexibility for sources. The allowance of averaging between EGUs in a system, a two-stage implementation of the rule, the ability to comply with either a 90% reduction requirement or an output-based standard, the Temporary Technology-Based Standard ("TTBS"), and the MPS allay any such notions. Thus, the MPS is available to any eligible source that wishes to take advantage of it. There are, of course, specific circumstances that are unique to each affected entity under the Illinois proposed rule. CWLP has created a separate deal which moots the need for it to consider the MPS. As evidenced by their presenting the MPS to the Board, both Dynegy and Ameren consider it reasonable. Kincaid Generation LLC ("Kincaid") has chosen to present its own option to the Board without the support of the Illinois EPA. Only Midwest Generation and Southern Illinois Power Cooperative ("SIPC") have indicated continued objection to the Illinois proposed rule and the proffered forms of regulatory flexibility without making any similar offering of their own. Of course, those sources may always comply with the primary rule. If Midwest Generation is unable to take advantage of the MPS, which is only one option, it can still apply to use the TTBS. Or, it can comply with the general rule which the Illinois EPA has demonstrated is feasible and reasonable.

Midwest Generation's fourth argument is that the MPS, or alternatively, the proposed rule, may not be a rule of general applicability. *Id*. at 4. This argument is wholly without merit as the rule and the MPS are clearly of general applicability. Any owner or operator of an affected EGU can choose to comply with the Illinois proposed "general" rule. The MPS is intended and presented as an option for those concerned

about achieving and maintaining the 90% standard. The Illinois EPA has lived up to its promise to meet with, and discuss concerns of, sources regarding meeting the 90% emissions reduction requirement in the proposed rule. This is not to say that the Illinois EPA believes the 90% reduction requirement to be infeasible; rather, it demonstrates a willingness of the Illinois EPA to listen to and if possible work to alleviate the concerns of industry. The MPS merely allows a slight relaxation of the mercury emissions reduction requirements in return for deep cuts in NOx and SO2 emissions. Because all regulated EGUs are subject to the proposed rule and the MPS is available to all sources that meet the defined eligibility criteria, the Illinois proposed rule – of which the MPS is a component – is a rule of general applicability.

Midwest Generation's fifth argument is that Illinois law requires the Board to consider the "technological feasibility and economic reasonableness" of measuring or reducing the particular type of pollution proposed to be regulated, yet the docket contains no evidence related to SO2 or NOx. 415 ILCS 5/27. Id. at 4. As a result, Midwest Generation claims that it is unclear if regulating SO2 or NOx under the MPS is technologically feasible and economically reasonable.

Pollutants SO2 and NOx are only involved tangentially in the Illinois proposed mercury rule. The MPS suggests an alternative to reduce *mercury compliance uncertainty* by utilizing known and well-tested NOx and SO2 technologies, and the resulting co-benefits achieved from utilization of those control technologies. Given that the record is replete with copious testimony on the actual issue of mercury compliance, Midwest Generation is attempting to create a diversion by trying to change the focus of the rulemaking. The Illinois proposal concerns mercury emissions reductions from

EGUs, not SO2 and NOx reductions. The technological feasibility and economic reasonableness of mercury reductions have been thoroughly examined throughout the course of the hearings. The MPS allows a slight relaxation of the mercury compliance requirements in exchange for the greatly increased control of SO2 and NOx emissions. These pollutants have been regulated for decades and can be controlled by equipment that is thoroughly tried and tested. So commonplace is the notion of SO2 and NOx control that the Federal CAMR relies on the reduction of these pollutants to achieve the Phase I mercury limit. The focus of the Illinois proposed rule is thus the technological feasibility and economic reasonableness of mercury reductions, not SO2 and NOx reductions. The Illinois EPA reiterates that as part of post-hearing comments to be submitted in this proceeding, it will address the impact and interplay between the MPS in the Illinois mercury rule with the provisions of the proposed Illinois CAIR rule.

Midwest Generation's sixth argument is that the MPS may violate Section 10 of the Act which prohibits the Board from adopting SO2 regulations and emission standards for existing fuel combustion stationary sources located outside non-attainment areas except to attain or maintain the SO2 National Ambient Air Quality Standard ("NAAQS"). *Id*. The Illinois EPA submitted its mercury regulatory proposal pursuant to Section 27 of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/27), and not Section 10. Therefore, the arguments raised by Midwest Generation pertaining to whether or not the MPS violates Section 10 are irrelevant and without merit. The argument is nothing more than an attempt to distract the Board and invite confusion by attempting to introduce an irrelevant provision of the Act as the basis for another attack on the proposed rule.

However, in the event the Board does decide to give this argument some consideration, the Illinois EPA notes that it discussed the Section 10(B) issue in the Statement of Reasons that accompanied the Illinois CAIR regulatory proposal. The Illinois EPA will thus briefly summarize the Section 10(B) discussion as it appears in the Illinois CAIR Statement of Reasons.

Again, the Illinois EPA submitted the mercury regulatory proposal, including the MPS, pursuant to Section 27 of the Act. For reasons other than attainment of the SO2 NAAQS, the proposed MPS would further address SO2 emissions from those EGUs who voluntarily chose to comply with the mercury proposal through the MPS, where such EGUs might be located in the three major metropolitan areas of Chicago, Peoria, and Metro-East/St. Louis.[1] Although Section 10(B) appears to apply to the SO2 portion of the MPS, such is not the case for several different reasons.[2] A closer reading, however, of that provision and subsequent regulatory and legislative history prove otherwise.

Section 10(B) of the Act is not applicable to this rulemaking, including the MPS, since the purpose behind that statutory provision has been fulfilled. It is well-established that in construing a statute, the most fundamental rule is to give effect to the legislature's intent, and the best evidence of that intent is the statutory language. That language must be given its plain and ordinary meaning, and courts may not properly construe a statute by altering its language in a way that constitutes a change in the plain meaning of the words actually adopted by the legislature. If the statutory language is clear, a reviewing body must give effect to the plain and ordinary meaning without resorting to other

[1] On April 4, 1995, USEPA approved the State Implementation Plan revision necessary for the last remaining SO_2 nonattainment area in the Illinois to be redesignated to attainment of the NAAQS. 40 CFR 52.724(h).

[2] Section 10(B) of the Act was adopted as part of Senate Bill 1967, later P.A. 81-1370, effective August 8, 1980.

construction aids. *U.S. Bank National Association v. Clark,* 216 *Ill.2d* 334, 346, 837 *N.E.2d* 74, 82 (2005).

The language of Section 10(B) is clear. The provisions were intended to limit the extent to which SO2 emissions from fuel combustion sources outside of the three major metropolitan areas could be controlled, as Illinois EPA was moving forward with its attainment and maintenance strategies for the SO2 NAAQS, following the adoption of the Clean Air Act Amendments of 1977. Accordingly, the General Assembly clearly gave the Board the authority to adopt two categories of regulations. First, the General Assembly stated that the Board would have the authority to adopt certain SO2 regulations and emission standards for existing stationary fuel combustion emission sources located in all areas of the State except for the Chicago, Peoria and Metro-East/St. Louis major metropolitan areas. As to those "state-wide" SO2 regulations, the General Assembly's language required in pertinent part that such regulations be no more restrictive than necessary to attain and maintain primary and secondary NAAQS for SO2. 415 ILCS 5/10(B)(1).

To address the second purpose of Section 10(B), i.e., nonattainment in the major metropolitan areas, Illinois EPA proposed standards for SO2 emissions from fuel combustion emission sources located within the major metropolitan areas, on December 1, 1980.[3] On February 24, 1983, the Board issued its final order for the adopted rule stemming from Illinois EPA's December 1980 proposal. *See*, *In the Matter Of: Sulfur Dioxide Emission Limitations: Rule 204 of Chapter 2*, R80-22, February 24, 1983. In the final order, the Board recognized that Illinois EPA's December 1980 proposal was in

[3] *See*, *In the Matter Of: Sulfur Dioxide Emission Limitations: Rule 204 of Chapter 2*, R80-22, February 24, 1983.

response to the legislative mandate (of Section 10(B) of the Act) that it review the SO2 emission standards for existing fuel combustion emission sources located within the three major metropolitan areas and thereafter propose amendments, consistent with the CAA's NAAQS program, which would enhance the use of Illinois coal. R80-22, p. 1.

By virtue of the completed rulemaking in R80-22, the Board and Illinois EPA fulfilled the second purpose of Section 10(B) as set forth by the General Assembly. Thus, that aspect of Section 10(B) has been met and no longer has any purpose.

With respect to the first purpose of Section 10(B), the Board was left with certain guidelines as to the nature of regulations affecting SO2 emissions in the remainder of the State other than the major metropolitan areas. The Board was to adopt such regulations so long as they were no more restrictive than needed to attain the NAAQS for SO2. Prospectively from 1983, then, the only remaining function of Section 10(B) was to provide guidance in the adoption of SO2-related regulations by the Board. A newer statutory provision superseded Section 10(B) as to that limited purpose, and therefore all remaining purpose and effect of Section 10(B) has essentially ended.

In 2001, the General Assembly adopted Section 9.10 of the Act pertaining to the regulation of electric generating units. 415 ILCS 5/9.10. Section 9.10(b)(2) directed Illinois EPA to propose regulations controlling SO_2 emissions from such sources.

It is clear that the General Assembly fully intended that Illinois EPA should propose, and the Board should have the authority to adopt, regulations for the control of SO_2 emissions whose nature went far beyond the minimum needed for attainment of the SO2 NAAQS, e.g., attainment of the $PM_{2.5}$ NAAQS, reduction in interstate transport, and improvement in visibility. This is obvious because the State of Illinois was in full

attainment of the SO_2 NAAQS when Section 9.10 was adopted.

That being the case, while there may seem to be a conflict between Sections 9.10 and 10(B) insofar as Section 9.10 contemplates regulation of SO_2 emissions statewide for several different purposes based on Illinois EPA findings and Section 10(B) envisions a more restricted regulation of SO_2 emissions, a review of relevant case law shows that there is no such conflict.

It is presumed that the legislature, in enacting various statutes, acts rationally and with full knowledge of all previous enactments. It is further presumed that the legislature would not enact a law that completely contradicts a prior statute without an express repeal of it and that statutes that relate to the same subject are to be governed by one spirit and a single policy. *Spina v. Toyota Motor Credit Corporation*, 301 *Ill.App.3d* 364, 376, 703 *N.E.2d* 484, 492 (1st Dist. 1998). In general, repeal of a previous enactment by implication through passage of a new law is not favored. Courts assume that the legislature will not draft a new law that contradicts an existing one without expressly repealing it, and that the legislature intends a consistent body of law when it amends or enacts new legislation. Thus, courts construe statutory provisions in a manner that avoids inconsistency and gives full effect to each provision wherever reasonably possible. *In re Marriage of Lasky*, 176 Ill.2d 75, 79-80, 678 N.E.2d 1035, 1037 (1997).

Applying those rules to the interplay of Sections 9.10 and 10(B), the appropriate conclusion to be drawn is that the General Assembly intended Section 10(B) to allow for the adoption of SO_2 regulations for the three major metropolitan areas, and also to provide a framework for other SO_2 emission-related regulations applicable to the remaining areas of the State. As a natural progression, over two decades later, the

General Assembly revised its previous stance, seeking to take into account the change in conditions throughout the State, and the increase in knowledge concerning atmospheric chemistry, the health effects of pollution and the availability of new emission control technology, it enacted Section 9.10 which allowed for, *inter alia*, broad-based regulation of SO_2 emissions throughout the State with no specific exclusion of the three major metropolitan areas identified in Section 10(B). Section 10(B)'s purpose in terms of directing regulation of SO_2 emissions was not without function in its historical context. However, it must be concluded that the General Assembly's intent for regulating SO_2 emissions has progressed to the broader instructions found in Section 9.10. For all these reasons, the Board should find that, to the extent any argument concerning the applicability or affect of Section 10(B) on the MPS be allowed, that Section 10(B) is not an impediment to the inclusion of the MPS into the Illinois proposed mercury rule, nor the adoption of that underlying rule as a whole.

Midwest Generation's seventh argument is that the MPS may not be a rule of general applicability, but rather an emission standard for only Ameren and Dynegy. Motion at 5. Citing to *Commonwealth Edison Co. v. Pollution Control Board*, 25 Ill. App. 3d 271 (1st Dist. 1974), Midwest Generation claims that if such is the case, these companies may be required to seek a variance or adjusted standard. Ameren and Dynegy have accepted the MPS alternative. Kincaid has suggested its own alternative. CWLP has created a separate deal which moots the need to consider the MPS. The rule and the MPS are of general applicability. Rather, it is Midwest Generation that is arguing that it cannot abide by the rule or any proffered alternative. Accordingly, it is Midwest Generation that may need to seek an adjusted standard or other site-specific relief. An

alternative does not have to be accepted by everyone to be generally applicable, only made available to them. The MPS is reasonably available to all affected sources.

Midwest Generation cites dicta from *Commonwealth Edison* for the proposition that the MPS is more appropriately an emission standard for Ameren and Dynegy. However, reviewing *Commonwealth Edison*, one sees that the MPS is generally applicable. The Court in *Commonwealth Edison* stated:

> The Board cannot be expected to research, evaluate, and make allowance for every special, unusual, or unique problem involving every producer of electrical energy. Where one fails to challenge the rules generally and instead 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.

25 Ill.App.3d 271, 281. More importantly, the Court stated:

> We believe that the rules in question should be found valid when one can reasonably infer from the evidence in the record that the Board concluded in promulgating the rules that it was technically feasible and economically reasonable for a substantial number of the individual emission sources in this state to comply by the specified deadline.

Id. at 281-282.

From this, it is apparent that the Board does not have to ensure that every source can avail itself of a potential rule. Rather, the Board must assure that "a substantial number" of the sources are able to comply. If a source is unable to comply with the MPS or TTBS, and it believes that it cannot comply with the general rule, then it may petition the Board for a variance or adjusted standard. Although in the present case Midwest Generation has challenged the rule generally, it is nevertheless such a source. Ameren and Dynegy have expressed support for the MPS, and they represent 31 of the 59 units in the State. CWLP, representing five units, could avail itself of the MPS, but has come to a

separate arrangement independent of the proposed rulemaking. Thus, this arrangement moots the MPS. In addition, Kincaid, representing two units, has submitted its own proposal to the Board. This leaves only Midwest Generation and SIPC remaining.

There has been ample testimony concerning the technical feasibility and economic reasonableness of the mercury standards. The MPS is purely voluntary; Midwest Generation is under no obligation to utilize its provisions. Midwest Generation could also elect to use the provisions of the TTBS, if it preferred to do so. The method of compliance is within the discretion of Midwest Generation. If Midwest Generation believes that none of the compliance methods truly countenances its particular situation, it may seek a variance or adjusted standard. But if it only wants to avoid the capital investment necessary to install mercury control technology, it is left to its own devices. It should not be allowed to pull down the whole edifice of the rule to avoid compliance. Midwest Generation is able to comply with the general rule, though it clearly wishes not to do so. That distaste of the rule, however, should not be equated to an inability to comply with the rule.

Midwest Generation's eighth argument is that if all of the sources in the State have the same coordination, financing and technology problems with the rule then the rule should be changed rather than creating an MPS. Motion at 6. Contrary to Midwest Generation's erroneous assumption, however, all sources do not have the same problems with the rule. As stated above, CWLP, Kincaid, Ameren, and Dynegy have suggested alternatives that fit their general economic planning. Since some of those alternatives involve minor changes to the mercury control requirements in the rule, in return for substantial reductions of other pollutants, the Illinois EPA has agreed to support some of

those alternatives. The Illinois EPA is not suggesting that the rule is unworkable or unmanageable. Rather, there has been extensive testimony on how the Illinois EPA believes the rule is both technologically feasible and economically reasonable. The MPS provides an alternate form of compliance. It is not an admission that the rule is improper. But, like the STAPPA/ALAPCO model rule and New Jersey's mercury rule, the Illinois EPA believes in the principle of flexibility. *See, Regulating Mercury from Power Plants: A Model Rule for States and Localities*, STAPPA/ALAPCO, November 2005 (copy attached to Statement of Reasons in initial filing) and N.J.A.C. 7:27 *et seq*.

Midwest Generation's ninth argument is that the MPS may raise compliance problems with meeting both the mercury regulations and the CAIR. Motion at 6. Once again, any possible problems would be better dealt with in future rulemakings. The present rule cannot be defeated over fears of what the future may bring. Hearings on how Illinois CAIR may be impacted by the current rule are appropriate for the Illinois CAIR hearings. Those hearings have already been scheduled. Midwest Generation should wait until those hearings to determine how that rulemaking will impact the present proposal. To do otherwise would put the cart before the horse. Merely because there is some overlap in subject matter between the rules does not mean there will be conflict. Indeed, the Federal CAIR was written with CAMR in mind. The Illinois EPA has analyzed the interaction between the proposed rule and the Illinois CAIR and believes they will work together to ensure significant reductions in harmful pollutants.

Midwest Generation's tenth argument is that the MPS may violate the Supremacy Clause of the United States Constitution by restricting the trading of SO2 allowances, citing *Clean Air Markets Group v. Pataki*, 194 F. Supp. 2d 147, 157 (N.D.N.Y. 2002),

aff'd, 338 F.3d 82 (2d Cir. 2003). *Id*. Midwest Generation claims that since the MPS requires parties opting into it to surrender SO2 allowances, such action effectively prohibits the trading of such allowances, thereby reducing the size of the market Congress created under Title IV of the CAA.

Midwest Generation's eleventh argument is that the MPS may violate the Commerce Clause of the United States Constitution. *Id*. at 7. Citing to *Clean Air Markets*, Midwest Generation claims that the MPS burdens interstate commerce without justifying those burdens in terms of "local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id*.

Midwest Generation's tenth and eleventh arguments concern the interplay of the Illinois proposed rule and the Federal Supremacy and Commerce Clauses. In support of the proposition that the Illinois proposed rule violates these clauses, Midwest Generation cites to *Clean Air Markets*, which concerned a New York law that sought to limit participation by New York sources in the Federal Acid Rain SO2 Allowance Trading Program under Title IV of the CAA. New York sources that transferred excess allowances to states "upwind" of New York (the law listed such states) had to report the sales to the New York Public Service Commission that would assess an air pollution mitigation offset against the seller. *Clean Air Markets* at 154. This offset would be equal to the amount received for the SO2 allowances. *Id*. Transfers to entities that were not in upwind states would have to contain a restrictive covenant prohibiting future sales to upwind states. *Id*. The attachment of the restrictive covenant was found to lower the value of the New York allowances. *Id*.

Using a Supremacy Clause analysis, the Court found that the New York law "actually conflicts with federal law." *Id*. at 158. The Court made this determination because although there was no physical impediment to the transfer of allowances, the New York law was contrary to the Federal provision that allowances be tradable to any other person. *Id*. Specifically, the New York law "is preempted because it interferes with the Clean Air Act's method for achieving the goal of air pollution control: a cap and nationwide SO2 allowance trading system." *Id*. at 158. The New York law also resulted in the decreased availability of SO2 allowances to states upwind of New York. *Id*. Thus, the law indirectly regulated the trading of allowances in other states. *Id*. at 159. The New York law effectively went beyond controlling emissions in New York to controlling emissions in other states. *Id*.

The Court in *Clean Air Markets* also performed a Commerce Clause analysis and such analysis centered on the principle of whether the law "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Id*. at 160. That is, "If the legislative means result in 'isolating the State from the national economy,' then the statute is unconstitutional despite a legitimate legislative goal." *Id*. In other words, a state cannot block imports from other states, nor exports from within its boundaries, without offending the Constitution. *Id*. Accordingly, was the New York law protectionist or isolationist?

The Court found that the New York law did impose a 100% penalty on New York unit allowance transfers to upwind states. *Id*. Since most units would not reasonably agree to make such transfers, the law discriminated against articles of commerce,

"isolating [New York State] from the national economy." *Id*. Moreover, the law did not restrict the transfer of SO2 allowances from one New York unit to another, thus giving a preferred right of access to SO2 allowances to in-state units over out-of-state units. *Id.*

Nor did the Court consider the New York law to be "fairly viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Id*. at 161. Concerning this, the Court found no "direct connection between the law's requirements and the purported concerns being addressed." *Id*. This is because the law could not guarantee that other states would not simply transfer their allowances to "upwind states." *Id*. at 162. Accordingly, there was no guarantee that the law would actually reduce pollution coming into New York. *Id*. Thus, the Court held that local concerns were not sufficiently strong for the burden placed on interstate commerce. *Id*. at 162.

The USEPA reviewed and dismissed the *Clean Air Markets* case when formulating CAIR. In describing the workings of the CAIR program, See, 70 Fed. Reg. 25162 (May 12, 2005), USEPA stated:

> The EPA's approach provides States the opportunity to impose more stringent control requirements for EGUs' SO2 emissions than under title IV through an EPA-administered cap and trade program that requires the use of title IV allowances for compliance at a ratio of 2 allowances per ton of emissions for allowances allocated for 2010 through 2014 and 2.86 allowances per ton of emissions for allowances allocated for 2015 or thereafter.

Id. at 25291. Concerning the role of states, USEPA stated:

> Further, as discussed above, if a State wants to achieve the SO2 emissions reductions required by today's action through more stringent EGU emission limitations only but without using the model cap and trade program, then EPA is requiring that the State include in its SIP a mechanism for retiring the excess title IV allowances that will result from imposition of these more stringent EGU requirements. In this case, the

> State must retire an amount of title IV allowances equal to the total amount of title IV allowances allocated to the units in the State minus the amount of title IV allowances equivalent to the tonnage cap set by the State on SO2 emissions by EGUs, and the State can choose what retirement mechanism to use.

Id. Importantly, concerning the use of Title IV allowances in a different program, USEPA asserted:

> The EPA maintains that it has the authority under section 110(a)(2)(D) and title IV to establish a new cap and trade program requiring the use of title IV allowances at a different tonnage authorization than under the Acid Rain Program and the retirement of such allowances for purposes of both programs. First, as discussed in section V above, EPA has the authority under section 110(a)(2)(D) to establish a new SO2 cap and trade program, administered by EPA if requested in a State's SIP, to prohibit emissions that contribute significantly to nonattainment, or interfere with maintenance, of the PM2.5 NAAQS. Further, EPA notes that under section 402(3), a title IV allowance is:
>
> > An authorization, allocated to an affected unit by the Administrator under this title [IV], to emit, during or after a specified calendar year, one ton of sulfur dioxide. 42 U.S.C. 7651(a)(3).

. However, section 403(f) states that:

> An allowance allocated under this title is a limited authorization to emit sulfur dioxide in accordance with the provision of this title [IV]. Such allowance does not constitute a property right. Nothing in this title [IV] or in any other provision of law shall be construed to limit the authority of the United States to terminate or limit such authorization. Nothing in this section relating to allowances shall be construed as affecting the application of, or compliance with, any other provision of this Act to an affected unit or source, including the provisions related to applicable National Ambient Air Quality Standards and State implementation plans. 42 U.S.C. 7651b(f).

Id.

In opposition to USEPA, Commenters cited the *Clean Air Markets* case. *Id*. at 25293. In distinguishing CAIR from the *Clean Air Markets* case, USEPA proffered:

> EPA believes that the exercise of its explicit authority under section 403(f) to limit the tonnage authorization of a title IV allowance in the CAIR SO2 cap and trade program and to terminate the tonnage authorization in the Acid Rain Program once the allowance is used in the CAIR SO2 program is consistent with—and necessary to preserve—the operation of the Acid Rain Program. Therefore, EPA concludes that its approach of limiting and terminating of the tonnage authorization of title IV allowances does not impermissibly interfere with the interstate operation of the Acid Rain Program and is reasonable.

Id. Moreover, USEPA declared:

> Unlike the circumstances in *Clean Air Markets Group,* under EPA's approach in today's action, each title IV allowance is freely transferable nationwide unless and until a source uses the allowance to meet the allowance-holding requirements of the CAIR SO2 program, at which time the allowance is deducted from the source's allowance tracking system account and retired for purposes of both the CAIR SO2 program and the Acid Rain Program.

Id. Thus, USEPA stated:

> EPA maintains that, on balance, the retirement of title IV allowances used for compliance in the CAIR model SO2 cap and trade program does not constitute impermissible interference with the interstate operation of the Acid Rain Program, but rather is consistent with, and necessary to preserve, the operation of the Acid Rain Program.

Id. Furthermore, USEPA believed that due to the fact that CAIR is not a nationwide program, the flood of Title IV allowances, were they not retired under CAIR, would cause the Title IV SO2 allowance market in those states not covered by CAIR, but still under Title IV to collapse. *Id*.

The MPS is similar to the Federal CAIR and, indeed, Illinois has proposed a CAIR rulemaking where this issue may more appropriately be discussed. Regardless, Federal CAIR anticipates the situation that Illinois is in and supports it. Beyond this, CAIR recognizes that a state allowance program may differ from the Federal program. That is, USEPA allows states to comply with CAIR by either: 1) requiring all SO2

reductions from EGUs; 2) requiring some SO2 reductions from EGUs and some from non-EGUs; or 3) requiring all reductions from non-EGUs. *Id*. at 25295. As USEPA stated:

> the allowance retirement requirement echoes the State's decision in the first instance concerning the amount of SO2 emissions reductions to require from EGUs in the State.

Id.

Other important differences exist between the Illinois MPS and the New York law at issue in *Clean Air Market*. First, the MPS does not prohibit trading with anyone. Second, it imposes no restrictive covenants on anyone. Third, the MPS does not differentiate between in-State and out-of-State purchasers. Illinois sources cannot sell any excess allowances made available from compliance with the MPS to other sources whether they are in Illinois or in other states. Finally, and most importantly, the MPS is voluntary. No unit is required to utilize it. It is only an option for sources that consider it the best fit for their business plan. Sources voluntarily agree to retire allowances directly attributable to the lower SO2 emissions standard that they become subject to under the MPS. Any additional allowances the source generates from SO2 emissions reductions beyond that required for compliance with the MPS, or from banking, may be freely transferred to any other entity.

Midwest Generation's twelfth argument is that it is not clear on the record how Illinois will demonstrate compliance with the CAMR emissions cap if other sources opted into the MPS. Motion at 8. This is not Midwest Generation's concern. The Illinois EPA testified at hearing that Illinois intends to successfully demonstrate to USEPA that it will be able to comply with the State cap. The Illinois EPA has had

extensive conversations with the USEPA on this matter, and those conversations will continue. Once again, the MPS ends in 2015, at which time virtually all sources will be required to meet the 90% mercury emissions reduction standard. Thus, compliance with the CAMR cap should not be a concern. In addition, the MPS is voluntary, and thus, no source is under any obligation to make use of its provisions.

Since both companies that have indicated they will utilize the MPS (i.e., Ameren and Dynegy) have estimated that from 2015 forward they will be achieving greater than 90% mercury emissions reductions system-wide, an assessment that the Illinois EPA agrees with, the issue of demonstrating that the CAMR caps will be met should be readily achievable. In fact, the Illinois EPA estimates that all companies will be achieving 90% or greater mercury emissions reductions from 2015 forward, which is significantly more stringent than the Federal CAMR caps.

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/_____
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DATED: August 31, 2006

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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state that I have served electronically the attached

RESPONSE TO MIDWEST GENERATION'S MOTION TO SCHEDULE

ADDITIONAL HEARINGS upon the following person:

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Clerk
Illinois Pollution Control Board
James R. Thompson Center
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and mailing it by first-class mail from Springfield, Illinois, with sufficient postage affixed to the following persons:

SEE ATTACHED SERVICE LIST

ILLINOIS ENVIRONMENTAL
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_____
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