

ILLINOIS POLLUTION CONTROL BOARD
December 20, 2012

MIDWEST GENERATION, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 13-24
)	(Variance - Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. D. O’Leary):

On November 30, 2012, Midwest Generation, LLC (Midwest Generation) filed a petition for variance from specified air pollution control requirements. After providing background on variances and Midwest Generation’s petition, today’s order discusses newspaper notice of the petition, accepts the petition for hearing, and addresses deadlines for the recommendation of the Illinois Environmental Protection Agency (Agency) and the final decision of the Board.

BACKGROUND

Under the Environmental Protection Act (Act) (415 ILCS 5/35-38 (2010)), the Board is responsible for granting variances when a petitioner demonstrates that compliance would impose an “arbitrary or unreasonable hardship” on petitioner. *See* 415 ILCS 5/35(a) (2010); *see also* 415 ILCS 5/37(a) (2010) (burden of proof is on petitioner). 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). The Board may issue a variance, with or without conditions, for up to five years, but may extend a variance if petitioner shows that it has made satisfactory progress toward compliance. *See* 415 ILCS 5/36(a), (b) (2010). The Act requires the Agency to “make a recommendation to the Board as to the disposition of the petition.” 415 ILCS 5/37(a) (2010).

According to Midwest Generation’s petition for variance (Pet.), as of 2013, Midwest Generation “will or legally could generate electricity from coal-fired units at five electric generating stations,” namely: Crawford Generating Station (Cook County); Joliet Generating Station (Will County); Powerton Generating Station (Tazewell County); Waukegan Generating Station (Lake County); and Will County Generating Station (Will County).¹ Pet. at 11.

Midwest Generation filed a petition for a system-wide variance from provisions of the Combined Pollutant Standard (CPS) set forth at 35 Ill. Adm. Code 225.295(b). Pet. at 1. Midwest Generation seeks a variance from the sulfur dioxide (SO₂) emission rates set forth in

¹ Midwest Generation also operated the coal-fired electric generating unit at Fisk Generation Station, which Midwest Generation states is not affected by this requested variance. Pet. at 11.

Section 225.295(b) (35 Ill. Adm. Code 225.295(b)) for the two-year period beginning January 1, 2015, and ending December 31, 2016. *Id.* at 1, 52. Midwest Generation also seeks a variance from Section 225.296(a)(2) (35 Ill. Adm. Code 225.296(a)(2)) for a period of five months, delaying that requirement until May 31, 2015. *Id.* at 1, 6. Section 225.296(a)(2) currently requires Midwest Generation to install flue gas desulfurization equipment at, or to permanently shut down, Waukegan Unit 8 by December 31, 2014. *Id.* at 8.

Additionally, Midwest Generation seeks a variance from the Board's order in Midwest Generation, LLC – Waukegan Generating Station v. IEPA, PCB 12-121 (Aug. 23, 2012) (Waukegan Order), specifically:

at page 20, where the Board ordered Midwest Generation to comply with the system-wide emission rates for sulfur dioxide (SO₂), or, in the alternative, Midwest Generation requests that the Board adjust that portion of the Waukegan Order to be consistent with the relief requested herein or specifically find that the variance requested here supersedes only that provision of the Waukegan Order that requires compliance with the system-wide SO₂ emission rate but not the provisions regarding the retrofit of the hot-side precipitator and the installation of the flue gas desulfurization equipment or the shutdown deadline as applicable to Waukegan Unit 7. *Pet.* at 1-2.

Midwest Generation describes its request for variance:

Midwest Generation does not seek changes to the CPS program for reducing SO₂ emissions in 2013 or 2014 or 2017 or thereafter, but, rather, proposes a “pause” in the pace of the decline of SO₂ emission rates in the middle of the program (2015-2016), accompanied by enforceable commitments to ensure that total SO₂ tons of emissions are less than projected under the CPS during the period from 2013 through 2016. *Pet.* at 2.

Midwest Generation states that this request for variance is:

an option of last resort that is intended to enable the company to manage through exceptionally difficult economic circumstances and financial hardship that could not have been foreseen when the CPS was adopted in 2007. *Pet.* at 2.

Midwest Generation further seeks this variance to “avoid arbitrary and unreasonable hardship.” *Pet.* at 7.

NEWSPAPER NOTICE

The Act requires the Agency to provide public notice of a variance petition, including notice by publication in a newspaper of general circulation in the county where the facility is located. *See* 415 ILCS 5/37(a) (2010). Section 104.214(a) of the Board's procedural rules requires the Agency to publish the notice within 14 days after the petition is filed. *See* 35 Ill. Adm. Code 104.214(a).

Midwest Generation's petition was filed on November 30, 2012. Newspaper notice was therefore required by December 14, 2012. The Midwest Generation facilities at issue are located in four counties: Cook; Lake; Tazewell; and Will. On December 13, 2012, the Agency timely filed a certification of publication. As indicated by the Agency, newspaper notice of the petition was provided in the *Joliet Herald News* on December 12, 2012; the *Peoria Journal Star* on December 11, 2012; the *Waukegan News-Sun* on December 12, 2012; and the *Lawndale News/Westside Times* on December 13, 2012. The Board finds that the Agency has satisfied the Act's newspaper notice requirement.

AGENCY RECOMMENDATION

Unless otherwise ordered by the hearing officer or the Board, the Agency is required to file its recommendation on the variance with the Board within 45 days after the filing of the petition, or at least 30 days prior to a scheduled hearing, whichever is earlier. *See* 35 Ill. Adm. Code 104.216(b). The Agency recommendation is currently due January 14, 2013, the 45th day after the petition was filed. However, the Board notes that at the most recent status conference held on December 17, 2012, the Agency agreed to file its recommendation with the Board by January 10, 2013. Within 14 days after service of the Agency's recommendation, Midwest Generation may file a response to the Agency recommendation or an amended petition. *See* 35 Ill. Adm. Code 104.220.

HEARING AND DECISION DEADLINE

Generally, the Board will hold a hearing on a variance petition (1) if the petitioner requests a hearing, (2) if the Agency 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) (2010); *see also* 35 Ill. Adm. Code 104.224, 104.234. Midwest Generation has requested a hearing in this case. Pet. at 54. The Board accepts Midwest Generation's petition for hearing without ruling upon the sufficiency of the petition. Before hearing, the Board or its hearing officer may issue one or more orders seeking additional information from Midwest Generation.

The assigned hearing officer is responsible for guiding the parties toward prompt resolution of this matter through whatever status calls and hearing officer orders he determines are necessary and appropriate. Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/38(a)), which only Midwest Generation may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Midwest Generation may deem the requested variance granted for a period not to exceed one year. *See* 415 ILCS 5/38(a) (2010). Currently, the decision deadline is April 4, 2013, following Midwest Generation's filing of a waiver of decision deadline on December 12, 2012. *See* 35 Ill. Adm. Code 104.232. The Board currently has a Board meeting scheduled for April 4, 2013.

IT IS SO ORDERED.

Chairman Holbrook Abstained.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 20, 2012, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John Therriault, Assistant Clerk
Illinois Pollution Control Board