

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

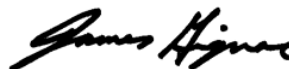
TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board the Response to Motion to Reopen and Substitute Parties of the Illinois Attorney General’s Office, a copy of which is hereby served upon you.

Dated: May 16, 2013

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney
General of the State of Illinois



BY: _____
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RESPONSE TO MOTION TO REOPEN AND SUBSTITUTE PARTIES

Pursuant to 35 Ill. Adm. Code § 101.500(d) and 104.224(d), the Illinois Attorney General’s Office, on behalf of the People of the State of Illinois (the “People”), hereby submits its response to the motion of Ameren Energy Resources (“AER”) and Illinois Power Holdings, LLC (“IPH”) to reopen the docket and substitute IPH as the party entitled to the variance granted by the Board to AER on September 20, 2012. Should the Board agree to reopen the docket, the People wish to emphasize the public process considerations posed by transferring a variance in this situation and urge the Board to reopen the comment period and to hold a hearing in order to fully evaluate IPH’s separate and independent need for a variance from the Multi-Pollutant Standard (“MPS”).

I. Legal Standard for a Variance

Under the Illinois Environmental Protection Act, the Board is authorized to grant variances from regulations when it finds that compliance would impose an “arbitrary or unreasonable hardship” on the petitioner. 415 ILCS 5/35(a). “When deciding whether to grant or deny a variance request, the Board is required to balance the hardship of continued compliance on the business against the adverse impact the variance will have on the

environment.” *Marathon Oil Co. v. EPA*, 242 Ill.App.3d 200, 206 (5th Dist. 1993) (citing *Monsanto Co. v. PCB*, 67 Ill.2d 276, 293 (1977)) (emphasis added).

In addition, “[t]he party requesting the variance has the burden of establishing that the hardship resulting from a denial of the variance outweighs any injury to the public or the environment from a grant of the variance.” *Id.* This burden has been described as “heavy.” *Willowbrook Motel v. PCB*, 135 Ill. App. 3d 343, 349 (1st Dist. 1985). Indeed, “if the one requesting the variance demonstrates only that compliance will be difficult, that proof alone is an insufficient basis upon which to grant the variance. The petitioner must go further and show that the hardship it will encounter from the denial of the variance will outweigh any injury to the public or environment from the grant of the variance.” *Marathon*, 242 Ill.App.3d at 206 (emphasis added).

II. Discussion

Here, the Board concluded that AER had satisfied its heavy burden of demonstrating that its hardship outweighed harm to public health or the environment—but only after an extensive round of public participation and involvement. *See* Order of September 20, 2012, at 2 (“The Board appreciates the extraordinary time and effort of State and local officials, individual citizens, and citizens groups who provided their professional opinions, personal stories, and concerns in this matter.”). Indeed, the Board received over 3,000 written comments on AER’s petition and more than 90 individuals provided oral comments and testimony at the public hearing held on August 1, 2012. *Id.* at 3.

Through its motion and supporting affidavits, AER and IPH assert that transferring AER’s coal plant subsidiaries to an entirely different corporation changes nothing with respect to the justification for a variance. In previous cases, the Board has approved the transfer of special

relief to different entities when, for example, in the words of the petitioner in a thermal discharge case, “the factors justifying the adjusted standard involved not the identity of the discharger” but rather “the nature of the discharge itself.” *Petition of Commonwealth Edison Company for an Adjusted Standard from 35 Ill. Adm. Code 302.211(d) and (e)*, AS96-10 (March 16, 2000) at 4 (emphasis in original).

Here, in contrast, the identity of the parties is of crucial importance given the key factors in this case of undue hardship to the petitioner of complying with the MPS and whether or not financing can be secured by the petitioner for pollution control measures and at what cost. The People agree with the Citizens Groups that apparently contradictory statements made by IPH’s corporate parent, Dynegy, (to its shareholders) and by IPH and AER (in the present motion) about the value of the coal plant acquisition, the outlook for future power prices, and other issues indicate that the Board should, at a minimum, seek additional information beyond that provided by the companies in the motion and supporting affidavits.

Accordingly, if the Board decides to grant the motion to reopen the docket, the People urge it to also reopen the comment period and to hold a hearing to fully evaluate whether IPH should receive variance relief from the MPS and can therefore be properly substituted for AER.

Dated: May 16, 2013

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney
General of the State of Illinois



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CERTIFICATE OF SERVICE

I, James P. Gignac, an Assistant Attorney General in this case, do certify that I caused to be served this 16th day of May, 2013, the foregoing Response to Motion to Reopen and Substitute Parties of the Illinois Attorney General's Office upon the persons listed on the Service List by depositing same in an envelope, first class postage prepaid, with the United States Postal Service at 69 W. Washington St., Chicago, Illinois, at or before the hour of 5:00 p.m.



JAMES P. GIGNAC