

ILLINOIS POLLUTION CONTROL BOARD

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AUG 31 2006

STATE OF ILLINOIS
Pollution Control Board

In The Matter of:)	
)	
Proposed New 35 Ill. Adm. Code 225)	No. R06-25
Control of Emissions from)	(Rulemaking – Air)
Large Combustion Sources)	

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on August 31, 2006, I filed with the Office of the Clerk of the Pollution Control Board, Participant KINCAID GENERATION, L.L.C.'s RESPONSE TO MOTION TO SCHEDULE ADDITIONAL HEARINGS, copies of which are herewith served upon you.

By: 
 Katherine M. Rahill

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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In The Matter of:)
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**KINCAID GENERATION, L.L.C.'S RESPONSE TO MOTION
TO SCHEDULE ADDITIONAL HEARINGS**

NOW COMES Participant KINCAID GENERATION, L.L.C. ("Kincaid"), by and through its attorneys, JENNER & BLOCK LLP, and hereby responds to Midwest Generation, LLC's ("Midwest Generation") Motion to Schedule Additional Hearings to address the amendments to proposed 35 Ill. Adm. Code 225, titled Multi-Pollutant Alternative, 35 Ill. Adm. Code § 225.233, proposed by Ameren 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. Kincaid adopts and supports the arguments contained in the Midwest Generation Motion to Schedule Additional Hearings, but believes the correct solution is to consider the Multi-Pollutant Alternative in a separate regulatory docket. In support of this response, Kincaid states as follows:

I. INTRODUCTION

On March 14, 2006, the IEPA filed a rulemaking proposal with the Board proposing new regulations to reduce mercury emissions from electric generating units ("EGUs"). The proposal was accepted for hearing by the Board on March 16, 2006. That proposal was later revised by IEPA to include regulations that provided for a Temporary Technology Based Standard ("TTBS"). The revised proposal (the "Proposal") was then the subject of hearings held June 12, 2006 through June 23, 2006.

THIS FILING IS SUBMITTED ON RECYCLED PAPER

Following those hearings, on July 28, 2006, Ameren submitted a proposed amendment to the Proposal, titled Multi-Pollutant Standards, to the Board in a Joint Statement with IEPA. Then, on August 21, 2006 in the midst of further evidentiary hearings on the Proposal, Dynegy and IEPA submitted a new Joint Statement to the Board requesting an amendment to the previously proposed Multi-Pollutant Standards section submitted by Ameren (hereinafter the Multi-Pollutant Standards as originally submitted by Ameren and later amended by Dynegy are collectively referred to as the "MPS").

Under the MPS, covered EGUs would be required to meet certain emissions standards for NO_x and SO₂ as well as comply with different mercury control requirements than set forth in the Proposal. Like Midwest Generation, Kincaid does not yet understand the effect of the proposed MPS. The MPS differs significantly from the Proposal and, as such, must be the subject of a separate regulatory proposal and hearings in order for the rulemaking participants, the public, and the Board to have an opportunity to fully analyze its effect. Kincaid believes that, under both Illinois and Federal law, the MPS proposal cannot be considered in this regulatory docket.

II. THE BOARD MUST OPEN A SEPARATE REGULATORY DOCKET TO ANALYZE ISSUES FUNDAMENTAL TO THE PROPOSAL AND MPS.

Kincaid, Midwest Generation and the other rulemaking participants have participated in two evidentiary hearings on the Proposal. During those hearings, witnesses presented testimony and were cross-examined on the basis for and impact of the Proposal. No evidence was submitted on the basis for and/or impact of the MPS. As a result, the participants have not and will not have the opportunity to present or cross-examine witnesses regarding the MPS. However, because the MPS sets new requirements for NO_x and SO₂ as well as fundamentally changes the proposed mercury control requirements applicable to covered EGUs, the MPS raises issues and questions that need to be examined prior to approval of the proposed regulations. As

a result, the Board must open a separate regulatory docket so that all interested persons can analyze the MPS and its effects on covered EGUs as well as on the Proposal as a whole and on the existing regulatory scheme.

As set forth in Midwest Generation's motion, the MPS raises questions as to: the technological feasibility and economic reasonableness of both the MPS and the Proposal, including whether the MPS is a viable option for all of the coal-fired electric generating units within the State of Illinois; the impact of the MPS on the operations of EGUs not covered by the MPS; the impact of the MPS on other regulatory schemes including concurrent rulemakings such as Illinois CAIR; the impacts of implementing the MPS on the ability of the State to achieve the caps set forth in CAMR; and the environmental and/or health impacts of the MPS alternative. In addition, the MPS raises questions as to the need for the controls currently contained in the Proposal. The mercury controls contained within the MPS appear to be less stringent. Participants and the Board need an opportunity to determine if these controls are less stringent and, if so, must analyze why these controls are sufficient for over half of the coal-fired generating capacity in Illinois, but not all. Kincaid has already made the point on the record, repeatedly, that it is uniquely disadvantaged by IEPA's original proposal, and remains uniquely disadvantaged even after the submission of the MPS. These issues are fundamental to the MPS and the Proposal and must be analyzed before either can be approved by the Board.

Moreover, as already established in the record, Kincaid's facility differs from other coal-fired electric generating stations within the state such as those operated by Dynegy and Ameren. As such, it is imperative that Kincaid understand (1) whether the MPS could be implemented at a facility like that operated by Kincaid; and (2) what impacts the MPS might have on Kincaid's operations.

III. A SEPARATE REGULATORY DOCKET AND HEARINGS ARE NECESSARY TO ENSURE COMPLIANCE WITH STATE LAW.

As stated in Midwest Generation's motion, Kincaid also believes the introduction of the MPS may have serious state law implications. First, the Board has not considered the "technological feasibility and economic reasonableness" of measuring or reducing NO_x and SO₂. See 415 ILCS 5/27. Second, there is no evidence in the record that the SO₂ limits contained in the MPS are necessary to attain and maintain the Primary National Ambient Air Quality Standards ("NAAQS") for sulfur dioxide as appears to be required by Section 10 of the Illinois Environmental Protection Act. See 415 ILCS 5/10. Third, the Board has not considered whether the MPS is a rule of general applicability or an emission standard for Ameren and Dynegy only and, depending on that analysis, whether the approach by which the Board is considering it is appropriate. See *Commonwealth Edison Co. v. Pollution Control Board*, 25 Ill. App. 3d 271, 281 (1st Dist. 1974) (discussing rules of general applicability versus variances); and 415 ILCS 5/28.1. Fourth, and perhaps most importantly, the Board has not provided public notification, via its First Notice, that it intends to regulate NO_x and SO₂ in this docket. It would violate Illinois law for the Board to adopt final regulations controlling these other pollutants where no First Notice disclosure has been presented to the public. This procedural defect simply cannot be cured by holding additional hearings in this docket, without adopting an additional First Notice proposal. Prior to approving the MPS and/or the Proposal, the Board should engage in an educated analysis of these issues which can only occur after public notification of the substantive content of the proposed regulations and sufficient hearings providing an opportunity for comment and questions. This analysis is best considered in a separate regulatory docket.

IV. A SEPARATE REGULATORY DOCKET AND HEARINGS ARE NECESSARY TO ENSURE COMPLIANCE WITH FEDERAL LAW.

Kincaid concurs with Midwest Generation's analysis that the MPS also raises concerns as to the validity of the MPS under both the Supremacy Clause and the Commerce Clause of the United States Constitution. Because the Board and other participants do not fully understand how the MPS will work, the interested parties cannot accurately assess whether the required surrender of SO₂ allowances under the MPS is preempted by the Clean Air Act's SO₂ cap and trade program. See *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). Moreover, the interested parties are also unable to evaluate whether the MPS violates the Commerce Clause prohibition against burdening interstate commerce. *Id.*

As an additional issue under Federal law, adoption of the MPS in this regulatory docket would not satisfy the federal requirements for public participation in adoption of state regulations submitted for USEPA approval. There has been no public notification that this docket will regulate NO_x and SO₂. Any state regulation submitted to USEPA for approval without adequate public participation must be rejected.

Furthermore, the MPS's approach raises uncertainties as to whether Illinois can demonstrate compliance with the federal CAMR state cap. The participants and the Board need to better understand the effect of various electric generating units within the State of Illinois opting in to the MPS on the ability of Illinois to comply with the mercury cap applicable to Illinois established by the U.S. EPA.

V. CONCLUSION

WHEREFORE, for the reasons set forth above, KINCAID GENERATION, LLC respectfully requests that the Board open a separate regulatory docket and schedule additional

hearings to address the 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.

Respectfully submitted,

Kincaid Generation, L.L.C.

by: 

One of Their Attorneys

Dated: August 31, 2006

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CERTIFICATE OF SERVICE

I, Katherine M. Rahill, an attorney, hereby certify that I served a copy of the foregoing KINCAID GENERATION, L.L.C.'s RESPONSE TO MOTION TO SCHEDULE ADDITIONAL HEARINGS, via first-class mail, postage fully prepaid, upon the parties on the attached Service List this 31st day of August, 2006:

By: _____



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