ILLINOIS POLLUTION CONTROL BOARD
January 22, 2009

AMEREN ENERGY GENERATING COMPANY, AMERENENERGY RESOURCES GENERATING COMPANY, and ELECTRIC ENERGY, INC.,	)	
Petitioners,	)	
v.	)	PCB 09-21 (Variance - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On October 1, 2008, Ameren Energy Generating Company, Amerenenergy Resources Generating Company, and Electric Energy, Inc. (Ameren) filed a petition for a variance (Pet.). The petition seeks a system-wide variance for seven coal-fired electric power plants located throughout Illinois. Ameren seeks relief from 35 Ill. Adm. Code 225.233(e)(2)(A). *See* 415 ILCS 5/35-37 (2006); 35 Ill. Adm. Code 105.206(a). Section 225.233(e)(2)(A) requires Ameren to comply with an overall sulfur dioxide (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, during calendar years 2013 and 2014.

The Illinois Environmental Protection Agency (IEPA) filed a recommendation (Rec.) on November 17, 2008, recommending that the request be denied. IEPA indicated that IEPA would not object to the Board's granting the variance if specific conditions were included. Ameren filed a response to the recommendation (Resp.) on November 25, 2008, and the IEPA filed a reply (Reply) on December 4, 2008. In addition the Board received three public comments one in support of the variance request, one in opposition, and the third from Ameren in response to the comments.

The Board finds that a variance is not appropriate relief for Ameren in that Ameren is seeking to be excused from compliance and does not plan to comply with the provisions of Section 225.233(e)(2)(A). Thus the relief requested is not temporary in nature and is not properly granted pursuant to Title IX of the Environmental Protection Act (Act) (415 ILCS 5/35-38 (2006)). The Board therefore denies the request for variance.

The Board will first explain the procedural background of this proceeding and then rule on a nonsubstantive motion. Next, the Board will explain the statutory and regulatory background. The Board will then summarize the relevant facts and Ameren's petition for variance. The IEPA's recommendation, Ameren's response, and IEPA's reply will then be

summarized in turn. The Board will also summarize the public comments before discussing the Board's reasons for finding that the variance relief is inappropriate.

PROCEDURAL BACKGROUND

October 1, 2008, Ameren filed a petition for a variance. The petition seeks a variance for seven coal-fired electric power plants located throughout Illinois. Ameren seeks relief from 35 Ill. Adm. Code 225.233(e)(2)(A).

On November 17, 2008, the IEPA filed a recommendation, asserting that Ameren's request be denied. IEPA indicated that IEPA would not object to the Board's granting the variance if specific conditions were included. In addition, the IEPA filed a motion to waive the notice requirement (Mot.) found in Section 104.214(a) of the Board's rules. 35 Ill. Adm. Code 104.214(a).

On November 25, 2008, Ameren filed a response to the IEPA's recommendation and the motion (Mot. Resp.). On December 4, 2008, the IEPA filed a motion for leave to file a reply and a reply. The motion for leave to file the reply is granted.

The Board also received three public comments. The first filed on December 15, 2008, by the Respiratory Health Association of Metropolitan Chicago, Sierra Club of Illinois, Natural Resources Defense Council, the American Bottom Conservancy and the Environmental Law and Policy Center (Public Interest Commentators) was docketed as PC 1. The second filed on December 22, 2008, by the Illinois AFL-CIO, International Brotherhood of Electrical Workers and the United Mine Worker of America (Unions) was docketed as PC 2. The third filed on December 30, 2008, by Ameren was docketed as PC 3.

MOTION TO WAIVE NOTICE REQUIREMENTS

Section 37(a) of the Act requires that:

> The Agency shall promptly give written notice of such petition to any person in the county in which the installation or property for which variance is sought is located who has in writing requested notice of variance petitions, the State's attorney of such county, the Chairman of the County Board of such county, and to each member of the General Assembly from the legislative district in which that installation or property is located, and shall publish a single notice of such petition in a newspaper of general circulation in such county. 415 ILCS 5.37(a) (2006)).

The Board rules provide:

> Within 14 days after the petition is filed, 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 [415 ILCS 5/37(a)]. 35 Ill. Adm. Code 104.214(a).

IEPA acknowledges that IEPA did not meet the 14-day notice publication requirement of the Board rules, while taking responsibility for the delay. Mot. at 2. IEPA notes several factors that led to the delay; however, ultimately notice was provided. Mot. at 2-3. IEPA points out that the Board rules echo the requirements of the statute, but the statute does not specify a time by which publication must be completed. Mot. at 1-2. Thus, IEPA claims that the Board rule imposes the 14-day deadline and not the statute. Mot. at 2. IEPA argues that no prejudice will occur due to the late publication of the notice and asks that the Board waive the 14-day deadline. Mot. at 3.

Ameren characterizes the motion as more appropriately a motion for extension of time and Ameren does not object to the motion. Mot. Resp. at 2. Ameren claims that Ameren and the Board have potentially been prejudiced by the late publication because of the Board's decision deadline in this case and the potential of a late request for hearing. *Id*.

The Board finds that there has been no prejudice due to the late notice publication. The statutory requirement has been met in that notice was published and a request for hearing was received. Also as two entities have filed public comments regarding the variance, clearly the notice to the public has been sufficient. Therefore, the Board waives the regulatory requirement found in Section 104.214(a) that notice be published within 14-days after the petition is filed.

LEGAL FRAMEWORK

The Board will discuss the general statutory framework for variances and then detail the regulatory background relevant to this proceeding.

Statutory Background

A "variance is a temporary exemption from any specified rule, regulation, requirement or order of the Board." *See* 35 Ill. Adm. Code 104.200(a)(1). Under Title IX of Act (415 ILCS 5/35-38 (2006)), the Board is responsible for granting variances when a petitioner demonstrates that immediate compliance with the Board regulation would impose an "arbitrary or unreasonable hardship" on petitioner. *See* 415 ILCS 5/35(a) (2006).

The Board may grant a variance, however, only to the extent consistent with applicable federal law. *See* 415 ILCS 5/35(a) (2006). Further, the Board may issue a variance with or without conditions, and for only up to five years. *See* 415 ILCS 5/36(a) (2006). The Board may extend a variance from year to year if petitioner shows that it has made satisfactory progress toward compliance with the regulations from which it received the variance relief. *See* 415 ILCS 5/36(b) (2006).

Specifically, the Act provides:

> To the extent consistent with applicable provisions of the . . . Clean Air Act . . . and regulations pursuant thereto . . .:
>
> 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. However, the Board is not required to find that an arbitrary or unreasonable hardship exists exclusively because the regulatory standard is under review and costs of compliance are substantial and certain. 415 ILCS 5/35(a) (2006); *see also* 35 Ill. Adm. Code 104.200, 104.208, 104.238.
>
> In granting a variance the Board may impose such conditions as the policies of this Act may require.
>
> ***
>
> [A]ny variance granted pursuant to the provisions of this Section shall be granted for such period of time, not exceeding five years, as shall be specified by the Board at the time of the grant of such variance, and upon the condition that the person who receives such variance shall make such periodic progress reports as the Board shall specify. Such variance may be extended from year to year by affirmative action of the Board, but only if satisfactory progress has been shown. 415 ILCS 5/36(a), (b) (2006); *see also* 35 Ill. Adm. Code 104.200, 104.210, 104.242, 104.244.

The Act requires IEPA to provide public notice of a variance petition, including notice by publication in a newspaper of general circulation in the county where petitioner's facility is located. *See* 415 ILCS 5/37(a) (2006); 35 Ill. Adm. Code 104.214. The Board will hold a hearing on the variance petition (1) if petitioner requests a hearing, (2) if IEPA or any other person files a written objection to the variance within 21 days after the newspaper notice publication, together with a written request for hearing, or (3) if the Board, in its discretion, concludes that a hearing would be advisable. *See* 415 ILCS 5/37(a) (2006); 35 Ill. Adm. Code 104.224, 104.234.

The Act requires IEPA to appear at hearings on variance petitions (415 ILCS 5/4(f) (2006)) and to investigate each variance petition and "make a recommendation to the Board as to the disposition of the petition" (415 ILCS 5/37(a) (2006); 35 Ill. Adm. Code 104.216). The "burden of proof shall be on the petitioner." 415 ILCS 5/37(a) (2006); *see also* 35 Ill. Adm. Code 104.200(a)(1), 104.238(a). In a variance proceeding then, the burden is on the petitioner to prove that immediate compliance with Board regulations would cause an arbitrary or unreasonable hardship that outweighs public interest in compliance with the regulations. *See* Willowbrook Motel v. PCB, 135 Ill. App. 3d 343, 349-50, 481 N.E.2d 1032, 1036-1037 (1st Dist. 1985).

Regulatory Background

After promulgation of regulations by the United States Environmental Protection Agency (USEPA) requiring reduction of nitrogen oxide (NO_x), sulfur dioxide (SO_2), and mercury (*see* 70 F.R. 25162 (May 12, 2005) and 70 F.R. 28606 (May 18, 2005)), the IEPA proposed rules to the Board to implement both federal rules. Pet. at 4-5; Rec. at 4-5. The first rulemaking was Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources

(Mercury), R06-25 (Dec. 21, 2006). The second was Proposed New Clean Air Interstate Rules (CAIR) SO_2, NO_x Annual and NO_x Ozone Season Trading Programs, 35 Ill. Adm. Code 225, Subparts A C, D, E, and F, R06-26, (Aug. 23, 2007). Ameren sought to control emissions from mercury, SO_2, and NO_x in a coordinated manner and approached the IEPA with an amendment to the rules that would allow a multi-pollutant standard (MPS). Pet. at 5-7; Rec. at 5. The Board included the provision in the final mercury rule. *Id*.

Specifically, the Board's rules provide in Section 225.233(a):

> As an alternative to compliance with the emissions standards of Section 225.230(a), the owner of eligible EGUs may elect for those EGUs to demonstrate compliance pursuant to this Section, which establishes control requirements and standards for emissions of NO_x and SO_2, as well as for emissions of mercury. 35 Ill. Adm. Code 225.233(a)(1).

Section 225.233(e)(2)(A) provides:

> 2) SO_2 Emission Standards.
>
> A) 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.
>
> B) Beginning in calendar year 2015 and continuing in each calendar year thereafter, for the EGUs in each MPS Grouping, the owner and operator of the EGUs must comply with an overall annual emission rate for SO_2 of 0.25 lbs/million Btu or a rate equivalent to 35 percent of the Base Rate of SO_2 emissions, whichever is more stringent. 35 Ill. Adm. Code 225.233(e)(2)(A) and (B).

FACTS

Ameren owns seven coal-fired power plants that generate electricity in several locations in Illinois. Pet. at 2. The plants are:

> Coffeen Power Station, Montgomery County
> Duck Power Station, Fulton County
> E.D. Edwards Power Station, Peoria County
> Joppa Power Station, Massac County
> Hutsonville Power Station, Crawford County
> Meredosia Power Station, Morgan County
> Newton Power Station, Jasper County. *Id*.

The power stations are all located in counties designated attainment for all air pollutants. Pet. at 2-3. Ameren employs approximately 985 persons at the seven power stations. Pet. at 4.

The principal emissions at Ameren's coal-fired plants are SO_2, NO_x, and particulate matter (PM). Pet. at 3. Ameren currently controls SO_2 through the use of low sulfur coal or blending Illinois coal with low sulfur coal. *Id*. There is an existing flue gas desulfurization (FGD) at Duck Creek that will be upgraded and retrofitted by 2010. *Id*. Construction permits have been issued for FGDs at the Coffeen Power Station also scheduled to go online in 2010. *Id*. FGDs are expected to be online at the other stations between 2010 and 2015. *Id*.

Ameren controls NO_x emissions using various combinations of low sulfur coal, low NO_x burners, over-fire air, and selective catalytic reductions systems (SCRs). Pet. at 3. PM is controlled through the use of flue gas conditioning and electrostatic precipitators. *Id*.

PETITION FOR VARIANCE

The Board will summarize Ameren's petition beginning with a brief background. Next the specific relief requested will be discussed followed by Ameren's compliance plan. The Board will conclude this section by discussing consistency of the requested relief with federal law and the arbitrary and unreasonable hardship claimed by Ameren.

Background

Ameren's petition requests a variance from the SO_2 portion of the MPS in 35 Ill. Adm. Code 225.233(e)(2)(A). Pet. at 1. The MPS was crafted with input from Ameren during the Board's mercury rulemaking, which was driven in part by the federal Clean Air Mercury Rule (CAMR). *See* Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury), R06-25 (Dec. 21, 2006); Pet. at 6. In 2007, Ameren opted into the MPS, which requires Ameren's seven coal-fired electric power plants to meet a system-wide SO_2 emission rate of 0.33 lb/mmBtu for the years 2013 – 2014. Pet. at 6.

Since Ameren opted into the MPS, the U.S. Court of Appeals vacated both the federal CAMR and CAIR in February and July 2008, respectively. Pet. at 8. Ameren states that this has caused uncertainty in the final requirements for not only SO_2 and NO_x emissions trading programs, but also the ozone and fine particulate matter ($PM_{2.5}$) control programs. Pet. at 8-11. In addition, Ameren cites to activities surrounding the promulgation of potential federal or regional regulation of greenhouse gases (GHG) that also add to the uncertainty. Pet. at 14-21.

Prior to the CAMR and CAIR rules being vacated, Ameren had determined a comprehensive approach to the Illinois mercury rule that would utilize emissions control technologies with co-benefits for reducing mercury, NO_x and/or SO_2. Pet. at 5 and 9-13. With the loss of Illinois CAIR, Ameren can no longer rely on allowances under CASA (Clean Air Set-Aside) that would have helped to offset the cost of the planned control equipment. Pet. at 9-11.

Relief Requested

Ameren states in the petition that: "[d]espite the Board's usual practice, the provisions of the regulations from which Petitioners here seek relief require that Ameren seek this relief on a

system-wide basis, rather than on a power station-by-power station basis." Pet. at 1. To achieve compliance with the deadlines of Section 225.233(e)(2)(A), Ameren must begin the procurement process for control equipment in the beginning of 2009. Pet. at 21-22. Ameren's request for variance is focused on allowing Ameren more time to evaluate its financial position and the best combination of locations and capital equipment to comply with the system-wide 0.25 lb/mmBtu SO_2 rate required for 2015. Pet. at 21-25 Ameren maintains that the uncertainties surrounding NO_x and SO_2 reductions coupled with potential GHG requirements that might lead Ameren to curtail or shut down coal-fired facilities or switch to natural gas complicate decisions which must be made to meet the requirements of Section 225.200(e)(2)(A). *Id*. and Pet. at 20-21. Ameren explains that funds committed now and in the near future to SO_2 control equipment associated with the coal-fired power plants could result in major stranded investments. Pet. at 19-20.

Ameren has met with the IEPA and indicated they have reached an agreement on emission limits to be incorporated in an upcoming rulemaking that will result in greater reductions in emissions than those contained in the MPS. Pet. at 22. Because of the time involved in the rulemaking process, Ameren is seeking immediate relief in the form of a variance to provide additional time to make decisions on compliance options and financial investments. Pet. at 23. The petition clarifies that Ameren does not seek a change in the requirements for the system-wide SO_2 emission rate of 0.25 lb/mmBtu by 2015, or the requirements for mercury removal and NO_x emission rates.

Specifically, Ameren seeks a variance for the period beginning on January 1, 2013. Ameren requests that the variance terminate at midnight on December 31, 2014, or upon the effective date of a rulemaking amending the MPS as that set of regulations applies to Ameren's MPS Group, whichever is sooner. Pet. at 28. Ameren recommends the following conditions:

1. Ameren's MPS Group is not subject to the provisions of Section 225.233(e)(2)(A).
2. Ameren's MPS Group shall comply with a system-wide average ozone season NO_x emission rate of 0.11 lb/mmBtu commencing January 1, 2010 and continuing thereafter.
3. Ameren's MPS Group shall comply with a system-wide average annual NO_x emission rate of 0.14 lb/mmBtu from January 1, 2010, through December 31, 2011.
4. Ameren's MPS Group shall comply with a system-wide average annual NO_x emission rate of 0.11 lb/mmBtu commencing January 1, 2012, and continuing thereafter.
5. 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.
6. 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.
7. 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.

8. Ameren shall comply with a system-wide annual average SO_2 emission rate of 0.23 lb/mmBtu commencing January 1, 2017. Pet. at 28-29.

Compliance Plan

Ameren's plan to comply with the regulations is to notify the IEPA, on or before June 1, 2012, of Ameren's anticipated compliance strategy. Pet. at 29. Then on or before June 1, 2012, Ameren must submit applications for construction permits for FGDs for the units to be controlled to meet the 0.25 lb/mmBtu system-wide SO_2 emission rate by January 1, 2015 to the IEPA. *Id.* Ameren states that the variance request is four years before the period for which a variance is sought because compliance activities need to begin now. Pet. at 25.

Consistency with Federal Law

Ameren asserts that the variance request is consistent with federal law and specifically the Clean Air Act (42 U.S.C. §§ 7401 *et seq.*). Pet. at 29. Ameren notes that the MPS was submitted to USEPA as a part of the Illinois Mercury rule; however with CAMR being vacated, USEPA has no authority to approve or disapprove the Mercury rule. *Id.* Ameren further asserts that there is no federal law that requires Ameren to comply with SO_2 emission rates of 0.33 lb/mmBtu in 2013. *Id.*

Arbitrary and Unreasonable Hardship

Ameren states: "Ameren faces an 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 to minimize stranded costs while doing so." Pet. at 24. Ameren maintains that the financial commitment meeting the standard would require is substantial and there is uncertainty over the best approach. *Id.*

Ameren opines that any minimal environmental impact resulting from the requested relief will be offset by the emission rates Ameren proposes in the variance. Pet. at 26. "Ameren does not have data that addresses the qualitative and quantitative impact" of Ameren's activities on human health and the environment. *Id.* However, Ameren notes that USEPA found that emissions from plants such as Ameren's tend to affect a large region with minimal impacts on the immediate vicinity. *Id.*

IEPA RECOMMENDATION

The IEPA recommends that the Board deny Ameren's request for a variance as proposed or in the alternative grant the petition subject to conditions contained in the recommendation. Rec. at 1. Specifically, the IEPA states:

> If the Board were to consider granting Ameren's request for a variance, IEPA 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. Rec. at 18.

IEPA disagrees with Ameren that the requested relief is necessitated by "speculation and outside factors" because IEPA asserts most of the current factors are unchanged from the time that Ameren opted into the MPS program. Rec. at 18.

The IEPA notes that Ameren concedes that while seeking a variance with this petition, permanent relief will also be sought. Rec. at 9. The IEPA opines that permanent relief is generally provided by an adjusted standard pursuant to Section 28.1 of the Act (415 ILCS 5/28.1 (2006)). *Id*. Furthermore, the IEPA recently filed a proposed rule revision to the mercury requirements and that proceeding could be used to address Ameren's desire for permanent relief. Rec. at 10.

The IEPA also takes issue with assertions in the petition that IEPA and Ameren have agreed to emission limits applicable to Ameren that would result in greater reduction in emissions than those contained in the MPS. Rec. at 9-10. IEPA concedes that Ameren and the IEPA have discussed an alternative proposal that will give some net environmental benefit and provide reduction in 2010 beyond those currently required. Rec. at 10.

The IEPA points out that Ameren does not identify any data or technical support for Ameren's statement that any environmental impact will be offset by the emission rates proposed in the variance. Rec. at 10-11. IEPA asserts that the variance will result in additional SO_2 emissions for the period beyond 2013 and therefore there will be a negative environmental impact. Rec. at 11. However, IEPA maintains that considering that CAIR has been vacated, IEPA and Ameren have discussed an alternative multi-pollutant proposal that will decrease SO_2 and NO_X. *Id*.

The IEPA maintains that Ameren has provided no evidence of Ameren's inability to comply with Section 225.233(e)(2)(A). Rec. at 12. IEPA asserts that instead Ameren cites to uncertainties surrounding SO_2 and NO_X reductions coupled with anticipated but unknown climate change requirements. *Id*. IEPA notes that Ameren further claims that potential federal or state mandated GHG programs could impact Ameren's financial and operational plans. *Id*. Based on Ameren's statements, the IEPA does not believe that an arbitrary or unreasonable hardship exists. Rec. at 14. The IEPA states that Ameren voluntarily opted into the MPS and should have known the costs involved with the program. *Id*. IEPA also states that Ameren provides no data, technical support, or financial information that indicates compliance would result in an arbitrary or unreasonable hardship.

The IEPA agrees that the variance can be granted consistent with federal law. Rec. at 14-15. The IEPA notes that Ameren has included a compliance plan and since the filing of the petition has discussed a system wide annual SO_2 emission rate of 0.43 lb/mmBtu. Rec. at 16-17.

RESPONSE TO RECOMMENDATION

In response to the IEPA's recommendation, Ameren states that Ameren accepts the IEPA's condition for a system wide annual SO_2 emission rate of 0.43 lb/mmBtu. Resp. at 1. Ameren also responds to comments made by IEPA on the issues of economics, arbitrary and unreasonable hardship, environmental impact, and permanent relief, as summarized below. Resp. at 1-5.

On economics and arbitrary and unreasonable hardship, Ameren states that an economic crisis exists and the decision to seek relief was not taken lightly by Ameren. Resp. at 2-3. Ameren indicates that the capital costs for compliance with CAIR and the mercury rule, prior to the federal rules being vacated, were provided. Resp. at 2. Ameren asserts that the size of Ameren's credit facilities was affected by the recent financial crisis and compliance with the environmental obligations is dependent upon securing capital funding. *Id*. Ameren opines that the relief sought would allow Ameren to defer approximately $500 million in environmental capital expenditures scheduled for 2009-2012 timeframe until the regulatory landscape is better defined and stability in the credit market returns. *Id*. Along with the IEPA's admission that the long-term effect of CAIR is in question, these factors establish that compliance with the MPS would impose an arbitrary or unreasonable hardship on Ameren. Resp. at 3-4.

On the issue of environmental harm, Ameren disagrees with IEPA's concern that the requested relief will result in additional SO_2 emissions for the period 2013 and beyond. Resp. at 4. Ameren notes that the requested relief does not change the SO_2 emission rate for 2015, only the rate for 2013. *Id*. In exchange for the requested relief, Ameren asserts that Ameren has agreed to rate commitments for both SO_2 and NO_x emissions. *Id*. Furthermore, Ameren notes that IEPA concedes that given the vacatur of CAIR, the emission rate that Ameren has agreed to would result in a small net environmental benefit. *Id*. Ameren argues that the IEPA's contention that Ameren did not identify data or technical support that the SO_2 emissions would offset any environmental impact, is inconsistent with the IEPA's statements found elsewhere in the recommendation. *Id*.

Ameren notes that IEPA commented that permanent relief is available through the adjusted standard process. Resp. at 5. However, Ameren reiterates that immediate relief, which is available through the variance process given the statutory decision deadline, is necessary. Resp. at 5. Ameren will seek permanent relief, "perhaps" in the mercury rulemaking currently pending before the Board. *Id*.

IEPA'S REPLY

IEPA's reply states that IEPA is not "amending or otherwise modifying the content" of the recommendation. Reply at 2. Further, IEPA is unable to respond to the comments of Ameren regarding Ameren's credit situation, as IEPA has no information to contradict or confirm Ameren's representations. Reply at 2-3. IEPA directs the Board to Ameren's agreement to the condition suggested by the IEPA that a system wide annual SO_2 emission rate of 0.43 lb/mmBtu apply from January 1, 2014 through December 31, 2014. Reply at 3. IEPA reiterates that if the Board includes such a condition, IEPA "does not object to the variance" requested by Ameren. *Id*.

PUBLIC COMMENTS

The Board received three public comments. The first from Public Interest Commentators (PC 1) and a second from the Unions (PC 2). In addition Ameren filed a public comment (PC 3) to respond to the comments from the Public Interest Commentators. The Board will summarize each comment below.

Public Interest Commentators

The Public Interest Commentators argue that under the Act and Board rules, Ameren's petition for a variance can only be granted if Ameren is able to present "adequate proof" that compliance with the rule would "impose an arbitrary or unreasonable hardship." 415 ILCS 5/35(a) (2006); 35 Ill. Adm. Code 104.200. PC 1 at 1. Further the burden of proof is on Ameren to establish that compliance would impose an arbitrary or unreasonable hardship. *Id*, citing 35 Ill. Adm. Code 104.238. Public Interest Commentators assert that in assessing the petition, the Board holds Ameren to a high standard, *i.e.* "proof that the claimed hardship of compliance with existing regulations outweighs the public interest in attaining compliance." PC 1 at 2, citing Plexus Scientific Corp. v. IEPA, PCB 01-120 (July 12, 2001); Monsanto v. PCB, 67 Ill. 2d 276, 292, 367 N.E.2d 684 (1977); Willowbrook Motel Partnership v. PCB, 135 Ill. App. 3d 343, 350, 481 N.E.2d 1032, 1037 (1st. Dist. 1985).

Public Interest Commentators indicate that in Willowbrook, the court explained that the burden on the petitioner is "heavy" and doubts should be resolved against the variance and in favor of compliance. PC 1 at 2, citing Willowbrook, 135 Ill. App. 3d at 349-50. Public Interest Commentators assert that Ameren has not proven that compliance with the standard would impose an arbitrary or unreasonable hardship and Ameren has failed to adequately address environmental impacts. PC 1 at 2-3. Therefore, Public Interest Commentators maintain that the Board should deny the requested variance.

Public Interest Commentators note that Ameren cites to current uncertainties in environmental law as support for the variance request. However, Public Interest Commentators assert that uncertainty about future environmental regulations is constant and should not justify the granting of a variance. Public Interest Commentators rely on Citizens Utility Co. v. IEPA, PCB 83-124 (Apr. 19, 1984) in which the Board stated: "[a]lthough revisions to standards do occasionally occur, the Board cannot grant variances based on a petitioner's hope that a particular set of standards will be changed in the future." PC 1 at 3, citing Citizens Utility, PCB 83-124, *aff.d sub nom* Citizens Utility Co. v. PCB, 134 Ill. App. 3d 111, 115, 479 N.E. 2d 1213 (3rd Dist. 1985). Public Interest Commentators note that the court stated: "[i]f the speculative prospect of future changes in the law were to constitute an arbitrary and unreasonable hardship, then the law itself would be emasculated with variances, as there is always the prospect for future change." *Id*. Public Interest Commentators indicate that IEPA also objected to Ameren's attempt to justify the variance on the basis of uncertainties in the law. PC 1 at 3-4. Public Interest Commentators maintain that legal uncertainty does not create an arbitrary or unreasonable hardship. PC 1 at 4.

Furthermore, Public Interest Commentators argue that the uncertainty claimed by Ameren "is nothing new" and that when Ameren opted into the MPS there was similar

uncertainty. PC 1 at 4. Public Interest Commentators assert that climate change regulations have been on the agenda since at least April 2007 and challenges to CAMR and CAIR were raised in August 2005. *Id*. Thus, Public Interest Commentators claim that the possibility of change to CAMR and CAIR is nothing Ameren could not have predicted when opting to make use of the MPS. *Id*. Also Public Interest Commentators opine that uncertainty about the future of coal-fired plants has been a part of the regulatory landscape. *Id*. Public Interest Commentators note that to the extent environmental uncertainty should be considered, the regulatory changes Ameren is pointing to will subject Ameren to more stringent rules rather than less. PC 1 at 5.

Public Interest Commentators indicate that it is important to note that the MPS was not simply rules made applicable to Ameren, but that the MPS was a regulatory compromise structured with direct input from Ameren. PC 1 at 4-5. Moreover, Public Interest Commentators state that Ameren's reliance on assertion of plant closures is misplaced as the MPS took the possibility of plant shutdowns into consideration. PC 1 at 6. Public Interest Commentators maintain that Ameren is apparently dissatisfied with the three alternative methods of compliance in the mercury rules and is attempting to develop a fourth option. *Id*. Public Interest Commentators urge the Board not to allow this. *Id*.

Public Interest Commentators do not deny that the US and global economies are facing significant stress; however Public Interest Commentators assert that environmental regulations put into place to protect the public health and environment are not enforceable only in good times. PC 1 at 6. Public Interest Commentators argue that Ameren's petition fails to provide adequate proof that Ameren's economic situation has changed to an extent that compliance with the MPS standards would now cause an undue or arbitrary hardship. PC 1 at 7. Public Interest Commentators note that Ameren refers to recent events on Wall Street and that in Ameren's response, Ameren discusses further recent economic downturns. *Id*. However, Public Interest Commentators maintains that Ameren does not present any evidence that compliance would create an arbitrary or unreasonable hardship. *Id*.

Public Interest Commentators claims that Ameren gives "short shrift" to the potential environmental impacts of the proposed variance even though Ameren bears the burden of proof. PC 1 at 8. Public Interest Commentators argues that Ameren's statements concerning the environmental impact are not sufficient to meet the burden of proof and Public Interest Commentators cites IEPA v. PCB, 95 Ill. App. 3d 400, 405-06, 420 N.E.2d 245 (3rd Dist. 1981) for support. PC 1 at 8-9. Public Interest Commentators argue that the variance will in some years have a more lenient emission standard than the MPS (2013 and 2014) and in some years a more stringent emission rate (2010-2013 and post 2017). PC 1 at 9-10. Public Interest Commentators claim that the lack of data in the record on operational use of plants and emissions as well as air quality make it impossible to confirm Ameren's claim. PC 1 at 10.

Public Interest Commentators also express concern that granting the variance will "open the door" to additional claims by other coal-fired plants. PC 1 at 10. Public Interest Commentators opine that if speculation over future regulation and legislation are sufficient, the Board will be "opening the floodgates to variance requests" from a variety of sources in flux. PC

1 at 10-11. Public Interest Commentators urge the Board to deny the variance or in the alternative to hold a hearing to require Ameren to meet the burden of proof. PC 1 at 11.

Unions

The Unions support Ameren's request for variance and note that Ameren has a "strong record of significant emissions reductions". PC 2 at 1. The Unions argue that Ameren's variance request was necessitated by uncertainty in federal courts and the economic crisis. *Id*. The Unions maintain that almost every industry sector has been impacted by the economic crisis and granting the variance would allow Ameren to defer approximately $500 million in capital expenditures. *Id*. The Unions urge the Board to remember that Ameren has provided jobs for more than a century to Illinoisans and paid taxes critical to the support of schools and city governments. *Id*.

Ameren

In response to the comments of Public Interest Commentators, Ameren states that Ameren has met the applicable burden of proof and the request for hearing is untimely. PC 3 at 2. Ameren asserts that Public Interest Commentators' claims are without merit in that Ameren has established an arbitrary and unreasonable hardship and the variance will have a net environmental benefit. *Id*.

Ameren agrees with Public Interest Commentators that in granting a variance the Board holds a petitioner to a high standard as the Board must balance individual hardship against environmental impact. PC 3 at 2, citing Monsanto Co. v. PCB, 67 Ill. 2d 276, 293, 367 N.E.2d 684 (1997). Ameren asserts that economic hardship is sufficient to establish individual harm. PC 3 at 2. Ameren maintains that the Board has "consistently held that economic hardship" is sufficient cause to allow a variance where there is no or minimal environmental impact. *Id*, citing Village of Lake Zurich v. IEPA, PCB 97-77 (Feb. 20, 1997); City of Farmington v. IEPA, PCB 03-6 (Nov. 7, 2002).

Ameren asserts that the individual hardship Ameren "must endure to meet Section 225.233(e)(2)(A) is arbitrary and unreasonable given the remand of CAIR and CAMR and political certainty of future greenhouse gas legislation." PC 3 at 3. Further, Ameren maintains that none of these circumstances existed when the MPS was adopted. *Id*. Ameren reiterates that the economic downturn was also not foreseeable and has only grown worse since the filing of the variance petition. *Id*. Ameren opines that the economic hardship of compliance with Section 225.233(e)(2)(A) "could very likely become a public hardship if Ameren were forced to shut down plants as a consequence." PC 3 at 3-4.

Ameren argues that the "dramatically changing and seriously unsettled regulatory environment for the coal-fired electric generating industry" supports Ameren's assertion of arbitrary and unreasonable hardship. PC 3 at 4. Ameren notes Public Interest Commentators' reference to Citizens Utility, but maintains that the Board has actually relied on federal regulatory uncertainty as grounds for finding an arbitrary and unreasonable hardship. PC 3, at 4, citing Village of Lake Zurich. Unlike Citizens Utility, Ameren claims that in this case there is

no doubt that the remand of CAIR and vacatur of CAMR have disrupted the air regulatory schemes for power plants and the remand of CAIR leaves even more uncertainty. *Id*. Further, Ameren claims that unlike in Citizens Utility, the prospect of change is not speculative but absolute and the change could require new technology that would "strand" investments in SO_2 pollution control equipment. PC 3 at 4-5.

As to Public Interest Commentators' claim that the mercury rule anticipated plant shutdowns, Ameren notes that the MPS does not address shutdowns. PC 3 at 7. Ameren has elected to reduce mercury emissions using the MPS and therefore cannot use the shutdown provision in Section 225.235 as those are alternatives for compliance with the mercury rule. *Id*. Ameren states that the MPS requires a different approach. *Id*.

Ameren maintains that Public Interest Commentators ignore the dire economic conditions. PC 3 at 8. Ameren again lists potential costs for compliance with the standard and that due to procurement and engineering lead times, Ameren must begin to comply immediately. PC 3 at 9. Ameren argues immediate compliance with the rule could create an imminent and substantial hardship due to the financial crisis and expected drop in power prices. PC 3 at 9-10. As a result of the drop in prices, Ameren states that Ameren's stock has been downgraded. PC 3 at 10. Ameren also claims that only regulated entities within Ameren's corporate groups, which do not include the MPS group, have received long-term financing in the last few months. *Id*.

Ameren argues that the Board can balance economic hardship alone against environmental impact to determine if a petitioner has demonstrated an arbitrary or unreasonable hardship. PC 3 at 12. Ameren notes that the Board has considered economic conditions but has refused to find arbitrary and unreasonable hardship where petitioner's economic loss was self-imposed. *Id*, citing GTE Automatic Electric, Inc. v. IEPA, PCB 80-225 (Sept. 3, 1981) and Willowbrook, 135 Ill. App. 3d at 345. Ameren maintains that economic crisis is far from self-imposed and Ameren had no way of knowing the turn the market would take at the time the MPS was designed. PC 3 at 12.

Ameren claims that the Ameren has worked very hard to minimize the environmental impact of the variance. PC 3 at 12. Ameren notes that as with developing the MPS, Ameren worked with IEPA and Ameren has agreed to a compliance plan with more stringent emission rate requirements for two pollutants. PC 3 at 4. Ameren asserts that the compliance plan will be "at least environmentally neutral, if not more beneficial." PC 3 at 12. Ameren notes that the MPS addresses regional impacts on air emissions rather than individual impacts. *Id*. Ameren notes that USEPA recognizes that reductions from a single plant or even a single company have little measurable effect downwind. PC 3 at 12-13. Ameren maintains that the variance will still result in significant reductions of SO_2 and NO_x as well as mercury beyond those required outside the MPS. PC 3 at 14.

Finally Ameren argues that the request for hearing by Public Interest Commentators is untimely and urges the Board to deny the request. PC 3 at 13-14.

DISCUSSION

The Board will first discuss the merits of the petition, and then will rule on the request by the Public Interest Commentators (PC 1) that the Board order a hearing if the Board does not deny the request for variance

A variance is one of three mechanisms in the Act that allow for relief from standards adopted by the Board of general applicability. In addition to the variance procedures under Title IX of the Act (415 ILCS 5/35-38 (2006)), there are adjusted standards under Section 28.1 of the Act (415 ILCS 5/28.1 (2006)) and site-specific rules under Section 27 and 28 of the Act (415 ILCS 5/27 and 28 (2006)). A difference between the three mechanisms is that with both a site-specific rule and an adjusted standard the statutory language authorizing the Board to grant the relief does not limit the duration of those two relief mechanisms. This is unlike the variance which is of limited duration (five years) and can only be extended by the Board if satisfactory progress has been made. *See* 415 ILCS 5/36(b)(2006). As the Board has stated: "A variance by its very nature, is a temporary reprieve from compliance with the Board's regulations, and compliance is to be pursued regardless of the hardship which eventual compliance presents and individual petitioner." Lake Zurich, PCB 97-77, slip. op. 6; 1997 Ill. Env. Lexis 81, citing Monsanto 67 Ill. 2d 276.

In Monsanto, the Illinois Supreme Court noted that "compliance by all polluters with the Board regulations is an ultimate goal." Monsanto, 67 Ill. 2d at 287. The court further noted that the "variance provisions afford some flexibility in regulating the speed of compliance, but total exemption from the statute would free a polluter from the task of developing more effective pollution-prevention technology and would impair the ability of the Board to protect health, welfare, property, and the quality of life." *Id*. The court stated that this would be inconsistent with the objectives of the Act. *Id*. The court stated that the statutory scheme "contemplates temporary variances". *Id*.

Ameren's request for relief specifies that Ameren is seeking relief from Section 225.233(e)(2)(A). Pet. at 1. Section 225.233(e)(2)(A) requires that beginning in calendar year 2013 and continuing in calendar year 2014 Ameren's comply with an overall SO_2 annual emission rate of 0.33 lbs/mmBtu. 35 Ill. Adm. Code 225.233(e)(2)(A). Ameren's request does not include a plan to meet the SO_2 annual emission rate of 0.33 lbs/mmBtu; rather, Ameren proposes that for the period beginning in 2010 a system-wide annual average SO_2 emission rate of 0.50 lb/mmBtu and a system-wide annual average SO_2 emission rate of 0.43 lb/mmBtu from January 1, 2014, through December 31, 2014. Thus, Ameren does not plan to comply with the Section 225.233(e)(2)(A), now or in the future.

Ameren does plan to comply with emission rates in Section 225.233(e)(2)(B), in 2015. However, the requirements found in Section 225.233(e)(2)(A) would be replaced completely by the proposed variance. The Board finds that such a request is not a variance as contemplated either in the Act or by the case law implementing Title IX of the Act (415 ILCS 5/35-38 (2006)).

Therefore, the Board will not grant the relief requested in this proceeding. Ameren should request an adjusted standard under Section 28.1 of the Act (415 ILCS 5/28.1 (2006)), or utilize the rulemaking provisions of the Act (*see* 415 ILCS 5/27 and 28 (2006)).

Because the Board will not grant the variance relief requested, the Board does not reach a conclusion on the merits of the request. The Board need not determine if an arbitrary and unreasonable hardship exists or consider the environmental impact to make this determination so the Board will not do so.

Finally, since the Board has denied Ameren's request for variance, the Public Interest Commentators request for hearing is denied as moot.

CONCLUSION

For the reasons stated above, the Board finds that Ameren's request for variance will not be granted because Ameren seeks permanent relief from Section 233.225(e)(2)(A) and not temporary relief as contemplated by Title IX of the Act (415 ILCS 5/35-38 (2006)) . Therefore, the Board finds that a variance is not the proper regulatory relief mechanism in this case, and declines to grant Ameren's request.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

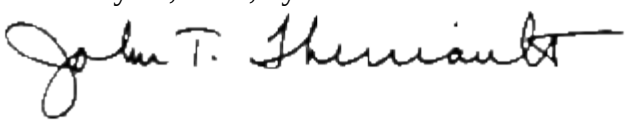
The Board denies Ameren Energy Generating Company, Amerenenergy Resources Generating Company, and Electric Energy, Inc. request for a variance.

IT IS SO ORDERED.

Board Member Thomas E. Johnson dissented.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 22, 2009, by a vote of 4-1.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board