

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMEREN ENERGY RESOURCES,)	
)	
Petitioner,)	PCB 12-126
)	(Variance - Air)
v.)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OBJECTION

Pursuant to 35 Ill. Adm. Code 104.224(b), Environmental Illinois, the Environmental Law & Policy Center, Natural Resources Defense Council, Respiratory Health Association of Metropolitan Chicago, and Sierra Club (collectively, "Citizens Groups") hereby OBJECT to the Petition for Variance ("the Petition") filed by Ameren Energy Resources ("Ameren" or "the Company") with the Pollution Control Board ("Board") on May 3, 2012. As discussed below, the Board should deny the Petition for several reasons:

- The Multi-Pollutant Standard ("MPS") Ameren now seeks to avoid reflects a settlement among multiple parties, including the Illinois Environmental Protection Agency ("Illinois EPA") and Citizens Groups, that Ameren proposed, agreed to, opted into, and benefitted from. Ameren must be held to that agreement.
- In arguing that the variance is necessary to avoid an arbitrary or unreasonable hardship, Ameren failed to explore all options available to it for complying with the MPS.
- Granting the variance would undermine the MPS and Combined Pollutant Standard ("CPS") and threaten the State's progress in control of mercury, SO₂, and NO_x.
- Ameren presents no basis to conclude that it will comply with the schedule it proposes under the variance.
- The variance will harm air quality, not create any net air quality benefits as Ameren claims.

Citizens Groups do not request a hearing pursuant to 35 Ill. Adm. Code 104.224(c), but will file comments further elaborating on the issues addressed in these objections, as well as other concerns about the proposed variance, during the public comment period in this proceeding.

I. The Board Should Require Ameren to Comply With the Agreed Standards It Negotiated, Opted Into, and Benefitted From.

The Board should deny Ameren's request for a variance because it agreed to, opted into, and benefitted from the standards it now seeks to undermine. Ameren requests a variance from 2015 and 2017 sulfur dioxide ("SO₂") emission limits required by the MPS, codified at 35 Ill. Adm. Code 225.233. The MPS, originally promulgated in 2006,¹ allows owners of Electric Generating Units ("EGUs") to meet mercury limits less stringent than would otherwise be required as long as they meet certain emission standards and technology requirements for SO₂ and nitrogen oxides ("NO_x"). See 35 Ill. Adm. Code 225.233. Specifically, the MPS gave EGU owners a time-limited ability to "opt in" to meeting MPS requirements for SO₂ and NO_x,² and, in exchange, the right to delay compliance with numeric or input-based mercury limits until at least 2015, or, in the case of certain smaller EGUs, the option to determine to meet a carbon injection requirement instead of an emission limit.³ See 35 Ill. Adm. Code 225.233(c) and (d). Both MPS mercury control options are less stringent than the

¹ *In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury)*, R06-25 (Dec. 21, 2006). As discussed herein, the MPS was amended in 2009 to, among other things, require Ameren to meet the very standards at issue in this variance proceeding – i.e., a fleet-wide SO₂ standard of 0.25 lb/million Btu by 2015 and a fleet-wide standard of 0.23 lb/million Btu by 2017. See *In the Matter of: Amendments to 35 Ill. Adm. Code 225: Control of Emissions from Large Combustion Sources (Mercury Monitoring)*, R09-10 (June 18, 2009).

² See 35 Ill. Adm. Code 225.233(e)(3)(c)(iii) and (iv). The MPS includes several requirements for SO₂ and NO_x control. For larger EGUs that fire bituminous coal, by no later than December 31, 2009, the EGU was required to install a Selective Catalytic Reduction ("SCR") system for control of NO_x and a scrubber for control of SO₂. 35 Ill. Adm. Code 225.233(c)(1)(A). EGU owners must also meet fleet-wide annual and ozone season NO_x emission limits, which for Ameren is 0.11 lb/million Btu beginning in 2012, and fleet-wide annual SO₂ emission limits, which for Ameren decline as follows: 0.50 lb/million Btu from 2010-2013, 0.43 lb/million Btu in 2014; 0.25 lb/million Btu in 2015; and 0.23 lb/million Btu in 2017. 35 Ill. Adm. Code 225.233(e)(3).

³ Under the MPS, the owners of certain smaller EGUs—those with less than 90 gross MW in capacity, and those with less than 115 MW in capacity and which do not exceed 4% of the total gross MW capacity of the MPS Group—have the option of committing to comply with numeric emission limits or to continue under a carbon injection requirement. 35 Ill. Adm. Code 225.223(c)(1)(B).

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requirements of the Illinois Mercury Rule,⁴ which applies to EGU owners that do not opt in to the MPS or the similar CPS, 35 Ill. Adm. Code 225.291-99. Thus, using the MPS relieves EGU owners from compliance with more onerous mercury requirements in the Illinois Mercury Rule provided they comply with the SO₂ and NO_x components of the rule.

As Ameren acknowledges in its Petition, the MPS was a result of negotiations in which Ameren took a lead role.⁵ Not only did Ameren just acknowledge this, but it extolled this agreement at the time. Ameren's then-Chairman, President, and Chief Executive Officer Gary L. Rainwater stated: "We appreciate Governor Blagojevich's support and that of the Illinois EPA in working with us to come up with an approach that provides reductions of multiple pollutants and offers flexibility, while reaching the goal of significantly reducing air emissions. . . . We believe this constructive approach will significantly benefit the state's air quality."⁶ The lengthy record of the MPS rulemaking reveals that numerous parties, including other EGU owners, the Illinois EPA, and citizens' organizations including Environmental Illinois, the Environmental Law & Policy Center, Respiratory Health Association of Metropolitan Chicago, and Sierra Club, all took part in the formulation of the MPS.⁷ The final 2006 MPS thus represented a laboriously-negotiated agreement among diverse parties who

⁴ The Illinois Mercury Rule required EGUs to meet the same numeric or input-based mercury standards as the MPS in 2009, six years earlier than required by the MPS, without the compliance option of injecting activated carbon at a particular rate for smaller EGUs. 35 Ill. Adm. Code 225.230.

⁵ Indeed, as Ameren admits, it proposed the regulatory compromise reflected in the MPS. Petition at 12.

⁶ See <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=5128> (last accessed May 31, 2012).

⁷ See generally *In the Matter of: Proposed New 35 Ill. Admin. Code 225 Control of Emissions from Large Combustion Sources (Mercury)*, R06-25, available at

<http://www.ipcb.state.il.us/COOL/external/CaseView.aspx?referer=results&case=12992> (last visited May 31, 2012).

The Citizens Groups were key players in the negotiations leading to the regulatory compromise of the MPS; Illinois EPA specifically sought the Citizen Groups' approval and sign-off on the agreement codified in the standards. The Citizen Groups' participation is reflected in an August 2, 2006 press release from the Office of the Governor that announced the "agreement" underlying the MPS and included statements from the Citizen Groups. See

<http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=5128> (last accessed May 31, 2012).

Id.

identified a mutually-acceptable path to address the problems of mercury, SO₂, and NO_x pollution from Illinois' electric generators. Ameren opted in to the MPS in 2007.⁸

Since Ameren negotiated, opted into, and benefitted from the MPS, the Board must not now permit the Company to undermine that crucial 2006 agreement by relieving it of its obligations to meet the 2015 and 2017 SO₂ emissions standards until 2020 and 2021, respectively. As noted above, the agreement underpinning the MPS hinged on the commitment of EGU owners to meet the standard's SO₂ and NO_x limits, and, in return, to be subject to less stringent mercury standards: it was a package deal. Ameren now wants to have its cake and eat it, too; it reaped the benefit of less stringent mercury standards for years but wants that benefit without meeting the prescribed SO₂ limits. Allowing Ameren to do so would breach the agreement that underlies the MPS, undermine the settlement process, and betray the public trust. Therefore, because Ameren's commitments to reduce SO₂ were part of a larger agreement which Ameren agreed to, opted into, and benefitted from, the Board must deny Ameren's Petition.

II. Ameren Failed to Explore All Available Options for Complying with the MPS.

In arguing that the variance is necessary to avoid an arbitrary and unreasonable hardship, Ameren does not adequately address at least two other strategies for complying with the MPS: reducing capacity at its plants with higher SO₂ emission rates and seeking financing from its parent company to complete installation of scrubbers at its Newton plant.

Based on the current record, it is not clear that Ameren needs to add scrubbers at its Newton plant in order to comply with the SO₂ provisions from which it now seeks a variance. Rather than add

⁸ Ameren's December 27, 2007 letter opting into the MPS is attached as Exhibit B to its October 10, 2008 Petition for Variance filed in *Ameren Energy Generating Co. et al. v. Ill. Env't'l Prot. Agency*, PCB 09-21. Dynegy also opted in to the MPS. Midwest Generation ("Midwest Gen") similarly agreed to meet certain SO₂ and NO_x emission limits and control equipment requirements in exchange for meeting less stringent mercury limits; however, the standards applicable to Midwest Gen's plants were codified separately as the CPS, 35 Ill. Adm. Code 225.239.

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scrubbers, Ameren could comply with the MPS by running its unscrubbed plants less (at a lower capacity factor). While that option could create certain costs for Ameren in terms of lost energy sales, the strategy is within the power of Ameren to implement, and Ameren has not presented any evidence that it is infeasible.⁹

Neither has Ameren shown that it cannot obtain the funding it claims it needs to comply with the MPS from its parent company, Ameren Corporation (“Ameren Corp”). Despite Ameren’s claims that funding from Ameren Corp “is not a viable option,” Petition at 22-23, Ameren has not shown that Ameren Corp is prohibited from providing such funding. To the contrary, Ameren Corp has promised to provide a guaranteed \$100 million to Ameren upon the sale of three natural gas plants Ameren owns, which total may grow when the plants are sold on the open market.¹⁰ Ameren failed to mention this funding mechanism in its Petition, and it has failed to meet its heavy burden of showing that the variance is necessary to avoid an unacceptable hardship.¹¹ The Board should deny Ameren’s Petition.

⁹ Indeed, Ameren made reference to this strategy during an earnings call. See Ameren Q4 2011 Earnings Call Transcript (Feb. 23, 2012), available at <http://www.morningstar.com/earnings/36055260-ameren-corp-q4-2011.aspx> (during question-and-answer period, Ameren mentioned “ratchet[ing] down” generation from uncontrolled generating plants as a compliance option should it not install scrubbers at Newton).

¹⁰ See Ameren Q1 2012 Earnings Call Transcript (May 4, 2012), available at <http://www.morningstar.com/earnings/earnings-call-transcript.aspx?t=AEE®ion=USA&culture=en-US&pindex=9&qindex=3> (last visited May 31, 2012) (addressed during question-and-answer period); see also Ameren SEC Form 10-Q (May 10, 2012) at 56, available at <http://quote.morningstar.com/stock-filing/Quarterly-Report/2012/3/31/t.aspx?t=XNYS:AEE&ft=10-Q&d=14ae4cee1502b73321b221f4469d3e6c> (last visited May 31, 2012).

¹¹ Ameren’s arguments for a variance are even more insufficient when viewed through the lens of Illinois law on agreements. Under Illinois law, the affirmative defense of impossibility of performance does not apply when “it lies within the power of the promisor to remove the obstacle to performance.” *YPI 180 N. LaSalle Owner, LLC, v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 8 (Ill. App. Ct. 1st Dist. 2010) (citing *Felbinger & Co. v. Traiforos*, 76 Ill. App. 3d 725, 733 (1979)). Here, it is clearly within Ameren’s power to meet its responsibilities under the agreed terms codified under the MPS—whether through ceasing or curtailing operations at its plants, or seeking financing from its parent company. Moreover, Ameren’s claimed financial distress resulting from poor market conditions brought about by, among other things, low natural gas prices, should not excuse its non-performance, because changing market conditions are foreseeable. See, e.g., *Northern Ill. Gas Co. v. Energy Coop., Inc.*, 122 Ill. App. 3d 940, 952-53, 461 N.E.2d 1049 (Ill. App. Ct. 3d Dist. 1984) (commercial frustration doctrine does not apply to financial distress resulting from changed natural gas prices).

III. Granting the Variance Would Undermine the MPS and CPS and Undo the State's Important Gains in Control of Mercury, SO₂, and NO_x.

A Board decision to grant the variance to Ameren would threaten future compliance with the MPS and CPS by the remaining EGUs in the State. Approving Ameren's variance sets a precedent for other EGU owners in the State to seek additional variances from Illinois' mercury, SO₂, and NO_x standards. It would thereby begin unraveling the negotiations and agreements that led to those standards, and roll back the crucial regulations that Illinois has put in place to protect its citizens from toxic pollutants. As noted above, Ameren was not the only EGU owner to opt in to the MPS; Dynegy also did so, and Midwest Generation agreed to a similar regulatory compromise in the CPS. The reasons Ameren cites as justifying a variance—i.e., financial distress due to low power demand, higher natural gas supplies, and inability to recuperate costs via rate recovery, as well as supposed regulatory uncertainty—are also true for all owners of coal-fired EGUs in Illinois, not just Ameren.¹² Moreover, Midwest Generation, like Ameren, has not yet installed expensive SO₂ and NO_x controls on a number of its EGUs.¹³ In short, Ameren's competitors are in the same boat as Ameren.¹⁴ If the variance is granted, there is no reason why those companies would not go to the Board seeking similar variances from the MPS and CPS for the exact same reasons Ameren invokes. This would put the Board in the position of having to pick winners and losers in the electricity market and could completely undo the MPS and CPS, undercutting the difficult-to-obtain agreements that led to those standards, and

¹² See Crain's Chicago Business, "Tepid power auction raises chances for a Midwest Gen bankruptcy," (May 21, 2012) available at <http://www.chicagobusiness.com/article/20120521/NEWS11/120519778/tepid-power-auction-raises-chances-for-a-midwestgen-bankruptcy> (last visited May 31, 2012); Dynegy Form 10-Q (May 10, 2012), available at http://dynegey.com/investor_relations/sec_filings.asp (last visited May 31, 2012).

¹³ See EPA, "Approval and Promulgation of Air Quality Implementation Plans; Illinois; Regional Haze," 77 Fed. Reg. 3966, 3972 (Jan. 26, 2012).

¹⁴ Although Dynegy has already installed, or is in the process of installing, equipment to control mercury, SO₂, and NO_x emissions from its EGUs, there is some indication that Dynegy is having difficulty meeting mercury limits under the MPS at its Wood River EGU. See Dynegy Investor Relations, Dynegy 2011 Annual and 4th Quarter Results (Mar. 11, 2012), available at http://dynegey.com/investor_relations/presentations.asp (last visited May 31, 2012). Thus, Dynegy may also have some mercury control equipment it may need to install, but could attempt to forestall via a variance.

exposing Illinois citizens to significantly greater quantities of harmful mercury, SO₂, and NO_x pollution.

Granting the variance also would harm the State in another critical manner. As noted above, the MPS and CPS were the result of large-scale negotiations involving multiple, diverse parties, including EGU owners, government agencies, and citizens groups. If one regulated entity can override standards codifying a complex agreement among such diverse parties whenever the economy goes sour, many of the parties at the negotiating table have no reason to come back. Public health and environmental groups like those involved in the drafting of the MPS and CPS have no incentive to dedicate precious resources to hammering out a compromise with industry and government if such agreements are simply disregarded in bad times. But including such groups at the negotiating table is good for Illinois, because it brings diverse constituencies together to craft more durable, balanced rules for our state. In order to ensure that one negotiating party—in this case, a single regulated entity—does not thwart opportunities to craft stronger, widely-supported regulations in the future, the Board should deny the variance.

IV. Ameren Presents No Basis to Conclude That It Will Comply With the Schedule It Proposes Under the Variance.

A petitioner for a variance must include a “detailed description” of a compliance plan, including a “time schedule for implementation of all phases of the control program from initiation of design to program completion.” 35 Ill. Adm. Code 104.204(f). *See also Ecko Glaco Corp. v. Ill. Env't'l Prot. Agency*, 186 Ill. App. 3d 141, 150-51 (1st Dist. 1989) (upholding Board’s decision to deny extension of a variance where petitioner lacked definite compliance plan).

In this case, if the Board grants the variance, there is no reason to believe that Ameren would not request another variance from the MPS in the future. In 2008, Ameren first requested a variance

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from the SO₂ requirements of the MPS, arguing, just like it does here, that regulatory uncertainty rendered compliance with the standards an arbitrary and unreasonable hardship.¹⁵ In 2009, Ameren obtained the amendments it sought for the MPS SO₂ standards¹⁶—including the 2015 and 2017 standards it now seeks to push back—yet, not even four years later, Ameren is back again before the Board requesting relief from the very standards it now negotiated twice.

In its current Petition, Ameren argues that power prices must improve before the investments in SO₂ control equipment required by the MPS will be economically feasible,¹⁷ but acknowledges that such an improvement in power prices may never occur.¹⁸ Indeed, Ameren's supporting evidence demonstrates that, if Ameren's compliance plan is premised entirely on an increase in power prices, it likely will never come to fruition. One of Ameren's affiants states that power prices "have continued to fall, and are not expected to improve in the near to immediate term." Petition, Ex. 7, Martin Aff. at ¶ 12. As the Standard and Poor's report excerpted in his affidavit indicates, Ameren's decision to stop spending money on legally required environmental controls "suggests management's lack of confidence in the longer-term economic sustainability of [Ameren's] business model." *Id.* at ¶ 12.

As such, just as Ameren claims it now cannot comply with the standards it requested in 2008, it is far from certain that Ameren will genuinely commit to the revised standards it requests here. It very well may seek yet another variance in several years' time. The Board should only grant a variance if it

¹⁵ See *Ameren Energy Generating Co. et al. v. Ill. Env't Prot. Agency*, PCB 09-21 (Oct. 1, 2008) (Petition for Variance) at 1, 8-21.

¹⁶ The changes to the SO₂ standards which Ameren sought in its 2008 Petition for Variance were adopted as amendments to the MPS, rather than as a variance. See *In the Matter of: Proposed Amendments to 35 Ill. Adm. Code 225: Control of Emissions From Large Combustion Sources (Mercury Monitoring)*, R09-10 (June 18, 2009).

¹⁷ See, e.g., Petition at 2 ("The additional time AER seeks due to hardship will provide the needed time to allow recovery of the power market..."); Petition at 7 ("AER seeks the variance... because eroding financial conditions make compliance with those requirements untenable").

¹⁸ See, e.g., Petition at 9 ("Assuming power prices rebound..."); Petition at 21-22 ("*unless* and until power price market conditions improve...") (emphasis added).

truly constitutes a temporary reprieve from requirements, rather than a mechanism for indefinitely propping up a failed business model. The Board should deny Ameren's Petition.

V. The Variance Will Worsen Air Quality, Not Create Any Net Air Quality Benefits.

Rather than create net air quality benefits, the requested variance would in fact worsen air quality. Ameren claims that the variance will result in "overall greater SO₂ reductions . . . than anticipated under current MPS requirements." Petition at 25. In making that claim, Ameren relies, in part, on "emission reductions" resulting from the closure of the Meredosia and Hutsonville plants, and apparently representing the difference between emissions allowed under the MPS and Ameren's actual emissions in 2010 and 2011. *Id.* at 26. The inclusion of both of these sets of "emissions reductions" in Ameren's calculation of the air quality benefits of the variance is facially absurd. First, the closure of the Meredosia and Hutsonville plants—and the consequent decrease in emissions from Ameren's coal fleet—*would occur regardless of whether the variance is granted*. Ameren announced last October that it would close Meredosia and Hutsonville by the end of the year,¹⁹ and as far back as 2009, Ameren planned to significantly cut operations at those plants.²⁰ It is simply absurd for Ameren to ascribe reductions in emissions resulting from plant closures it planned years ago to the variance it now proposes. The same is true of the "emissions reductions" representing the difference between emissions allowed under the MPS and Ameren's actual emissions in 2010 and 2011: those "reductions" far predate the variance and are entirely independent of it. As Citizen Groups will further explain in our comments, if the air quality impact of the variance is properly evaluated, excluding those two sets of farfetched "emission reductions," it is clear that the variance will in fact significantly

¹⁹ See St. Louis Business Journal, "Ameren to close 2 plants, affecting 90 workers," (Oct. 4, 2011), *available at* <http://www.bizjournals.com/stlouis/news/2011/10/04/ameren-to-close-2-plants-lay-off-90.html?page=all&date=2011-10-04> (last visited May 31, 2012).

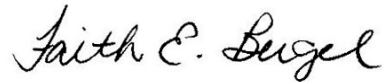
²⁰ See PR Newswire, "Ameren Energy Resources Announces Staff Reductions at Three Illinois Power Plants in Response to Changes in Power Markets, Tough Economy" (Aug. 12, 2009), *available at* <http://www.prnewswire.com/news-releases/ameren-energy-resources-announces-staff-reductions-at-three-illinois-power-plants-in-response-to-changes-in-power-markets-tough-economy-62215822.html> (last visited May 31, 2012).

increase harmful SO₂ pollution and thereby worsen air quality. For this reason alone, the Board should deny the variance.

VI. Conclusion.

For the reasons addressed in this Objection, as well as additional reasons that Citizens Groups will provide in comments we will submit later in this proceeding, the Board should deny Ameren's Petition for Variance.

Respectfully submitted,



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DATED: May 31, 2012

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

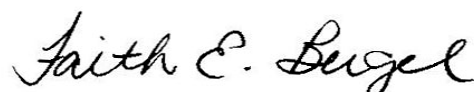
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NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on May 31, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois an **OBJECTION** on behalf of Environment Illinois, Environmental Law & Policy Center, Natural Resources Defense Council, Respiratory Health Association Of Metropolitan Chicago, and Sierra Club, a copy of which is attached hereto and herewith served upon you.

Respectfully Submitted,

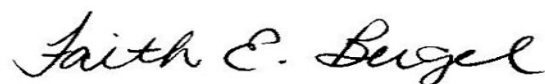


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CERTIFICATE OF SERVICE

I, Faith Bugel, hereby certify that I have filed the attached **OBJECTION** on behalf of Environment Illinois, Environmental Law & Policy Center, Natural Resources Defense Council, Respiratory Health Association Of Metropolitan Chicago, And Sierra Club in PCB 12-126 upon the attached service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on May 31, 2012.

Respectfully submitted,



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May 31, 2012

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