

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

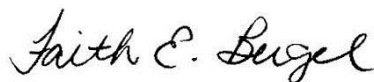
MIDWEST GENERATION, LLC)	
Petitioner,)	PCB 2013-024
)	(Variance - Air)
v.)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on January 2, 2013, I electronically filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an **OBJECTION** on behalf of Citizens Against Ruining the Environment, Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,



Faith Bugel
Senior Attorney
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
312-795-3708

Dated: January 2, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC,)	
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Petitioner,)	PCB 2013-024
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ILLINOIS ENVIRONMENTAL)	
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OBJECTION

Pursuant to 35 Ill. Adm. Code 104.224(b), Citizens Against Ruining the Environment, Environmental Law & Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club (collectively, “Citizens Groups”) hereby OBJECT to the Petition for Variance (“the Petition”) filed by Midwest Generation, LLC (“MWGen” or “the Company”) with the Pollution Control Board (“Board”) on November 30, 2012. As discussed below, the Board should deny the Petition for several reasons:

- The Combined Pollutant Standard (“CPS”) MWGen now seeks to avoid reflects a settlement among multiple parties, including the Illinois Environmental Protection Agency (“Illinois EPA”) and Citizens Groups, that MWGen proposed, agreed to, opted into, and benefitted from. MWGen must be held to that agreement.
- MWGen presents no basis to conclude that it will comply with the schedule it proposes under the variance.
- The Board should defer any decision on the variance until MWGen’s bankruptcy proceeding is resolved, at which time there will be much more certainty regarding MWGen’s financial situation and its ability to finance pollution control projects.

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 MWGen to Comply With the Agreed Standards It Negotiated, Opted Into, and Benefitted From.

The Board should deny MWGen's request for a variance because it agreed to, opted into, and benefitted from the standards it now seeks to undermine. MWGen requests a variance from the CPS, codified at 35 Ill. Adm. Code 225.291-299, specifically the 2015 and 2016 sulfur dioxide ("SO₂") emission limits required by 35 Ill. Adm. Code 225.295(b) and the December 30, 2014 deadline to either permanently shut down or install flue gas desulfurization ("FGD") equipment at Waukegan Unit 8 required by 35 Ill. Adm. Code 225.296(a)(2). The CPS, originally promulgated in 2007, allows MWGen, specifically, to meet mercury limits less stringent than would otherwise be required as long as it meets certain emission standards and technology requirements for SO₂ and nitrogen oxides ("NO_x"). *See* 35 Ill. Adm. Code 225.291-299. Specifically, the CPS gave MWGen a time-limited ability to "opt in" to meeting CPS requirements for SO₂ and NO_x, and, in exchange, the right to delay compliance with numeric or input-based mercury limits until at least 2015. *See* 35 Ill. Adm. Code 225.293 and 225.294. CPS mercury control options are less stringent than the requirements of the Illinois Mercury Rule,¹ which applies to EGU owners that do not opt in to the CPS or the similar MPS. *Compare* 35 Ill. Adm. Code 225.294 *with* 35 Ill. Adm. Code 225.230. Thus, using the CPS relieves MWGen from compliance with more onerous mercury requirements in the Illinois Mercury Rule provided it complies with the SO₂ and NO_x components of the rule.

As MWGen acknowledges in its Petition, the CPS was a result of negotiations in which MWGen took a lead role.² The lengthy record of the CPS and MPS rulemakings reveals that numerous parties, including other EGU owners, the Illinois EPA, and citizens' organizations including

¹ The Illinois Mercury Rule required EGUs to meet the same numeric or input-based mercury standards as the CPS in 2009, six years earlier than required by the CPS. 35 Ill. Adm. Code 225.230.

² Indeed, as MWGen admits, it proposed the regulatory compromise reflected in the CPS. Petition at 20.

Environment Illinois, the Environmental Law & Policy Center, Respiratory Health Association³, and Sierra Club, all took part in the formulation of the CPS and MPS.⁴ The final CPS and MPS thus represented a laboriously-negotiated agreement among diverse parties who identified a mutually-acceptable path to address the problems of mercury, SO₂, and NO_x pollution from Illinois' electric generators. MWGen opted in to the CPS in 2007.⁵

Since MWGen negotiated, opted into, and benefitted from the CPS, the Board must not now permit the Company to undermine that crucial agreement by relieving it of its obligations to meet the 2015 and 2016 SO₂ emissions standards until 2017, or by allowing it an additional five months to determine whether to shut down or install FGD equipment at Waukegan Unit 8. As noted above, the agreement underpinning the CPS and 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. MWGen reaped the benefit of less stringent mercury standards for years but wants that benefit without meeting the prescribed SO₂ limits. Allowing MWGen to do so would breach the agreement that underlies the MPS, undermine the settlement process, and betray the public trust. Therefore, because MWGen's commitments to reduce SO₂ were part of a larger agreement which MWGen agreed to, opted into, and benefitted from, the Board must deny MWGen's Petition.

³ At the time of the negotiations, the Respiratory Health Association was named the American Lung Association of Metropolitan Chicago.

⁴ 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 December 21, 2012). The Citizens Groups were key players in the negotiations leading to the regulatory compromise of the CPS; 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 a December 12, 2006 press release from the Office of the Governor that announced the "agreement" underlying the CPS and included statements from the Citizen Groups. See <http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=5591> (last accessed December 21, 2012).

⁵ Petition at 21.

II. MWGen Presents No Assurances That It Will Be Able to 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. IEPA*, 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, MWGen gives us inadequate assurances that (1) it can comply with the compliance schedule laid out in the variance; and (2) it won’t ask for yet another variance in the future. In April of 2012, MWGen first requested a variance from the specific requirements of the CPS that apply to Waukegan.⁶ MWGen obtained the amendments it sought yet, less than four months after that decision, MWGen is back again before the Board requesting relief from the very standards it now has negotiated twice.

In its current Petition, MWGen points to constricted revenues and increased costs as the reasons for its financial challenges. The financial challenges in turn are the hardship that caused the need for relief from the CPS requirements.

However, Trona injection and related ESP upgrades are necessary at additional units to achieve the 2015 and 2016 CPS SO₂ rates. External factors arising after the Trona injection and fuel plans were developed, including the impacts of reduced demand and lower electricity prices combined with current debt obligations, as discussed here and in the attached affidavits, materially threaten if not prevent Midwest Generation from being able to fund such controls in 2013 and 2014, and there is no other feasible control option to achieve the 2015 and 2016 CPS rates.

Petition at 25-26. MWGen’s financial situation is so severe that, subsequent to the filing of its Petition, MWGen filed for bankruptcy. *In re Edison Mission Energy et al.*, No. 12-49219 (Bankr. N.D.

⁶ *See Midwest Generation, LLC—Waukegan Generating Station v. IEPA*, PCB 12-121 (Apr. 10, 2012) (Petition for Variance).

Ill., *filed* Dec. 17, 2012). However, there is no reason to expect that most or all of the conditions to which MWGen cites as the causes for its financial situation will abate such that it will be able to fund the necessary controls in 2015-2016 in order to achieve the CPS rates thereafter.

For instance, MWGen's compliance plan is premised on an increase in energy prices that may not occur. It states, "Midwest Generation needs time for the energy market to recover and for EME to effectuate a financial restructuring." Petition at 55. Yet MWG elsewhere in the petition points out that energy prices have fallen every year since 2008 due to "unprecedented exploration and production of shale gas that have caused steep reductions in the price of natural gas, which energy prices track." Petition at 37. Particularly in view of this admitted fact, MWGen has provided no assurance that natural gas prices and energy prices will rise again and thereby increase its revenue. And in fact, the U.S. Energy Information Administration ("EIA") forecasts that there will continue to be increasing production of natural gas, the very thing that MWGen indicates caused the reductions in natural gas and energy prices. *See* Petition at 37; Exhibit A, EIA, *Annual Energy Outlook 2013 Early Release*, Table—Production: Dry Natural Gas.⁷

MWGen also indicates that it "has experienced a recent substantial increase in fuel costs [because] a favorable long-term coal rail contract expired, and Midwest Generation entered into a new, higher-priced contract for the transport of low sulfur coal to its fleet." Petition at 38. Again, however, MWGen provides no reason for believing that the higher-priced contract is only temporary, or that the company will be able to enter a new favorable coal rail contract in the future. MWGen goes on to state that it "expects that operating losses and deficits likely will continue through 2014." *Id.* But MWGen gives no indication or assurance that it expects operating losses and deficits to subside in 2015 and 2016.

⁷ The table is available at <http://www.eia.gov/oiaf/aeo/tablebrowser/#release=AEO2013ER&subject=0-AEO2013ER&table=1-AEO2013ER®ion=0-0&cases=full2012-d020112c,early2013-d102312a>.

As such, just as MWGen claims it cannot comply with the standards it requested, it is far from certain that MWGen can 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 truly constitutes a temporary reprieve from requirements, rather than a mechanism for indefinitely propping up a failed business model. The Board should deny MWGen's Petition.

III. The IPCB Should Defer Any Decision on the Variance Until MWGen's Bankruptcy Proceeding Is Resolved.

The most important principle applying to the intersection of bankruptcy and environmental law is that the debtor must comply with State and Federal environmental laws that apply to its facilities. *SP3-Monograph 3, Collier on Bankruptcy* § 5(5) ("Perhaps the single most important principle at the intersection of environmental and bankruptcy law is that a debtor in possession is obligated to comply with the environmental laws applicable to any facility that it owns and operates."). This obligation derives from nonbankruptcy law and is codified at 28 U.S.C. § 959(b). This provision states that the debtor in possession "shall manage and operate the property in his possession...according to the requirements of the valid laws of the State in which such property is situated." *Id.* Thus, MWGen's financial status and bankruptcy should not be used as an excuse to waive environmental laws.

Second, granting the variance is premature and based on a set of financial facts that are going to change over time. The ownership interest in the units covered by the variance could change as a result of the bankruptcy proceeding. We will not know, however, until the resolution of the bankruptcy proceeding whether there is a new owner and what any new owner's financial ability will be to fund pollution control equipment installations.

Further, it is for the bankruptcy court to decide priorities among competing demands on the debtor's limited assets, not the Board. MWGen uses its precarious financial situation as a reason to

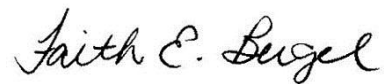
request a variance. Yet the Board cannot know how precarious MWGen's financial situation is until the bankruptcy proceeding is resolved. In fact, MWGen itself points out that "[a] successful restructuring should make additional funds for controls available." Petition at 29.

The variance proceeding is premature for the same reason that a broad variety of cases against the debtor are stayed during bankruptcy proceedings. 11 U.S.C. § 362(a). The sweep of the § 362(a) stay is broad. *3-362 Collier on Bankruptcy P 362.01* ("362 provides for a broad stay of litigation"). The purpose is to stay actions that would "affect or interfere" with property of the debtor. *Id.* Viewed in this light, the variance proceeding would affect or interfere with property of the debtor since it affects capital investments—installation of pollution control equipment—in the debtor's facilities. MWGen's petition is premised on its claimed inability to make the capital investments it needs to comply with the CPS. See Petition at 2 (describing the request is "an option of last resort that is intended to enable the company to manage through exceptionally difficult economic circumstances and financial hardship"). The bankruptcy proceeding now cuts straight to the heart of that justification for the variance. The Board should allow the bankruptcy court to resolve MWGen's ability to make the capital investments needed to comply with the CPS, and the timetable under which those investments can be made. Deciding on this variance request at this time is premature.

IV. Conclusion.

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

Respectfully submitted,



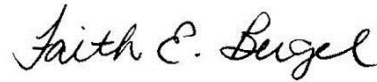
Faith Bugel
Senior Attorney
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
312-795-3708

DATED: January 2, 2013

CERTIFICATE OF SERVICE

I, Faith Bugel, hereby certify that I have filed the attached OBJECTION on behalf of the Citizens Against Ruining the Environment, Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club in PCB 2013-24. The aforementioned documents have been served upon the attached service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on January 2, 2013.

Respectfully submitted,



Faith Bugel
Senior Attorney
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
312-795-3708

SERVICE LIST

January 2, 2013

Dana Vetterhoffer
Julie K. Armitage
Illinois EPA
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Stephen J. Bonebrake
Andrew N. Sawula
Kathleen C. Bassi
Schiff Hardin, LLP
6600 Willis Tower
233 South Wacker Drive
Chicago, IL 60606

Exhibit A:

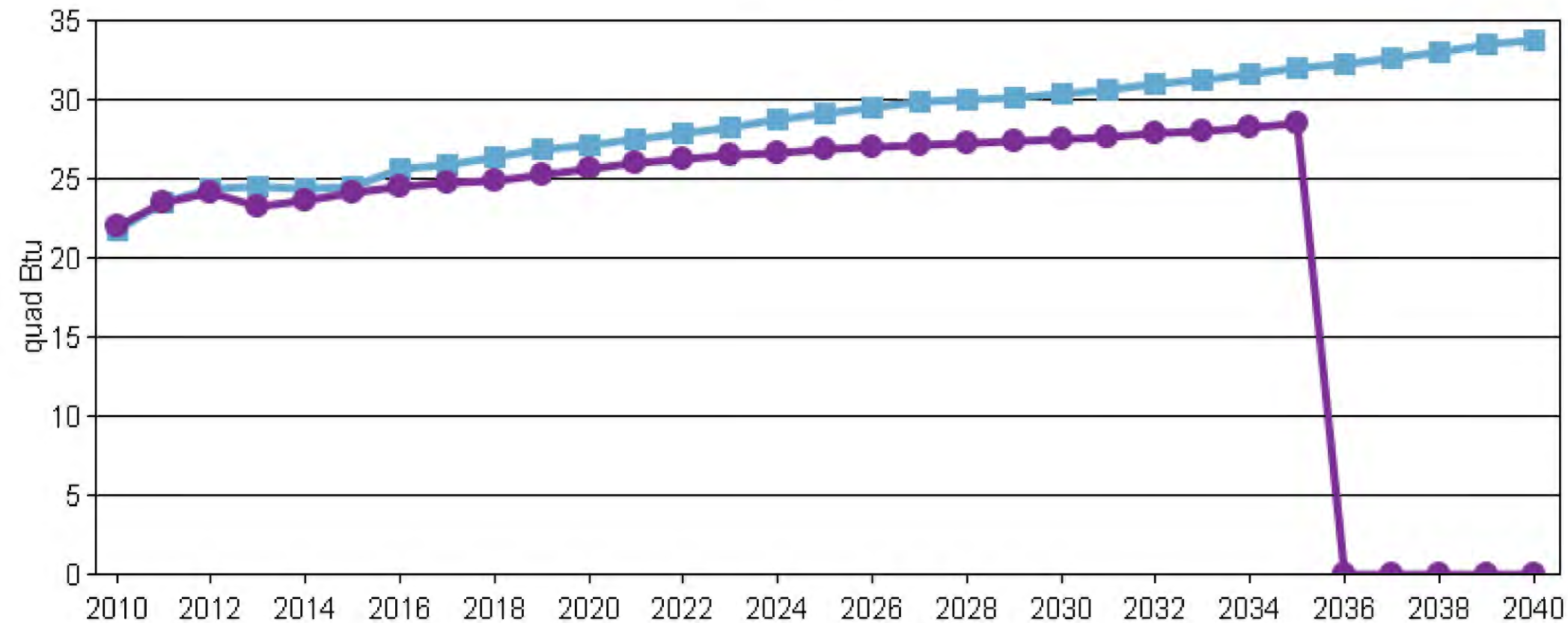
United States Energy Information Administration (EIA):

Annual Energy Outlook 2013 Early Release, Table—Production: Dry Natural Gas

Total Energy : Production: Dry Natural Gas

Reference

AEO2012 Reference



Independent Statistics & Analysis
U.S. Energy Information
Administration