BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

AMEREN ENERGY GENERATING COMPANY, AMERENENERGY RESOURCES GENRATING COMPANY, AND ELECTRIC ENERGY, INC.,	)	
Petitioners,	)	
v.	)	**PCB 09-021 (Variance-Air)**
ILLINOIS ENVRIONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

John Therriault, Assistant Clerk
Illinois Pollution Control Board
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Illinois Pollution Control Board
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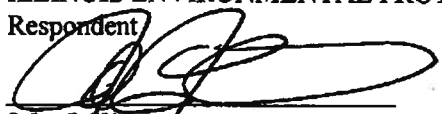
PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board an APPEARANCE, MOTION TO WAIVE NOTICE REQUIREMENT, and RECOMMENDATION, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: November 17, 2008

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Respondent.	)	

APPEARANCE

The undersigned hereby enters his Appearance on behalf of the Illinois Environmental Protection Agency.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: _____
Kent E. Mohr Jr.
Assistant Counsel
Division of Legal Counsel

DATED:

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Respondent.	)	

MOTION TO WAIVE NOTICE REQUIREMENT

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys and, pursuant to 35 Ill. Adm. Code 101.500, 101.502 and 102.402, moves that the Illinois Pollution Control Board ("Board") or its assigned Hearing Officer waive the 14 day publication of notice requirement as set forth in Section 104.214(a) of the Board's procedural rules (35 Ill. Adm. Code 104.214(a)). In support of its Motion, the Illinois EPA respectfully states as follows:

1. On October 1, 2008, Ameren Energy Generating Company, AmerenEnergy Resources Generating Company, and Electric Energy, Inc. (collectively, "Ameren" or "Petitioners"), filed a Petition for Variance with the Board.

2. Pursuant to Section 104.214(a) of the Board's procedural rules, within 14 days after a petition for variance is filed, the Illinois EPA must publish a single notice of such petition in a newspaper of general circulation in the county where the facility or pollution source is located. That section also incorporates the same publication of notice requirement as founding Section 37(a) of the Environmental Protection Act ("Act") (415 ILCS 5/37(a)), though the Act's

corresponding language does not specify a time by which such publication must be completed.

3. The Illinois EPA recently filed a Certification of Publication which documented that the notice of Ameren's petition was published in seven different newspapers, the first appearing on October 27, 2008, and the last on October 30, 2008.

4. The Illinois EPA therefore was late in meeting the 14 day requirement for publication by between 13 and 16 days, depending on the affected newspaper.

5. The Illinois EPA, and specifically the undersigned attorney, regret the delay in completing the publication of notice as required in Section 104.214(a). Though the delay is the fault of the undersigned attorney, there are at least two factors which contributed to the delay. First, the undersigned attorney is currently assisting another state agency in their legal department, and therefore the press of "normal" business has been increased. Second, the Petitioners served the notice of the petition upon two specific staff attorneys at the Illinois EPA; unfortunately, one of those attorneys has been out of the office since September on maternity leave, and the other attorney has also been out of the office for much of early October. Thus, it took several additional days for the Petition to be properly routed to the undersigned attorney.

6. These factors contributed to the delay in the publication of notice, though the responsibility clearly remains upon the Illinois EPA and the undersigned attorney. The 14 day deadline is imposed by Board rule, not by statute, and it should be noted that Section 37(a) of the Act does not specify any particular time period or reflect any sense of urgency related to the requirement of publication. Further, in this case the notices (in different newspapers, owing to different facilities of the Ameren being affected) were ultimately published, approximately two weeks longer than otherwise allowed, though by the end of the same calendar month of the Petition's filing.

7. Due to the relatively short period of time by which the publication of notice went beyond the time allowed, and the fact that no prejudice will befall any party to this action or any entity or person, the minor delay experienced in this situation may be allowed.

WHEREFORE, for the reasons set forth herein, the Illinois EPA respectfully requests that the Board or its assigned Hearing Officer grant this motion to waive the 14 day deadline by which to notice of the Petition must be published in a newspaper of general circulation in the counties in which the affected facilities are located.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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Dated: November 17, 2008

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Respondent.	)	

RECOMMENDATION

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA") by its attorneys, John J. Kim and Kent E. Mohr Jr., in response to the Petition for Variance of AMEREN GENERATING COMPANY, AMERENENERGY RESOURCES GENERATING COMPANY, and ELECTRIC ENERGY, INC. (collectively, "Ameren" or "Petitioners"), from certain requirements of the Multi-Pollutant Standard ("MPS"), 35 Ill. Adm. Code 225.233. Pursuant to Section 37(a) of the Illinois Environmental Protection Act ("Act") [415 ILCS 5/37(a) (2008)] and 35 Ill. Adm. Code 104.216, the Illinois EPA recommends that the Illinois Pollution Control Board ("Board") deny Petitioners' request for variance as proposed, or in the alternative, grant the Petition subject to the terms and conditions contained herein. In support of its recommendation, the Illinois EPA states as follows.

I. INTRODUCTION

1. On October 1, 2008, Petitioners filed a Petition for Variance from a provision of the MPS, 35 Ill. Adm. Code 225.233, for a period beginning January 1, 2013, through

December 31, 2014.

2. Petitioners specifically seek a variance from one of the components of the MPS, Section 225.223(e)(2)(A), on a system-wide basis, rather than on a power station-by-power station basis. Section 225.233(e)(2)(A) provides that MPS sources must comply with a sulfur dioxide ("SO_2") emission rate of 0.33 pounds per million British thermal units ("lb/mmBtu"), or 44% of its baseline, whichever is more stringent.

3. Petitioners own and operate seven coal-fired power plants in the State of Illinois, which are the subject of this Petition, for the generation of electricity in numerous locations in downstate Illinois. These plants include the Coffeen Power Station located in Montgomery County, the Duck Creek Power Station located in Fulton County, the E.D Edwards Power Station located in Peoria County, the Joppa Power Station located in Massac County, the Hutsonville Power Station located in Crawford County, the Meredosia Power Station located in Morgan County, and the Newton Power Station located in Jasper County. Currently, all of these counties are designated attainment for all pollutants. Although, USEPA has proposed to designate Massac County as nonattainment for the daily 2006 fine particulate matter ("PM2.5") standard based on 2005 through 2007 air quality data.

4. Pursuant to Section 104.214 of the Board's procedural rules, the Illinois EPA must provide public notice of any petition for variance within 14 days after filing of the petition. *See*, 35 Ill. Adm. Code 104.214. Section 104.214(a) provides that "the Agency must publish a single notice of such petition in a newspaper of general circulation in the county where the facility or pollution source is located." *See also*, 415 ILCS 5/37(a) (2008). Section 104.214(b) requires the Illinois EPA to serve written notice of a petition on the County State's Attorney, the Chairman of the County Board, each member of the General

Assembly from the legislative district affected, and any person in the county who has in writing requested notice of variance petitions.

5. Regretfully, the Illinois EPA was not able to meet the 14 day period specified in Section 104.214(a) of the Board's procedural rules because the Petition was served on two attorneys at the Illinois EPA who were out of the office, rather than on the Illinois EPA Chief Legal Counsel, which ultimately resulted in exceeding the applicable 14 day period. This situation is also addressed in a separate motion filed concurrently with this Recommendation. As a result, the Illinois EPA has not yet received any written comments, objections or requests for hearing. Should any public comments be received before the end of the comment period, the Illinois EPA will file an amendment to its Recommendation addressing any necessary issues.

6. Pursuant to the Board's procedural rules, "[w]ithin 21 days after the publication of notice, the Agency must file with the Board a certification of publication that states the date on which the notice was published and must attach a copy of the published notice." *See*, 35 Ill. Adm. Code 104.214(f). The Illinois EPA has filed a certification of publication within this timeframe.

7. The Illinois EPA is required to make a recommendation to the Board on the disposition of a petition for variance within forty-five (45) days of filing of the petition or any amendment thereto or thirty (30) days before a scheduled hearing pursuant to 35 Ill. Adm. Code 104.216.

8. Since the filing of the Petition for Variance, the Petitioners and the Illinois EPA have had discussions regarding a modification to the Petition relating to the SO_2 emission limitation for the compliance period of 2013-2014. The results of those discussions

will be addressed below.

II. BACKGROUND

9. As discussed, Petitioners own and operate seven coal-fired power plants for the generation of electricity in downstate Illinois with principal emissions consisting of SO_2, nitrogen oxides ("NO_x"), and particulate matter ("PM").

10. Petitioners' SO_2 emissions are currently controlled through the use of low sulfur coal, blending low sulfur coal with Illinois coal, or add-on controls. (Pet. at 3). Petitioners maintain an existing scrubber (flue gas desulfurization or "FGD") at Duck Creek that is being upgraded and replace with a wet FGD. (Pet. at 3). Petitioners indicate that this will be in service no later than 2010. (Pet. at 3). The Illinois EPA has issued construction permits for the Coffeen Power Station for the installation of two FGDs, schedule to be on-line by 2010. (Pet. at 3). Petitioners state that FGDs at other stations are expected to be online by 2015 to comply with the 0.25 lb/mmBtu emission rate, but will be staggered. (Pet. at 3). Petitioners' NOx emissions are generally controlled by combinations of low sulfur coal, low NOx burners, over-fire air, and selective catalytic reduction systems ("SCRs"). (Pet. at 3).

11. The U.S. Environmental Protection Agency ("USEPA") promulgated regulations requiring reductions of emissions of SO_2 and NOx in the Clean Air Interstate Rule ("CAIR") to address ozone and PM2.5 nonattainment areas in May 2005. *See*, 70 Fed. Reg. 25162 (May 12, 2005). Also in May 2005, the USEPA promulgated the Clean Air Mercury Rule ("CAMR") which required facilities to reduce their mercury emissions. *See*, 70 Fed. Reg. 28606 (May 18, 2005).

12. Following promulgation of the CAMR and CAIR rules, the Illinois EPA

initiated outreach with all Illinois electrical generating units ("EGUs") and other interested parties setting forth its intended regulatory proposals to satisfy the federal requirements of CAIR and CAMR. After considering issues raised in outreach, the Illinois EPA filed two separate rulemaking proposals with the Board addressing those two federal rules. In its rule, Illinois EPA went well beyond CAMR because of the health risks associated with mercury and other concerns regarding the implementation of CAMR alone in Illinois.

13. Subsequently, the Board adopted the Illinois mercury rule at R06-25 (December 21, 2006) with the MPS, and the Illinois CAIR at R06-26 (August 23, 2007) with a Combined Pollutant Standard. As a result, Petitioners endeavored to coordinate the two regulatory requirements and install pollution controls to address both rules. Petitioners have indicated that pollution control equipment necessary to reduce NOx emissions consisted of SCRs and selective non-catalytic reduction ("SNCR") control equipment. To address SO_2 emissions, Petitioners indicated that FGDs and baghouses for SO_2, mercury and PM2.5 control were necessary.

14. Petitioners approached the Illinois EPA with a multi-pollutant proposal to address, in a coordinated fashion, SO_2, NOx and mercury. This proposal was eventually reflected in the Illinois MPS , and adopted by the Board as part of Illinois' mercury rule. As a result, Petitioners voluntarily opted in to the MPS on December 27, 2007, memorializing their commitment to abide by and comply with those requirements. (Pet. at 6).

15. In February 2008, the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") vacated the federal CAMR indicating that the CAMR had not gone far enough in addressing mercury reductions and that USEPA had improperly promulgated CAMR under Section 111 of the Clean Air Act ("CAA") instead of a MACT standard under

Section 112. *See, State of New Jersey v. Environmental Protection Agency*, 517 F.3d 574 (D.C. Cir. 2008). The D.C. Circuit's vacatur of CAMR will result in USEPA's promulgation of CAMR under Section 112.

16. In July 2008, the U.S. Court of Appeals for the District of Columbia Circuit vacated the federal CAIR because of a multitude of inadequacies in the rule, including Section 110(a)(2)(D) issues. *See, State of North Carolina v. Environmental Protection Agency*, 531 F.3d 896 (C.A.D.C. 2008). However, this vacatur does not render invalid USEPA's finding in CAIR that EGUs in Illinois significantly impact downwind states and interfere with their ability to attain one or more of the national ambient air quality standards ("NAAQS"). Furthermore, even though CAIR has been vacated, Illinois must still address attainment of the ozone and PM2.5 NAAQS and must address its impact on downwind states pursuant to Section 110(a)(2)(D).

17. In order to fulfill the requirements of the Illinois mercury rule and MPS, Petitioners must install and operate activated carbon injection systems and/or SCR/FGD systems. The MPS extends the deadline for Petitioners to demonstrate compliance with the 90% mercury reduction requirement until 2015. The MPS establishes declining emission limitations for NOx and SO_2 over a period of time, including a system-wide SO_2 limit of 0.33 lb/mmBtu in 2013, declining to a rate of 0.25 lb/mmBtu in 2015, and precludes trading of any excess NOx and SO_2 allowances that result from the installation and operation of the pollution control equipment necessary to meet applicable emissions limitations. Since the MPS restricts emissions trading, Petitioners must install and operate pollution control equipment.

18. Petitioners indicate that its current system-wide average SO_2 emission rate at

its coal-fired units, based upon 2007 data, is 0.60 lb/mmBtu. (Pet. at 23). Petitioners allege in the Petition that when the FGD projects come online, there will be a gradual reduction of the system-wide SO_2 emission rate to 0.50 lb/mmBtu in 2010, to 0.44 lb/mmBtu by January 2104, to 0.25 lb/mmBtu by January 1, 2015 and then 0.23 lb/mmBtu in 2017. (Pet. at 23). Petitioners also indicate that there will be a gradual reduction in the system-wide annual NOx emission rate to 0.14 lb/mmBtu in 2010, down to 0.11 lb/mmBtu in 2012, and ozone season NOx emission rate of 0.11 lb/mmBtu beginning in 2010. (Pet. at 23).

19. As discussed further *infra*, recently, Petitioners have engaged in conversations with Illinois EPA to discuss the subject of the Petition. As a result of those discussions, and after the filing of the Petition, the parties came to an understanding regarding emission limits applicable to Petitioners that would deviate from the MPS-established figures yet would still be acceptable to the Illinois EPA; however, the figures the parties came to an understanding on are not found or reflected in the Petition.

20. Currently, there are no pending State enforcement actions against the Petitioners.

III. RELIEF REQUESTED

21. As explained above, Petitioners are currently required to comply with the MPS, which establishes control requirements and standards for emissions of NO_x and SO_2, and an alternative to compliance with emissions standards of Section 225.230(a) for mercury. 35 Ill. Adm. Code 225.233(a)(1). Specifically, Petitioners are required to comply with Section 225.233(e)(2)(A), which provides as follows:

> Beginning in calendar year 2013 and continuing in calendar year 2014, for the EGUs in each MPS Group, the owner and operator of the EGUs must comply with an overall SO_2 annual emission rate of 0.33 lbs/million Btu or a rate equivalent to 44 percent of the Base Rate of SO_2 emissions, whichever is more stringent.

35 Ill. Adm. Code 225.233(e)(2)(A). Section 225.233(e)(2)(A) requires an "overall SO_2 annual emission rate" which means Petitioners must average its SO_2 emission rate over its MPS group. Under the regulations, Petitioners' MPS group consists of all EGUs it owned in Illinois as of July 1, 2006.

22. Petitioners only seek relief from the requirement in Section 225.233(e)(2)(A) that it achieve a system-wide SO_2 emission rate of 0.33 lb/mmBtu or a rate that is 44% of its baseline for the period from January 1, 2013, through December 31, 2014. Petitioners are not seeking a change of any of the following requirements: to install sorbent injection on its coal-fired EGUs by July 1, 2009, for purposes of mercury removal; that it remove mercury at its units that are smaller than 90 MW by January 1, 2013; that it meet annual and ozone season-system-wide NO_x emission rates of 0.11 lb/mmBtu by January 1, 2012; or that it meet a system-wide SO_2 emission rate of 0.25 lb/mmBtu by January 2, 2015. (Pet. at 23).

23. Petitioners' primary basis for requesting temporary relief from the requirements of Section 225.233(e)(2)(A) is the "uncertainty surrounding potential greenhouse gas ("GHG") legislation and regulation and its impacts on power generators." (Pet. At 21). Petitioners believe that "because of all the uncertainties surrounding NO_x and SO_2 reductions coupled with anticipated but unknown climate change requirements and because the impact to the environment, if there is any at all, is not significant, Ameren faces arbitrary and unreasonable hardship if it is not granted the variance and allowed the next two years to make responsible decisions regarding the best combinations of actions to address the myriad compliance requirements that will become applicable over the next decade and to minimize the stranded costs while doing so." (Pet. at 24)

24. As discussed *infra,* Petitioners have requested regulatory relief from MPS

Section 225.233(e)(2)(A) based on financial hardship.

IV. FACTS PRESENTED IN THE PETITION

25. As required by Section 104.216(a) [35 Ill. Adm. Code 104.216(a)], the Illinois EPA has investigated the facts alleged in Petitioners' Variance Petition. To date, the Illinois EPA has not received any public comments regarding the Petition. As stated *supra,* the Illinois EPA will file an amendment to its Recommendation should any additional comment be received before the end of the public comment period.

26. The Petition represents that Ameren and the Illinois EPA have engaged in a dialogue regarding Ameren's desire to obtain relief from its obligations under the MPS. Ameren further represents that "Because the parties have agreed to emissions limits that will require permanent change to the rule, Ameren will file a proposal for rulemaking to incorporate the new changes into the MPS." (Pet. at 22-23). In addition, Petitioners allege that since the rulemaking process requires more time than is available to Petitioners to make compliance determinations and investment decisions, this regulatory relief is necessary." (Pet. at 23).

27. First and foremost, Petitioners have requested a variance, but they also concede that further permanent relief will be sought. Such permanent relief generally is provided by an adjusted standard under Section 28.1 of the Act and the Board's procedural rules at 35 Ill. Adm. Code 104.400. However, as noted, the Petitioners intend to follow through with a request to the Board to seek permanent relief of the same relief now being sought in this matter.

28. Second, Petitioners have incorrectly asserted that the parties have agreed to emission limits applicable to Petitioners which "result in greater reductions in emissions than

those contained in the MPS." As to the form and content of the Petition that was filed, the Illinois EPA disagrees with that statement. However, Petitioners and the Illinois EPA have discussed an alternative proposal which will result in a small net environmental benefit, and given the vacatur of CAIR, will provide reductions in 2010 beyond those currently required under federal and State law.

29. Third, Petitioners indicate that they must file a proposal for rulemaking to incorporate the emission limits proposed in its Petition, but argue that this rulemaking process requires more time than available for Petitioners to make compliance decisions and investment decisions. The Illinois EPA filed its Illinois mercury rule revisions, including the MPS, on October 3, 2008 (R09-10). This rule and its MPS are now before the Board; therefore, that proceeding could be considered for addressing Petitioners' desire for permanent relief. It should again be noted that Petitioners voluntarily opted in to compliance with those provisions.

V. ENVIRONMENTAL IMPACT

30. Pursuant to Section 104.216(b)(2), the Illinois EPA is required to state the location of the nearest air monitoring station, where applicable. Exhibit 1 of the Petition for Variance contains a copy of the map included in the Illinois EPA's Illinois Annual Air Quality Report 2006. The locations of the air quality monitoring stations relative to Petitioners' facilities are delineated on page 34 of this report and contained in Petitioners' Exhibit 1.

31. Petitioners state that "any minimal environmental impact resulting from the requested relief will be offset by the new and additional emission rates for SO_2 and NOx" proposed in the Petition. (Pet. at 26). Petitioners do not identify any data or technical

support for this statement. Instead, Petitioners claim that the difference between its proposed emission rates and those contained in the MPS may not even be measureable, and state that the slight increase in its SO_2 emission rate "should" have no significant impact on air quality. (Pet. at 27).

32. Furthermore, Petitioners state that the reductions from a single plant or single company's system of power plants in a single state have little measurable effect and that emissions from the coal-fired electric power generation section as a whole tend to affect a large region of the country with relatively minimal impacts in the immediate vicinity of an individual plant. (Pet. at 26). However, Petitioners also state that it "does not have data that addresses the qualitative and quantitative impact of its activity on human health and the environment." (Pet. at 26).

33. As proposed, Petitioners' alternative limits will result in additional SO_2 for the period of 2013 and beyond. Therefore, based on available information, there will be a negative environmental impact, if the Board were to grant the Petition for Variance as initially proposed. However, based on further discussions with Petitioners, the parties have discussed an alternative multi-pollutant proposal that will result in a slight decrease in SO_2 and NOx emissions, combined, than contained in the MPS, when considering that CAIR has been vacated by the U.S. Court of Appeals for the District of Columbia Circuit.

VI. ARBITRARY AND UNREASONABLE HARDSHIP

34. In considering whether to grant or deny a variance pursuant to Section 35(a) of the Act, the Board is required to determine whether the Petitioners have shown that they would suffer an arbitrary or unreasonable hardship if required to comply with the regulation or permit requirement at issue. The Act provides that "The Board may grant individual

variances beyond the limitations prescribed in this Act, whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." 415 ILCS 5/35(a)(2008).

35. Also, Section 104.216(b)(5) [35 Ill. Adm. Code 104.216(b)(5)] of the Board rules requires the Illinois EPA to estimate the cost that compliance would impose on the Petitioners and on others. *See*, 35 Ill. Adm. Code 104.216(b)(5).

36. Petitioners provide no evidence of its inability to comply with Section 225.233(e)(2)(A). Rather, Petitioners state that "because of all the uncertainties surrounding NO_x and SO_2 reductions coupled with anticipated but unknown climate change requirements and because the impact to the environment, if there is any at all, is not significant, Ameren faces arbitrary and unreasonable hardship if it is not granted the variance and allowed the next two years to make responsible decisions regarding the best combinations of actions to address the myriad compliance requirements that will become applicable over the next decade and to minimize the stranded costs while doing so." (Pet. at 24).

37. As part of this, Petitioners state that their "costs of complying with any mandated federal or state GHG program could have a material impact on its future operations, financial position, or liquidity." (Pet at 24). Further, Petitioners state that "making capital expenditures now for environmental projects at facilities that may be curtailed or shut down in the near short term due to GHG regulation or additional regulation of criteria pollutants is not financially prudent and would divert capital expenditures that could be spent on future regulatory requirements." (Pet. at 21). Petitioners also cite the lengthy procurement process for environmental capital projects necessary for compliance

with the MPS SO_2 limits and indicates that the "potential for stranded costs is extremely high and a risk that Ameren needs to avoid" and Ameren "believes that its ability to determine whether it is appropriate to add pollution controls to units, shut down units, or do both will become clearer within the next two years consistent with the timeline for decisions at both the federal and regional levels on GHG control requirements." (Pet. at 21-22). Petitioners indicate that to reduce SO_2 emissions between now and 2017 is not insignificant and the financial commitments required to meet the 0.33 lb/mmBtu rate is substantial. (Pet. At 24).

38. Petitioners estimate that their capital costs of compliance with the Illinois CAIR, the Illinois mercury rule (including the MPS), Illinois' requirements to address visibility, and Illinois' requirements to address attainment of both the ozone and PM2.5 NAAQS, based on current technology, would be $500 million in 2008, $1.595-2.060 billion in 2009-2021, $135-190 million in 2013-2017, for a total of $2.230-2.750 billion by 2017. (Pet. at 13). Petitioners also stated that the cost of environmental projects at the Newton and E.D. Edwards plants are estimated to be $0.9-1.2 billon, with annual estimated operating costs of $30-40 million. (Pet. at 25). Petitioners assert that they are still reviewing the timing and ultimate amount of capital costs in light of the vacatur of the federal CAMR and CAIR rules. Petitioners have not provided such estimates to date.

39. Petitioners indicate that they must plan and finance the purchase of the necessary pollution control equipment, and that since the MPS requires compliance with specific emissions rates, Petitioners do not have the option of delaying equipment planning and financing through purchases of allowances under the now vacated CAIR to satisfy its compliance obligations until the financial, labor, and equipment markets are more advantageous or Petitioners' financial position is better. (Pet. at 7).

40. The Illinois EPA does not agree that an arbitrary and unreasonable hardship exists in this case for the following reasons: 1) Petitioners voluntarily opted in to the MPS; 2) Petitioners knew or should have known the costs associated with compliance with the MPS; 3) Petitioners are citing speculation over the impact of CAIR, CAMR, and GHG legislation, and recent market conditions as a basis for arbitrary and unreasonable hardship instead of data and technical support; and 4) Petitioners have presented no financial information to support the need for financial conservatism. However, Petitioners did not know that the challenges facing CAIR would result in its vacatur when they opted in to the MPS, and since the long term viability and effect of CAIR and Illinois CAIR rules (35 Ill. Adm. Code 225, Subpts. C, D, and E) are in question, the negotiated relief will result in a small net environmental benefit and will result in emission reductions beginning in 2010.

VII. CONSISTENCY WITH FEDERAL LAW

41. Pursuant to Section 35 of the Act [415 ILCS 5/35 (2008)] and 35 Ill. Adm. Code 104.208(a), all petitions for variances must be consistent with federal law. Petitioners state that "there is no federal law that requires Ameren to comply with an SO_2 emission rate of 0.33 lb/mmBtu in 2013, there is no federal approval of the MPS which would have the effect of raising it to the level of a federal regulations, and the Board's grant of this variance request, therefore, would not be inconsistent with federal law." (Pet. at 30) .

42. The Petitioners are correct that there is currently no authority that would require or address federal approval of the MPS, as that authority which previously existed has since been vacated through court order. However, it is likely that in the future such authority will be reinstated or otherwise rendered applicable again, and even if CAIR is not reinstated in some form, Illinois must still develop a plan to attain the ozone and PM2.5

NAAQS, and more importantly, address its impact on downwind states pursuant to Section 110(a)(2)(D) of the CAA. USEPA made a finding in CAIR that EGUs in Illinois significantly impact downwind states and interfere with their ability to attain one or more of the NAAQS.

43. If there were to be federal review of the proposed relief from the MPS, it is not probable that USEPA would concur with a revision that would result in no net reduction in emission benefits.

VIII. COMPLIANCE PLAN

44. Pursuant to Section 104.204(f), the Petitioners are required to present a detailed compliance plan in the Petition for Variance. Petitioners provide the following compliance plan in its Petition for Variance.

45. Petitioners request the term of the variance to begin on January 1, 2013 and terminate on December 31, 2014, or upon the effective date of a rulemaking amending the MPS as that set of regulations applies to Petitioners' MPS group, whichever is sooner. Petitioners suggest that the following conditions apply prior to or during the term of the variance:

A. Ameren's MPS group is subject to the provisions of Section 225.233(e)(2)(A).

B. Ameren's MPS group shall comply with a system-wide average ozone-season NOx emission rate of 0.11 lb/mmBtu commencing January 1, 2010 and continuing thereafter.

C. Ameren's MPS group shall comply with a system-wide average annual NOx emission rate of 0.14 lb/mmBtu from January 1, 2010,

through December 31, 2011.

D. Ameren's MPS group shall comply with a system-wide average annual NOx emission rate of 0.11 lb/mmBtu commencing January 1, 2012, and continuing thereafter.

E. Ameren's MPS group shall comply with a system-wide annual average SO_2 emission rate of 0.50 lb/mmBtu by January 1, 2010.

F. Ameren's MPS group shall comply with a system-wide annual average SO_2 emission rate of 0.44 lb/mmBtu from January 1, 2014, through December 31, 2014.

G. Ameren's MPS group shall comply with a system-wide annual average SO_2 emission rate of 0.25 lb/mmBtu commencing January 1, 2015, and continuing thereafter.

H. Ameren shall comply with a system-wide annual average SO_2 emission rate of 0.23 lb/mmBtu commencing January 1, 2017.

46. Petitioners propose the following compliance plan in the Petition.

A. Ameren shall notify the Illinois EPA of its anticipated compliance strategy on or before June 1, 2012.

B. On or before June 1, 2012, Ameren shall submit applications for construction permits for FGDs for the units to be controlled to meet the 0.25 lb/mmBtu system-wide SO2 emission rate by January 1, 2015.

47. However, discussions between Petitioners and the Illinois EPA that post-dated the filing of the Petition resulted in Petitioners further proposing that it would agree to a

system-wide annual average SO_2 emission rate of 0.43 (as opposed to 0.44 as set forth in Paragraph 45(F) above) lb/mmBtu from January 1, 2014, through December 31, 2014. The other figures in Paragraph 45 (A-E, G, H) above would remain otherwise unchanged.

IX. RECOMMENDATION AND CONCLUSION

48. Under Section 37 of the Act and Section 104.216(b)(11) of the Board rules, the Illinois EPA is required to make a recommendation to the Board as to the disposition of the petition. *See,* 415 ILCS 5/37(a) and 35 Ill. Adm. Code 104.216(b)(11). The burden of proof in a variance proceeding is on the Petitioners to demonstrate that compliance with the rule or regulation would impose an arbitrary or unreasonable hardship. *See,* 415 ILCS 5/35(a) and 35 Ill. Adm. Code 104.238.

49. As stated *supra,* in its Petition for Variance, Petitioners indicate that they have discussed this matter with the Illinois EPA. As a result of these discussions, Petitioners assert that the Parties have agreed to emission limits applicable to Petitioners which would "result in greater reductions in emissions than those contained in the MPS." This statement is inaccurate insofar as what is provided for in the proposed relief in the Petition. This assertion could only be considered accurate in the event that Petitioners agreed to a system-wide annual average SO_2 emission rate of 0.43 lbs/mmBTU in 2014; taking into account NOx reductions, that rate, along with the other rates and dates proposed in the Petition, would result in a small net environmental benefit through 2020.

50. Further, as discussed *supra,* Petitioners have indicated that they understand they must seek or work towards some permanent rule change to incorporate the proposed new changes to the MPS, since the rulemaking process required more time than is apparently available to Petitioners to make Section 225.233(e)(2)(A) compliance decisions and

investment decisions.

51. The Illinois EPA does not agree with the Petitioners' general proposition that speculation and outside factors have led to the need for seeking the relief now requested, as most if not all of the current factors cited to by the Petitioners are unchanged from the time of the Petitioners opting in to the MPS.

52. Therefore, as presented, the Illinois EPA recommends that the Board deny the Petitioners' request for a variance as that request and associated relief is set forth in the Petition.

53. However, if the Board were to consider granting Petitioners' request for a variance, then the Illinois EPA would not object to such relief so long as the relief included a system-wide annual average SO_2 emission rate of 0.43 lb/mmBtu for the period from January 1, 2014, through December 31, 2014. The Illinois EPA's position is that inclusion of this rate (as opposed to the 0.44 lb/mmBtu rate proposed in the Petition) would result in a net environmental benefit through 2020.

WHEREFORE, for the reasons set forth above, the Illinois EPA recommends that the Board DENY the variance as presented and requested by Petitioners.

Respectfully submitted,

ILLINIOIS ENVIRONMENTAL
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Dated: November 17, 2008

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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on November 17, 2008, I served true and correct copies of an APPEARANCE, MOTION TO WAIVE NOTICE REQUIREMENT, and RECOMMENDATION, by electronically filing with the Illinois Pollution Control Board and by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

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