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.	)	

DISSENTING OPINION (by T.E. Johnson):

I respectfully dissent from the majority opinion, in which the Board denies Ameren's petition for variance without reaching its merits. The majority opinion declines to grant the variance requested because Ameren purportedly seeks "permanent relief" rather than "temporary relief." Opinion at 16. According to the majority, Ameren's request is therefore "not a variance" as contemplated by the Environmental Protection Act or case law. *Id*. at 15. My colleagues advise that instead "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))." *Id*. at 16.

Through these statements and its reliance on Monsanto Co. v. PCB, 67 Ill. 2d 276, 376 N.E.2d 684 (1977), the majority opinion is concluding that the Board lacks the authority to grant the relief *as a variance*. I believe that the Board has the authority to grant the relief requested and therefore the Board should rule on the substance of Ameren's petition, *i.e.*, decide whether the petition meets the Board's content requirements for variance petitions and, if so, decide whether Ameren has proven an arbitrary or unreasonable hardship.

ANALYSIS

To support its finding that "a variance is not appropriate relief for Ameren" (Opinion at 1), the majority relies upon the Illinois Supreme Court's decision in Monsanto Co. v. PCB, 67 Ill. 2d 276, 376 N.E.2d 684 (1977). In that case, the Monsanto Company had petitioned the Board for a "permanent variance" from a statewide regulation limiting the levels of mercury in discharges to public sewer systems. Monsanto, 67 Ill. 2d at 282-83. The applicability of the Board's mercury regulation was not limited in duration. The regulation at issue with Ameren applies only in the years 2013 and 2014.

At the time of Monsanto's variance petition, the Act permitted only variances of up to one year, rather than the current five years. Monsanto, 67 Ill. 2d at 287-88. Monsanto argued, however, that the Act's one-year limit on the term of a variance applied to a different type of

variance from that sought by Monsanto. *Id.* at 285-88. The Board disagreed, ruling that the one-year limit applied and that the Board therefore had no authority to issue a variance in excess of one year. The Board granted a one-year variance, conditioning the variance on Monsanto limiting its mercury discharges to levels described by the Illinois Supreme Court as "approximately five and eight times . . . in excess of the statewide [regulation from which relief was granted]." *Id.* at 284.

The Illinois Supreme Court reinstated the Board's decision, finding that "the Board was correct in concluding that its power to grant variances under section 35 was circumscribed by the one-year limitation of section 36(b)." Monsanto, 67 Ill. 2d at 286. The Court accordingly held that the appellate court erred "in holding that the Board had the authority to grant variances in excess of one year." *Id.* at 295. The Supreme Court found that "the concept of a variance which permanently liberates a polluter from the dictates of a board regulation is wholly inconsistent with the purposes of the Environmental Protection Act." *Id.* at 286. The Court added that the "statutory scheme actually conceived by the legislature . . . contemplates temporary variances." *Id.* at 287.

I maintain that the terms "permanent variance" and "temporary variance," as used by the Illinois Supreme Court in Monsanto, cannot be divorced from their context. The Supreme Court was faced with the issue of whether the Act permitted the Board to issue a variance that would have *no termination date*. The Court used the word "permanent" because as proposed by Monsanto, the company would forever be subject only to the less stringent effluent limits of the variance. With such an improper "permanent variance," the Court observed that "the Board is concerned with the continuing discharge of contaminants at levels exceeding statewide standards." Monsanto, 67 Ill. 2d at 288. In contrast, the Court noted, "the Board can provide relief from the hardship of immediate compliance and yet retain control over a polluter's future conduct by granting a temporary variance." *Id.*

Here, there is no question that the Act permits a variance of longer duration than that proposed by Ameren. Ameren seeks a variance that would provide regulatory relief for, at most, two years.[1] After two years of variance relief, Ameren would have to comply with the Board's regulations. Specifically, as of January 1, 2015, Ameren would be subject to the emission rate from the Multi-Pollutant Standard (MPS) rules, which is a *more* stringent rate (overall annual emission rate for sulfur dioxide (SO_2) of 0.25 lbs/million Btu) than the one from which Ameren seeks relief (overall SO_2 annual emission rate of 0.33 lbs/million Btu). Pet. at 29. In fact, Ameren further proposes to comply, beginning on January 1, 2017, with an SO_2 emission rate of 0.23 lb/million Btu, a reduction that goes beyond the requirements of the MPS rules.[2] *Id.* The Illinois Environmental Protection Agency (Agency) states that Ameren's current proposal "would result in a net environmental benefit through 2020," and given the *vacatur* of the Clean Air Interstate Rule, "provide reductions in 2010 beyond those currently required under federal and State law." Rec. at

[1] "Ameren requests that the variance terminate at midnight on December 31, 2014, or upon the effective date of a rulemaking amending the MPS [Multi-Pollutant Standard] as that set of regulations applies to Ameren's MPS Group, whichever is sooner." Pet. at 28.

[2] These commitments by Ameren would modify Ameren's obligations under Section 225.233(e)(2)(B) and extend beyond the term of a variance. The Agency and Ameren accordingly note that Ameren will need to seek a "permanent" change either through rulemaking or adjusted standard petition. Pet. at 22-23; Rec. at 9, 10; Resp. at 5.

10, 11, 18; *see also* Resp. at 1. Ameren will have to, and plans to, install and operate pollution control equipment to meet these levels. Rec. at 4, 6-7, 13, 16.

The variance Ameren proposes would therefore not allow "continuing discharge[s] at levels exceeding statewide standards." Monsanto, 67 Ill. 2d at 288. Nor would the variance "free [Ameren] from the task of developing more effective pollution-prevention technology." *Id.* Moreover, the Board would "retain control over [Ameren's] future conduct." *Id.* I believe Ameren's request for two years of regulatory relief is a request for a "temporary variance" in the sense the Monsanto Court used the term, and is well within the Board's authority under the Act, which, as noted, allows for variances of up to five years. *See* 415 ILCS 5/36(b) (2006).

The majority opinion emphasizes that Ameren does not plan to ever comply with the rule from which it seeks relief, the SO_2 emission rate of 0.33 lbs/million Btu for 2013 and 2014. By its terms, however, the Act does not make such eventual compliance a prerequisite to granting a variance. *See* 415 ILCS 5/36(b) (2006). The Board has granted variances under which the petitioner was allowed to progress toward compliance with, by the end of the variance term, yet-to-be-adopted rules—rules that were expected to be less stringent than the rules from which the relief was granted. *See* Citizens Utilities Co. of Illinois v. IEPA, PCB 85-95 (Oct. 24, 1991); Citizens Utilities Co. of Illinois v. PCB, 213 Ill. App. 3d 864, 572 N.E.2d 373 (3rd Dist 1991); Citizens Utilities Co. of Illinois v. IEPA, PCB 78-313 (Mar. 5, 1981). Ameren proposes to meet an SO_2 emission rate of 0.50 lbs/million Btu for 2010 through 2013, a rate of 0.43 lbs/million Btu for 2014, and by the end of the two-year variance term, the then-applicable rate 0.25 lbs/million Btu. Pet. at 28, 29; Resp. at 1.

The words "temporary" and "permanent" do not appear in the variance provisions of the Act. *See* 415 ILCS 5/35-38 (2006). Rather, the Act provides that variances "shall be granted for such period of time, not exceeding five years, as shall be specified by the Board . . . ." 415 ILCS 5/36(b) (2006). The Board should not "depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent." Alternate Fuels, Inc. v. Director of IEPA, 215 Ill. 2d 219, 238, 830 N.E.2d 444 (2004). I believe it requires a strained interpretation of the Act to find that the Board *would* have the authority to grant the variance petition if Ameren had only proposed complying with the 0.33 lbs/million Btu emission rate on December 31, 2014, the day before Ameren has agreed to comply with the 0.25 lbs/million Btu emission rate. I respectfully suggest that by the majority's logic, this change alone would render Ameren's requested relief "temporary" and thus a permissible matter for variance consideration. *See* State Farm Fire & Casualty Co. v. Yapejian, 152 Ill. 2d 533, 541, 605 N.E.2d 539 at 541 (1992) ("a court construing the language of a statute will assume that the legislature did not intend to produce an absurd or unjust result.").

Lastly, I note that the Agency refers to Ameren's variance petition as "requesting temporary relief." Rec. at 8. The Agency would not have made the following statements if it felt the Board lacked the authority to issue the requested variance:

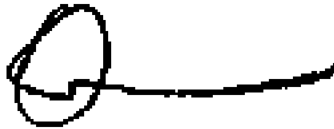
> Given that agreement by Ameren to include the 0.43 lb/mmBtu emission rate for SO_2, along with the other commitments and conditions proposed by Ameren in the Petition, *the Illinois EPA hereby makes clear to the Board that it does not object to the variance being sought by Ameren*.

> WHEREFORE, for the reasons set forth above, *the Illinois EPA reiterates and further clarifies its Recommendation and states that it does not object to the Board granting the variance as presented and requested by Petitioners*, including the agreement made in the Response to modify the Petition as described herein. Reply at 3 (emphasis added).

I believe the majority's reading of the Act is an unduly narrow one, and one that is neither dictated by case law nor urged by the Agency. The Board has the authority to grant the requested variance.

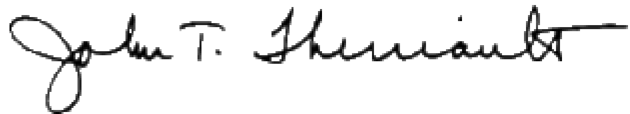
CONCLUSION

For all of the reasons articulated above, I respectfully dissent. I feel the proper course of action in this case would be to issue a decision on the substance of Ameren's variance petition. I add my belief that a final decision is, at present, not due until late March of this year. In its November 25, 2008 response, Ameren states that it agrees with the Agency's suggestion to amend the petition so that the SO_2 emission rate for 2014 is 0.43 lbs/million Btu rather than 0.44 lbs/million Btu. Resp. at 1. The Agency maintains 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." Rec. at 18. It is evident then that through this change, Ameren has "substantively" amended its petition, which "recommences the decision period." 35 Ill. Adm. 104.226; *see also* 35 Ill. Adm. Code 104.232(a)(2).



Thomas E. Johnson

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on January 22, 2009.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board