

ILLINOIS POLLUTION CONTROL BOARD  
August 9, 2007

IN THE MATTER OF: )  
)  
PROPOSED NEW CLEAN AIR ) R06-26  
INTERSTATE RULES (CAIR) SO<sub>2</sub>, NO<sub>x</sub> ) (Rulemaking – Air)  
ANNUAL AND NO<sub>x</sub> OZONE SEASON )  
TRADING PROGRAMS, 35 ILL. ADM. )  
CODE 225, SUBPARTS A, C, D, E, and F )

ORDER OF THE BOARD (by T.E. Johnson):

On July 26, 2007, the Board adopted second-notice amendments in this rulemaking for review by the Joint Committee on Administrative Rules (JCAR). The second-notice period began on July 27, 2007. On July 30, 2007, Midwest Generation, LLC (Midwest Generation) filed a “Motion for Additional Hearing” (Motion). For the reasons below, the Board denies the Motion. In this order, the Board first describes the Motion before discussing the Board’s ruling.

**MOTION**

Midwest Generation asks for one additional hearing on the issue raised in its most recent public comment (PC 14), filed on June 25, 2007, concerning “air in-leakage.” Motion at 1, 5. Midwest Generation’s comment sought to have the proposed formula for sorbent injection amended to account for air in-leakage. PC 14 at 1-2. The formula is set forth in Section 225.615(g)(4) of the Combined Pollutant Standards (CPS) of the proposed Clean Air Interstate Rule (CAIR). Midwest Generation wants the formula changed “to allow for the reduction of sorbent injection in response to the percentage of air in-leakage present in [Midwest Generation’s] stack flow.” Motion at 1. Midwest Generation claims that without this rule change, it and potentially other sources “will needlessly apply large quantities of additional sorbent in response to clean air leaking into the stack flow.” *Id.*

In the Motion, Midwest Generation estimates that with its air in-leakage rate of 10 to 15%, the company will “waste \$3 million per year to inject sorbent in response to air in-leakage of clean, unpolluted air” unless the rule is amended. Motion at 2. Midwest Generation adds that its evaluation of the sorbent market “suggests that sorbent supplies are limited, very expensive, and will become more costly and scarce as the [Clean Air Mercury Rule] and the CPS rule take effect.” *Id.* Midwest Generation maintains that if it is allowed to account for air in-leakage in the stack flow, and thereby reduce sorbent injection, the company “will *still be able to comply* with the limits for Mercury emissions set forth in the CPS.” *Id.* (emphasis in original).

Midwest Generation states that it “identified the air in-leakage issue” on April 2, 2007, and had a conference call on the subject with the Illinois Environmental Protection Agency (IEPA) on April 6, 2007. Motion at 2. According to Midwest Generation, IEPA advised the company at that time to “submit a letter of determination explaining how [Midwest Generation] would propose calculating flow at the injection point and the reasons for doing so.” *Id.* The

Motion provides that on June 14, 2007, Midwest Generation sent its proposed calculation methodology to IEPA and on June 19, 2007, counsel for IEPA advised the company that a “determination letter was not the appropriate method of approving [Midwest Generation’s] proposed alternate flow methodology.” *Id.* at 3. Midwest Generation claims that on June 21, 2007, it met with IEPA and “received input for the changes [Midwest Generation] proposed” and Midwest Generation “circulated a proposed Joint Comment” to IEPA. *Id.* Midwest Generation asserts that on June 25, 2007, the last day of the first-notice comment period, IEPA indicated it could not join in Midwest Generation’s proposed joint public comment, and Midwest Generation “was left to raise the issue alone,” which it did in PC 14. *Id.*

Midwest Generation claims that it will be “materially prejudiced” without an additional hearing because the proposed rule would require it to “waste millions of dollars on unnecessary sorbent without cognizable benefit to the environment.” Motion at 3, citing 35 Ill. Adm. Code 102.412(b). Midwest Generation further claims that its dealings with IEPA, described above, demonstrate that the company exercised “due diligence” on this issue. *Id.* at 4.

### **DISCUSSION**

Initially, the Board notes that the 14-day time period during which other rulemaking participants may file responses to Midwest Generation’s Motion to hold an additional hearing has not yet run and, to date, the Board has received no responses. *See* 35 Ill. Adm. Code 101.500(d). To avoid any undue delay, however, the Board rules on the Motion today as this rulemaking is scheduled to be considered by JCAR at its August 14, 2007 meeting, which falls before the Board’s next scheduled meeting.

The Board denies Midwest Generation’s Motion for several reasons. First, another hearing at this juncture of the proceeding is prohibited by the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100 (2006)). Second, conducting an additional hearing would jeopardize the State of Illinois’ compliance with a critical federal deadline. Finally, during the course of this rulemaking, Midwest Generation had many opportunities to timely develop its “air in-leakage” issue before the Board, but failed to do so. The Board now discusses in turn each of these bases for denying the Motion.

### **IAPA Restriction**

On July 26, 2007, the Board proposed CAIR for second-notice review by JCAR. The second-notice period began the next day, on July 27, 2007, with the Board’s submittal of the written notice to JCAR. It was only after these events that Midwest Generation, on July 30, 2007, filed its Motion for an additional hearing. Section 5-40(c) of the IAPA provides in relevant part:

After commencement of the second notice period, no substantive change may be made to a proposed rulemaking unless it is made in response to an objection or suggestion of the Joint Committee. 5 ILCS 100/5-40(c) (2006); *see also* 35 Ill. Adm. Code 102.606(a), (b).

Accordingly, at this stage of the rulemaking process, the Board can make no substantive change to CAIR unless made at JCAR's request. The additional hearing proposed now by Midwest Generation, to try to substantiate the rule change proposed by the company, is therefore not permitted by the IAPA. For this reason alone, the Board must deny the Motion. To further put Midwest Generation's hearing request in the proper context, however, the Board will also discuss the federal requirements and deadline for CAIR, as well as the opportunities for public participation throughout the history of this rulemaking, all of which militates against granting Midwest Generation's present request.

### **Federal Requirements and Deadline**

This rulemaking was initiated by IEPA in part because the State of Illinois must meet federal Clean Air Act (42 U.S.C. §§ 7401 *et seq.*) requirements for controlling fine particulate matter (PM<sub>2.5</sub>) and ozone in the greater Chicago and Metro East/St. Louis nonattainment areas. The United States Environmental Protection Agency (USEPA) has determined that most eastern states, including Illinois, will not be able to timely meet the National Ambient Air Quality Standards (NAAQS) largely because individual states cannot effectively address the interstate transport of airborne pollution from upwind areas. To address this regional problem, USEPA promulgated federal CAIR. Under federal CAIR, states like Illinois are given the option of complying with emission budgets set by USEPA or, as proposed by the Board for nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>) emissions from fossil fuel-fired electric generating units (EGUs), adopting federal "cap and trade" programs.

Generally, the trading program rules proposed by the Board do not require EGUs to install specific control technology or meet a particular emission limit. Instead, each affected unit is required at the end of each control period to hold allowances sufficient to cover the tons of NO<sub>x</sub> and SO<sub>2</sub> emitted. These allowances can be obtained either through a direct allocation from a state (NO<sub>x</sub> allowances) or USEPA (SO<sub>2</sub> allowances) or through trading. It is anticipated that affected units that can install the least costly controls will do so, and will "over control," and thereby have extra allowances to sell to other EGUs that cannot reduce emissions as cost-effectively. This approach should encourage economically efficient compliance.

In its most recent public comment (PC 15), filed on June 25, 2007, IEPA stressed the need for expedited adoption of the CAIR proposal. According to IEPA, to avoid having USEPA's Federal Implementation Plan (FIP) allocate NO<sub>x</sub> emission allowances in Illinois for the 2009 control period:

Initial allocations based on a *fully adopted state rule* are required to be submitted to USEPA no later than September 30, 2007. If Illinois fails to either fully adopt its CAIR proposal by September 25, 2007, or submit final NO<sub>x</sub> allocations for the Annual and Ozone trading programs by September 30, 2007, USEPA will use the NO<sub>x</sub> allocations for Illinois sources as set forth in the FIP. These allocations would be for the 2009 control period. If USEPA uses the FIP allocations scheme, there will be allowances allocated from the Clean Air Set-Aside ("CASA") to EGUs rather than as described by the Illinois CASA regulations. Allowances from the CASA represent 25 percent of the NO<sub>x</sub> budget for the 2009 control

periods. As allowances from the CASA are intended to encourage installation of air pollution control equipment, as well as investment in energy efficiency and conservation, and renewable energy projects in the 2009 control period, these efforts would not receive this incentive for a critical year. The 2009 control period is the year looked to for attainment of the 8-hour ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards. PC 15 at 2-3 (emphasis added), citing 71 Fed. Reg. 25328 (Apr. 28, 2006); *see also* 71 Fed. Reg. 25328, 25354 (Apr. 28, 2006) (USEPA's NO<sub>x</sub> allocation recordation deadline is September 30, 2007, for the 2009 control period).

Accordingly, failure to meet the USEPA deadline will result in the State of Illinois losing control of the allocations for the 2009 period. Important policy objectives underlying this rulemaking would be lost, including the CASA incentives to invest in renewable energy projects, which work toward addressing the renewable energy initiative of Section 9.10 of the Environmental Protection Act (415 ILCS 5/9.10 (2006)).

Holding an additional hearing as requested by Midwest Generation would retard this rulemaking proceeding. For example, a general rulemaking hearing, as requested by Midwest Generation, to consider rule amendments under the federal Clean Air Act requires newspaper notice of the hearing to be published at least 30 days before the hearing date. *See* 35 Ill. Adm. Code 102.416(a)(3). Further, as with this proceeding, such a hearing is preceded by the submission of pre-filed testimony and followed by the filing of a hearing transcript, after which post-hearing public comments are filed. *See* 35 Ill. Adm. Code 102.108, 102.418, 102.424. The Board finds that holding any additional hearing would jeopardize Illinois's ability to meet the federal deadline.

### **Midwest Generation's Earlier Opportunities to Participate**

As detailed below, Midwest Generation had ample opportunities to participate throughout the duration of this rulemaking and, in fact, has been an active participant. Despite this, Midwest Generation did not develop its air in-leakage issue before the Board in a timely fashion.

IEPA filed this rulemaking proposal on May 30, 2006, and the Board accepted the matter for hearing on June 15, 2006. On July 20, 2006, based on the federal deadline, the Board granted IEPA's motion for expedited review in part. To maximize opportunities for public participation, however, the Board denied IEPA's motion in part by declining to proceed immediately to first notice without commenting on the merits of the IEPA proposal.

The Board held five days of hearings in this rulemaking, all before first notice. The first hearing began on October 10, 2006, and continued through October 12, 2006, in Springfield. The second hearing began on November 28, 2006, and continued through November 29, 2006, in Chicago. Midwest Generation appeared and participated in these hearings.

After hearing, on November 30, 2006, Midwest Generation and two other companies moved to dismiss the rulemaking proposal. On January 5, 2007, Midwest Generation withdrew as a party to the motion to dismiss. Numerous public comments were filed before first notice.

For example, on January 5, 2007, comments were received from Midwest Generation (PC 8) and from Midwest Generation and IEPA jointly (PC 9). On January 10, 2007, after the deadline for filing pre-first notice public comments, IEPA filed a motion for leave to file *instanter* a revised joint comment (granted April 19, 2007), attaching the revised joint comment (PC 11) of IEPA and Midwest Generation. In these public comments, Midwest Generation and IEPA jointly proposed the CPS, including the provision with the formula Midwest Generation now seeks to modify after an additional hearing, Section 225.615(g)(4).

On February 16, 2007, the Board received a joint motion to amend the proposed CPS from Midwest Generation and IEPA. In its April 19, 2007 first-notice opinion and order, the Board granted the motion to amend and incorporated all of Midwest Generation's requested rule language. First notice was published in the *Illinois Register* on May 11, 2007 (31 Ill. Reg. 6769 (May 11, 2007)), which began the 45-day first-notice public comment period.

Midwest Generation filed its final public comment on the last day of the first-notice public comment period, June 25, 2007. That two-page public comment raised, for the first time in this rulemaking record, Midwest Generation's issue of air in-leakage. The Board thoroughly considered and discussed the public comment in the Board's second-notice opinion. See Proposed New Clean Air Interstate Rules (Cair) So<sub>2</sub>, No<sub>x</sub> Annual And No<sub>x</sub> Ozone Season Trading Programs, 35 Ill. Adm. Code 225, Subparts A, C, D, E, and F, R06-26, slip op. at 25-26, 36 (July 26, 2007). As the Board noted:

although Midwest Generation states sorbent costs are significant and supply may be limited, it does not include an economic analysis or cost figures to quantify the sought-after benefit. Midwest Generation's proposal also does not illustrate the derivation of the equations or relate the adjustment to the correction for gas temperature. The Board finds that at this point in the rulemaking process, the justification for the equations proposed by Midwest Generation has not been adequately developed and the Board accordingly declines to adopt the change. *Id.* at 36.<sup>1</sup>

In its Motion, Midwest Generation claims that it was only when the company was "unexpectedly told it could not pursue a letter ruling" did the air in-leakage issue become "ripe," concurrent with the close of the public comment period. Motion at 4-5. Midwest Generation claims that, "[i]n practical terms, the expiration of the comment period left [Midwest Generation] without a forum in which to raise its concerns about the sorbent injection issue." *Id.* at 5.

The Board is unaware of the legal effect, if any, of the "letter ruling" that Midwest Generation sought from IEPA. Midwest Generation needed to look no further than the Board, however, for a forum in which to try to substantiate the basis for, and have duly promulgated, a rule amendment. Midwest Generation could have raised its concerns with the Board when the company became aware of the air in-leakage issue, in early April 2007, before the Board had

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<sup>1</sup> The \$3 million dollar annual cost estimate for Midwest Generation makes its first appearance in the Motion, and lacks supporting documentation.

even adopted its first-notice proposal. Midwest Generation could have but failed to seek an extension of the public comment period in an effort to better support its proposed change. Midwest Generation could have but did not request an additional hearing before first notice or during the first-notice period. *See* 5 ILCS 100/5-40(b) (2006); 35 Ill. Adm. Code 102.412(b). Moreover, Midwest Generation filed its Motion for an additional hearing, not with its final public comment on June 25, 2007, but rather on July 30, 2007, after the start of the second-notice period and some five weeks after the close of the public comment period.

It is true that the Board's procedural rules contain a provision allowing rulemaking participants to request additional hearings by motion demonstrating, among other things, that "failing to hold an additional hearing would result in material prejudice to the movant" and that the movant has "exercised due diligence in his participation in the proceeding." 35 Ill. Adm. Code 102.412(b). This general provision, of course, cannot be read in isolation or in contravention of the specific language of the IAPA or, for that matter, other provisions of the Board's procedural rules applicable here:

The Board will accept comments only from JCAR during the second notice period. 35 Ill. Adm. Code 102.202.606(a).

After the beginning of the second notice period, no substantive changes will be made to the proposed regulation, except in response to objections or suggestions from JCAR. 35 Ill. Adm. Code 102.202.606(b).

Under these circumstances, the Board cannot find that Midwest Generation "exercised due diligence in [its] participation *in the proceeding*" with respect to the air in-leakage issue. 35 Ill. Adm. Code 102.412(b) (emphasis added). Had it exercised such due diligence, Midwest Generation might have avoided the "material prejudice" it now claims it will suffer absent a sixth day of hearings in this rulemaking. Furthermore, nothing in this order precludes Midwest Generation from initiating a separate proceeding before the Board by filing a proposal for regulatory amendment or other relief. *See* 415 ILCS 5/27-28.1 (2006).

### **CONCLUSION**

For the reasons articulated above, the Board denies Midwest's Motion to hold an additional hearing.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 9, 2007, by a vote of 4-0.



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John Therriault, Assistant Clerk  
Illinois Pollution Control Board