BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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PLEASE TAKE NOTICE that we have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **REPLY IN SUPPORT OF MOTION TO REOPEN THE DOCKET AND SUBSTITUTE PARTIES**, copies of which are herewith served upon you.

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Dated: June 3, 2013

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REPLY IN SUPPORT OF MOTION TO REOPEN THE DOCKET AND SUBSTITUTE PARTIES

Pursuant to Section 101.500(e), Ameren Energy Resources, LLC ("AER") and Illinois Power Holdings, LLC ("IPH") (collectively the "Movants"), by and through their attorneys, submit this reply in support of their joint Motion to Reopen Docket and Substitute Parties ("Motion") filed electronically with the Board on May 2, 2013. In the Motion, the Movants seek to substitute IPH for AER as grantee of the variance relief, subject to the conditions in the Board's September 20, 2012 order in Docket PCB 12-126 (the "Board Order"). In this reply, the Movants address the response filed by the Illinois Environmental Protection Agency ("IEPA") on May 20, 2013 ("Response"), the only respondent in this docket, and public comments filed by the Environmental Law & Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club (collectively, "Citizens Groups") ("PC 3008") and the Illinois Attorney General's Office (the "AGO") ("PC 3013").[1]

Consistent with the legal nature of variance relief, the Board-ordered variance was granted prospectively, for a specific five-year term (January 1, 2015 and ending December 31,

[1] The Movants recognize the Board has received additional comments on the Motion, but to date none have raised any new arguments that would merit an individual response.

2019). It also contains specific and well-considered regulatory compliance commitments that must be met during that term and imposed other requirements requiring compliance earlier than 2015. The terms of the Board Order apply to seven Illinois coal-fired power plants, owned and operated by AER, and those plants comprise the Ameren MPS Group subject to emission standards set forth in the Illinois Multi-Pollutant Standard ("MPS"), 35 Ill. Adm. Code § 225.233(e)(3).

On March 14, 2013, Ameren Corporation ("Ameren"), the parent of AER, reached an agreement ("Transaction Agreement") with IPH to convey AER's equity interest in five operating energy centers to IPH, a subsidiary of Dynegy Inc. ("Dynegy"). Relevant here, the conveyance is conditioned upon IPH being the holder of the Board Order without substantive change. If AER's variance is transferred to IPH and other unrelated conditions of the transaction are met, IPH is set to assume ownership, control and responsibility for the five operating plants: Newton (Jasper County), Coffeen (Montgomery County), Duck Creek (Fulton County), E.D. Edwards (Peoria County), and Joppa (Massac County).

The Motion seeks to reopen this docket for the specific and limited purpose of modifying the Board Order to allow for the substitution of IPH for AER as the holder of the variance, contingent on the parties closing under the Transaction Agreement and to be effective on the date of transaction closing. Significantly, IEPA (the only party to this proceeding beside Movants), procedurally "has no issue with the manner in which the Movants' request is being made to the Board to reopen the docket and substitute parties." IEPA Response, p. 2. Given the 40-year history between the Board and the IEPA as it relates to regulations and regulatory relief mechanisms, such as variances and adjusted standards, this legal position deserves respect. Also, such position should be no surprise to the Board since IEPA had not opposed the underlying

variance, determining that a net benefit to the environment and to Illinois will be realized. Correctly, in its Response, the IEPA cites to at least one case where similar substitution was granted by the Board.[2] *See In the Matter of: Petition of Cromwell-Phoenix, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 218.204 (C)*, AS 03-05 (Nov. 20, 2003).

Yet, the Citizens Groups and the AGO have filed responses to the Motion which object to the relief sought and argue for a full new hearing on the merits of the Board Order. The Board should soundly reject such an approach, as inconsistent with the Illinois Environmental Protection Act ("Act"), with prior Board actions and with the relief already granted. That relief and concomitant compliance commitments were based upon significant record information and significant public input that remains relevant here regardless of the holder of the variance.

I. REPLY TO THE COMMENTS OF THE AGO.

At the start, we note that the AGO, which opposed the Board's granting of the underlying variance, does not expressly oppose the relief requested in the present motion. Instead, the AGO has suggested that if the Board agrees to re-open the docket, it should hold a public comment period and hearing to "fully evaluate" the appropriateness of MPS relief to a potential new owner. However, to the extent that this full evaluation the AGO seeks is really a request to reconsider the underlying conclusions about factors which have not changed since the original variance was granted, then the AGO's request is nothing more than an attempt to relitigate a final decision the Board has already made. As such, the AGO's request is neither supported by the Act nor prior Board action. The cases cited by the AGO, *Marathon Oil Co. v. EPA*, 242 Ill. App. 3d 200, 206 (5th Dist. 1993) and *In the Matter of: Petition of Commonwealth Edison Company*

[2] Many other Board cases support the relief sought herein, which the Movants cite in this Reply. *See also Midwest Generation, LLC v. IEPA*, PCB 13-24 (Apr. 4, 2013).

for an Adjusted Standard from 35 Ill. Adm. Code 302.211(d) and (d), AS 96-10 (Mar. 16, 2000) ("*In the Matter of: Petition of ComEd*"), simply do not support this position.

First, the gravamen of *Marathon* is that the Board is obligated to assess the "probable environmental impact" against a claimed business hardship. *Marathon*, at p. 208. Marathon believed it needed a variance from the Board's chloride discharge standard because, without it, Marathon believed it would violate the relevant regulation. Yet, the Board sided with the IEPA in denying the variance because Marathon had *not yet* violated the standard. Noting that the Board's variance decisions are quasi-judicial in nature, the Appellate Court reversed the Board's denial of the variance and remanded it for the Board to weigh the claimed hardship (here, a claimed *future* hardship, as there was no present violation) against any adverse environmental impact.

Here, in granting the underlying variance, the Board balanced the hardship on AER's Illinois coal-fired power plants resulting from compliance with 35 Ill. Adm. Code § 225.233(e)(3) against "any injury to the public or the environment." Not only did the Board find that such hardship outweighed any adverse impact, it determined (given the compliance commitments imposed by the variance) that the variance constituted a "net benefit to Illinois clean air." Board Order, p. 54.

Thus, the Board made the determination the Act requires that it make. And it made such determination in its appropriate context: the MPS regulatory requirements relevant to seven specific Illinois coal-fired power plants. *Marathon* simply does not stand for the proposition that the Act requires that the Board make a separate and independent hardship determination related to the specific financial circumstances of a purchasing corporate entity.

Second, the AGO cites language from the Board's Commonwealth Edison ("ComEd") adjusted standard order out of context. There, as here, the Board was asked to reopen a regulatory relief docket and substitute a new owner, Midwest Generation. The change resulted from Midwest Generation's purchase of four of ComEd's generating stations. The parties wanted to reopen a nearly four-year-old adjusted standard which provided relief from thermal discharge standards at each of the facilities. As here, IEPA supported granting the relief to the purchaser.

In support of the motion to reopen the docket and substitute Midwest Generation as the holder of the adjusted standard, the parties stated that the factors justifying the adjusted standard involved the regulatory context (thermal discharge) and environmental conditions (lack of impact), not the identity of the discharger. While the AGO attempts to make much of this "identity" phraseology, in fact the Board's simply repeated the petitioners' argument. The Board did not actually rely on any such language but rather granted the motion and substituted the parties based on assurances by both parties that the management and operation of the facilities would continue unchanged and on the Board's previous findings on the relevant factors.

If anything, the Board should look to *In the Matter of: Petition of ComEd* as rationale in support of the Movant's petition, which asks for virtually the same result (albeit in the variance context). As the Board noted in *In the Matter of: Petition of ComEd*, even where the Board does not have a specific rule to cover a requested motion, the Board will utilize its processes and authority (and prior similar precedent) to take the type of general, common sense action requested here: "Neither the Act nor the Board's procedural rules address the specific type of relief being sought by petitioners. However, ComEd and Midwest identified a previous situation in which the Board granted similar relief." *See In the Matter of: Petition of ComEd*, AS 96-10,

at 4, citing *In the Matter of: Petition of Envirite Corporation for an Adjusted Standard from 35 Ill. Adm. Code 721 Subpart D: List of Hazardous Substances, Appendix I,* AS 94-10 (Nov. 7, 1996). *See also Freedom Oil v. Illinois Pollution Control Board,* 275 Ill. App. 3d 508, 514 (4th Dist., 1995) ("In performing its specific duties, an administrative agency has wide latitude to accomplish its responsibilities.").

II. REPLY TO THE COMMENTS OF THE CITIZEN GROUPS.

The Citizens Groups make two basic arguments: (a) the Board cannot offer the relief requested unless and until IPH "legally owns the facilities subject to regulation" (prematurity argument) and (b) the Board must make a new and independent determination that [IPH] is in "virtually the same financial position" as [AER] (corporate-specific financial hardship argument).[3] Both arguments fail.

The Board has previously reopened a variance proceeding to modify the variance after the final order was issued. *Continental White Cap, Inc. v. IEPA*, PCB 92-155 (July 22, 1993) (granting motion to modify condition of variance); *Olin Corp. v. IEPA*, PCB 89-72 (July 25, 1991) (same); *IEPA v. Velsicol Chem. Corp.*, PCB 72-326 (July 11, 1991) (reopening docket to delete phrase from order); *The Nutrasweet Co. and Consumers Ill. Water Co. v. IEPA*, PCB 88-84 (Dec. 20, 1990) (granting motion to modify condition of variance); *Allied-Signal, Inc. v. IEPA*, PCB 88-172 (Sept. 27, 1990) (same); *Ekco Glaco Corp. v. IEPA*, PCB 86-91 (Jan. 8, 1987) (treating motion to reconsider as motion to modify and granting modification); *Morton Thiokol Inc. v. IEPA*, PCB 86-223 (Oct. 1, 1987) (granting motion to modify condition of variance).

[3] The Citizen Groups erroneously and continuously refer to AER as Ameren and IPH as Dynegy. As the Board well knows, AER was the recipient of the Board- ordered variance, not its parent Ameren Corporation. Here, IPH seeks to become the holder of the variance, not its parent, Dynegy Inc. The Movants are AER and IPH. This is a vital distinction.

IEPA and the Movants agree that the Board can transfer variance relief and can do so in this docket contingent on the parties closing under the Transaction Agreement and to be effective on the date of transaction closing. As noted, on numerous occasions, the Board has granted similar requests in adjusted standard cases. *In the Matter of: Petition of Crownline Boats, Inc. for an Adjusted Standard*, AS 04-01 (Oct. 7, 2010) (substituting recipient of adjusted standard); *In the Matter of: Petition of Cromwell-Phoenix, Inc. for an Adjusted Standard from Ill. Adm. Code 218.204(C)*, AS 03-05 (Nov. 20, 2003) (same); *In the Matter of Ensign-Bickford Co. for an Adjusted Standard from 35 Ill. Adm. Code 237.103*, AS 00-5 (Jun. 5, 2003) (same); *In the Matter of Midwest Generation, LLC*, AS 96-9 (Dec. 7, 2000) (same); *In the Matter of: Petition of Toscopetro Corp. for an Adjusted Standard*, AS 97-3 (Oct. 5, 2000) (same); *In the Matter of: Petition of Commonwealth Edison Co. for an Adjusted Standard from 35 Ill. Adm. Code 302.211(d) and (e)*, AS 96-10, at 4 (Mar. 16, 2000) (same); *In the Matter of: Petition of Envirite Corporation for a Revised Adjusted Standard from 35 Ill. Adm. Code 721 Subpart D*, PCB 94-10 (Dec. 19, 1996) (same).

Furthermore, the Board did not reevaluate the merits of the adjusted standard petition in any one of those adjusted standard cases as the Citizen Groups would have the Board do in this case. In each of the adjusted standard cases, the Board was either silent or determined that the factors relevant to granting the relief had not changed. *Id. In the Matter of Ensign-Bickford*, AS 00-5, at 2 (granting motion to substitute grantee of adjusted standard based "upon the Board's previous findings of justification"); *Petition of Toscopetro*, AS 97-3, at 3 (granting motion to substitute grantee of adjusted standard based on petitioner's "representation that the relevant factors which justified the original adjusted standard in this matter have not changed"). Similarly, the Board should grant Movants' motion to substitute without reevaluating the

underlying merits of the variance petition because neither party seeks to make any substantive changes to the variance. A new petition is simply not required. *Compare Allied-Hastings Barrel and Drum Serv., Inc*., PCB 86-21, 87-123 (Aug. 6, 1987) (petitioner was required to file a new petition for a variance because the petitioner sought to modify the compliance plan included in the original variance).

The Citizen Groups' attempt to distinguish the variance and adjusted standard proceedings is unavailing. Both are regulatory relief mechanisms, created for the very purpose of providing regulatory relief to regulated entities and subject to Part 104 of the Board's procedural rules. 35 Ill. Adm. Code Part 104. Both are adjudicatory cases. *See* 35 Ill. Adm. Code 101.108(c). In both, the relevant parties are the regulated entities and the IEPA. Both are subject to judicial review pursuant to Section 41 of the Act. *See* 415 ILCS 5/28.1(g), 41(a).

Like a variance petition, the adjusted standard inquiry is based on petitioner-specific information. For example, in an adjusted standard proceeding, the Board must consider whether the "factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner." 415 ILCS 5/28.1(c)(1). The Board must also consider whether the adjusted standard will "result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability." 415 ILCS 5/28.1(c)(3). Indeed, the Board has later transferred adjusted standard relief even where the original orders were individually tailored to the petitioner.[4] Because the Board has substituted parties in adjusted standard proceedings where the standard requires petitioner-specific information and the

[4] *See, e.g., In the Matter of: Shell Wood River*, AS 97-3 ("This adjusted standard applies to the Shell Wood River Refining Company (Shell) located near Roxana, Illinois, in Madison County for its Treatment Pond #1."); *In the Matter of: Petition of Commonwealth Edison*, AS 96-9 ("Commonwealth Edison Company is hereby granted an adjusted standard for the Joliet/Lincoln Quarry Site . . .").

Board orders granted provide petitioner-specific relief, the Board too can do the same with a motion to substitute the grantee of a variance.

A. <u>The Movants' Request is Not Premature Because the Act Does Not Require Immediate Ownership as a Prerequisite for Regulatory Relief</u>.

The Movants' motion to transfer the variance relief to IPH is timely and appropriate. Granting substitution contingent on the parties closing under the Transaction Agreement and to be effective on the date of closing assures seamless compliance with the terms of the Board's Order. Although the variance relief does not begin until 2015, other aspects of the Board Order do impose immediate compliance obligations. For example, prior to 2015, the plants must comply with a more stringent interim SO_2 emission rate than would otherwise be required under the MPS, must maintain the Hutsonville and Meredosia Energy Centers electric generating units shuttered through December 31, 2020, and must file annual reports documenting progress on completion of the FGD system at the Newton Energy Center ("Newton FGD Project"). In order to complete engineering work on the Newton FGD Project, work relative to that project must be ongoing. Granting substitution contingent and effective upon the parties closing under the Transaction Agreement will transfer both the obligations and benefits of the variance relief to IPH immediately upon taking ownership of and responsibility over the plants and will allow for a smooth transition.

Board precedent and regulations allow an entity to receive assurance that a variance will be transferred before it legally owns the facilities subject to regulation. In fact, as the IEPA notes, the Board has previously transferred relief to a new company before the assets had transferred to that company. *In the Matter of: Petition of Cromwell-Phoenix, for an Adjusted Standard from 35 Ill. Adm. Code 218.204(C),* AS 03-5 (Nov. 20, 2003). In *Cromwell-Phoenix*, the Board granted pre-closing relief for two reasons: (1) the parties filed a joint motion, and (2)

the president of the new company submitted an affidavit stating it would assume all of the obligations and liabilities arising from operating the facility and providing record support for the motion.

IPH here presents an identical scenario. First, IPH moves jointly with AER to transfer the Board Order. Second, the Movants provide adequate record support in the Motion to justify the substitution. IPH submitted an affidavit of the Vice President of Illinois Power Holdings, Mr. Daniel Thompson, who assures the Board that IPH will, upon closing, assume ownership of Duck Creek, Coffeen, E.D. Edwards, Newton, and Joppa Energy Centers and will operate the energy centers in materially the same way as they are operated today under AER. *Affidavit of Daniel P. Thompson*, p. 4, 9. In addition, the Movants submitted the Affidavit of Mr. Martin Lyons, the Executive Vice President and Chief Financial Officer of Medina Valley. *Affidavit of Martin J. Lyons*, p. 6. Medina Valley will acquire ownership of the Hutsonville and Meredosia energy centers if the Board grants the Motion to Substitute. On behalf of Medina Valley, Mr. Lyons independently commits to not operate the electric generating units at Hutsonville and Meredosia through December 31, 2020; Medina Valley also agrees to submit annual certifications to IPH confirming this commitment since, as the holder of the variance, IPH is responsible to assure compliance with Condition 4 of the Board Order. *Id*., pp. 5-6.

Further, contrary to the Citizen Groups' assertion, *Ensign-Bickford* in no way requires a finding that a variance cannot be transferred nor that a motion to substitute parties prior to changing ownership is untimely. PC 3008, p. 3. The pivotal distinction between *Ensign-Bickford* and here is that, unlike IPH, the purchasing entity in that matter (Dyno Nobel, Inc.) was not a party to the motion. *Ensign-Bickford Co. v. IEPA*, PCB 02-159 (Apr. 3, 2003). Thus, the Board had no assurance from Dyno Nobel, Inc. that it would assume all of the obligations and

liabilities of operating the facility. *Id.* In any event, in *Ensign-Bickford* the parties did not return jointly because the Board ultimately granted the necessary relief to Dyno Nobel in a concurrently pending adjusted standard proceeding. Here, the Movants do not intend to file for permanent relief through an adjusted standard.

Accordingly, the Motion is proper and not premature, and the Board should transfer variance relief on the basis of the information of record in the underlying proceeding and as supplemented in the Motion.

B. <u>A Separate Finding as to Financial Hardship on the Part of IPH is Neither Required Nor Appropriate and the Factors in the Underlying Proceeding are Equally Relevant Here</u>.

Significantly, the parties to this proceeding, the Movants and IEPA, each agree that "the relevant factors in support of the Board's decision to grant AER the variance have not changed and *are not affected by the acquisition of AER by IPH*." IEPA Response, p. 2 (emphasis added). Clear from the above Board cases, in transferring relief, the key consideration is whether the relevant factors that justified the original relief have changed and whether the new company will operate the facility in substantially the same manner. *Petition of Ensign-Bickford*, AS 00-5 (Jun. 5, 2003). In such cases, the Board has consistently focused on the relevant factors supporting its decision when considering the transfer of relief. In particular, the Board gives significant consideration to the environmental consequences of its decision. Here, among several other findings, the Board found that the underlying variance "provides a net benefit to Illinois air quality." Board Order, p. 68. That benefit will not go away when and if IPH assumes responsibility for the operating plants and for the Board Order. As set forth below, the factors relevant to granting the variance, specifically that AER would suffer an arbitrary or unreasonable hardship if required to comply with the MPS, are equally relevant to any entity that assumes control.

(i.) <u>An Arbitrary or Unreasonable Hardship Exists and Will Continue to Exist for the Owner of the Energy Centers</u>.

AER has already met the burden required to show that any hardship it would encounter from being denied the variance would outweigh any injury to the public or environment from the grant of the variance. AER received variance relief because it was able to make this requisite showing. Current conditions are consistent with the conditions on which the Board granted relief. *See, e.g.*, Motion, pp. 12-14. Significantly, IPH commits that if it becomes the new owner and operator of the five operating energy centers, it will operate the facilities in substantially the same manner and will be subject to the same conditions of the Board Order granting AER variance relief. Motion, pp. 9-10.

The relative balance between regulatory hardship and environmental impact does not change with IPH's acquisition of AER. The existence of an arbitrary or unreasonable hardship currently lies with AER, as determined by the Board, and will remain with the owner of the plants during the term of the variance, regardless of the ultimate parent company. The Citizen Groups' statement that "[t]here will be no hardship if the variance is not available because . . . then the deal will not happen" is fundamentally flawed. The hardship currently exists and if the transaction does not occur, the hardship, which the Board found merited a variance in PCB 12-126, does not magically go away. Whether it is AER within Ameren's family of companies, or the AER plants within Dynegy's family of companies, or the AER plants within any other family of companies, the hardship is the same and remains applicable to the company operating the subject plants, both then and now. This alone is a sufficient basis for the Board to find that conditions relevant to this factor have not changed.

(ii.) <u>In Assuming Responsibility for the Subject Energy Centers, IPH Faces the Same Hardship as that of AER</u>.

The Citizen Groups attempt to write new language (and a new standard) into the Act's variance provisions. Section 35(a) requires that a variance be granted upon adequate proof that "compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." 415 ILCS 5/35(a). No Board opinion focuses solely on the financial condition of a purchasing entity, as the Citizens Groups urge here. Rather, the key considerations have always been (and should be here) focused on the nature of the regulatory hardship balanced against any adverse impact to the environment. Here, that regulatory hardship exists no matter who owns and operates the subject facilities and that hardship has been determined conclusively by this Board. Nonetheless, the Movants will address these comments and have provided sufficient record information, in the nature of affidavits in support of the Motion, to allow the Board to grant the substitution as requested. Contrary to the Citizen Groups' assertions, the circumstances the Board relied on in finding an arbitrary or unreasonable hardship have not "changed radically." PC 3008, p. 9. The Motion and Dynegy's public statements are aligned in stating that as before and as of now, there is a financial hardship.

Statements made publicly by IPH's corporate parent, Dynegy Inc., are in no way inconsistent with AER's statements in the underlying proceeding establishing an arbitrary or unreasonable hardship. At hearing in the underlying proceeding, Mr. Gary Rygh of Barclay's Bank PLC stated "[s]ome factors that contributed to market conditions are a permanent part of the long-term plan such as stringent environmental regulations and Illinois' deregulated power market. However, others will definitely change during the term of the variance . . . [a]s a result, we will likely see market prices for electricity rise." *Aug. 1, 2012 Hearing Transcript*, pp. 48-49. Further, when asked about the proposed compliance date at hearing, Mr. Menne on behalf of

AER replied "things are just changing so much every year that we don't know what position we will be in going forward . . . our assumption is that markets will recover. We'll be in shape to construct [the Newton FGD system] at that time, but beyond that, we really just don't know at this point in time." *Aug. 1, 2012 Hearing Transcript*, p. 38. Taken together, these statements and others in the record of the underlying variance proceeding illustrate that given the unforeseen events, AER did not have the cash flow to complete installation of the Newton FGD Project *at that time* and in time to meet the MPS. Future events were yet to be determined, but were predicted to improve in time to finish construction of the Newton FGD Project.

Dynegy Inc.'s public comments concerning IPH's contemplated acquisition of AER are entirely consistent with the financial hardship that the Board determined, among other factors, justified the grant of the variance and are entirely consistent with AER's predictions of future market recovery. AER simply does not have the financial resources to install the Newton FGD Project under current market conditions. Specifically, the financial resources needed to fund completion of the approximate $250 million remaining for the Newton FGD Project will not exist on the timeline needed, as predicted by AER in the underlying proceeding and *as reflected in Dynegy's public statements*, until sustained recovery of power and capacity prices occurs.

While certain predictions of power prices by independent market observers remain flat through 2017 (*Affidavit of Mario E. Alonso*, p. 7), Dynegy's own belief, as publicly stated, is that market prices will begin to recover when compliance with the federal Mercury and Air Toxics Standards (MATS), beginning in April, 2015, tightens supply as noncompliant or uneconomic generation units in the Midwest continue to retire.[5] Dynegy's view of anticipated future market conditions in no way contradicts the fact that market prices remain depressed today and will

[5] Dynegy Inc. Form 8-K (Mar. 14, 2013), Ex. 99.2 at 2 (available at www.dynegy.com/investor-relations/sec-filings); DYN-Q4 2012 Dynegy Inc Earnings Conference Call (Mar. 14, 2013), Transcript at p. 17.

remain so for the next several years; thus, as determined in the underlying proceeding, the AER energy centers are not expected to have the necessary financial resources until sometime after 2015 to fund completion of the Newton FGD Project in time to meet the applicable emission rate at the end of the variance period. Here, under IPH's ownership, those energy centers will also be entirely dependent on these market prices, as they were under AER—nothing has changed.

Notably, the recovery of market prices is not expected to be instantaneous; while Dynegy expects market recovery to begin as MATS takes effect in 2015, the recovery in power prices is expected to be gradual. Moreover, improved financial performance will not immediately create sufficient cash to complete the Newton FGD Project earlier than projected in the underlying variance proceeding. Rather, over time, Dynegy anticipates that AER (IPH after transfer) will be able to accumulate the financial resources to cover the significant capital investment to continue the Newton FGD Project construction and ramp up for completion in time to meet the applicable rate at the end of the variance period. In short, as it has publicly stated, Dynegy anticipates that the financial performance of the AER plants will improve over time. Such market optimism, however, does not mean that sufficient funds will be available in 2015 to fund completion of the Newton FGD Project in time to meet the MPS emission rates without the relief provided by the Board Order. Simply stated, the variance is essential and without a transfer of this variance, IPH will simply not be in a position to assume the risk—the transaction will then not occur, submitting the State of Illinois to much greater risk that the energy centers will themselves ultimately fail.

Further, as alluded to above and similar to the Board's recognition of Ameren Corporation's inability to provide financing to or assume debt on behalf of its subsidiary AER (Board Order, pp. 50-51), Dynegy Inc. cannot provide funding to or assume debt on behalf of its

subsidiary IPH. As was the case with Ameren Corporation, the credit rating agencies made clear to Dynegy that its credit rating would be negatively impacted if Dynegy were to provide material financial support to IPH. Indeed, Dynegy's financial resources are significantly lower than those of Ameren Corporation, which includes regulated utilities among its subsidiaries, and Dynegy's credit rating is much lower than Ameren Corporation's credit rating. A downgrade in Dynegy Inc.'s credit rating would, among other things, increase Dynegy's cost of borrowing, cause a loss in investor confidence and jeopardize Dynegy's balance sheet. Having only recently emerged from bankruptcy in fall 2012, Dynegy cannot jeopardize its financial future, and the future of its other subsidiaries, by accepting such negative consequences.

Thus, the future expectations described in both the underlying variance proceeding and in the Motion *are* consistent and the quotations provided by the Citizen Groups are in no way "evidence" that any factor relied on by the Board has changed. Rather, the substantial record information provided by the Movants is sufficient to allow this request to be granted, as the Board has done for other purchasing entities seeking to transfer regulatory relief.

(iii.) <u>There is Simply No Self-Imposed Hardship Here</u>.

Further, the Citizens Groups again misconstrue case law in arguing that IPH's hardship would be self-imposed if it voluntarily purchases the five operating energy centers. The hardship facing AER and then IPH upon closing under the Transaction Agreement is a very different scenario than the cases cited by the Citizen Groups. Rather, the appropriate inquiry for the Board in a self-imposed hardship scenario is whether a company is seeking relief when in a quagmire of their own making, due to lack of diligence. For example, in *Ecko Glaco v. IEPA*, PCB 87-41 (Dec. 17, 1987), the company put itself in a poor financial position due to procrastination and poor business decisions. The Board correctly found that continued unwillingness to commit to a compliance plan demonstrated a lack of commitment to follow

through. Likewise, in *Skyway Realty v. IEPA*, PCB 75-249 (Sept. 18, 1975), the company asked for relief to avoid the costs of complying with regulations after proceeding with a construction project with full knowledge of the regulations. The Board found that any hardship would be wholly self-imposed. Here, the transfer is not sought due to lack of diligence, but because such relief (which was found to be environmentally beneficial from a regulatory standpoint) makes the transaction viable.

The Citizen Groups' reliance on *Copley Memorial Hospital, Inc. v. City of Aurora*, 99 Ill. App. 3d 217, 222, 425 N.E.2d 493 (2nd Dist. 1981) is equally misplaced. In *Copley*, a hospital bought property without any assurances as to whether it will be granted the requested relief. The hospital was aware of certain zoning restrictions, assumed the property with such restrictions, *then* sued for declaratory judgment when denied a special use permit to develop a parking lot. Here, IPH is deliberatively putting the horse before the cart. It acknowledges the hardship, and will not acquire the plants unless the Board grants the Motion. IPH's situation is also distinguishable from the self-imposed hardship found in *Bravo-Ernst v. IEPA,* PCB 81-62 (Dec. 2, 1981). In *Bravo-Ernst*, the Board determined the petitioner's alleged hardship was self-imposed because it was based solely on economic hardship that applied equally to other similarly-situated entities. Here IPH is not seeking to achieve immediate financial advantage over others and the hardship is based upon circumstances unique to the plants of Ameren MPS Group and associated emission rates and compliance deadlines. Indeed, the Board Order found that a number of factors contribute to an arbitrary or unreasonable hardship unique to the plants of the Ameren MPS Group and ability of the plants to meet the 2015 and 2017 SO_2 emission rates.

The Movants' request also is unlike other instances where the Board or the courts have found a hardship to be self-imposed because IPH's hardship is not due to ignorance of the existence of regulations (*City of Ottawa v. IEPA*, PCB 86-165, slip op. at 7 (Jan. 22, 1987)), a result of the Petitioner's inactivity or faulty decision-making (*Marathon Oil Co. v. IEPA*, PCB 95-150 (May 16, 1996)), or due to a failure to request relief in a timely manner (*Fedders-USA v. IEPA*, PCB 86-47 (Apr. 6, 1989)).

Finally, the argument that the hardship is self-imposed because IPH is voluntarily acquiring the five operating energy centers must be rejected on its face because it would mean that no Board-ordered regulatory relief could ever be transferred to a new owner since the new owner would always be voluntarily making the purchase and thus, under the Citizen Groups' reasoning, would be assuming any hardship voluntarily. The arguments presented by the Citizen Groups that the financial hardship of IPH is somehow self-imposed must be rejected.

(iv.) <u>The Hardship Analysis Requires Consideration of More Than Just Financial Condition</u>.

The Citizen Groups' arguments regarding hardship are also selectively and inappropriately narrow. Financial hardship is but one component of AER's showing of an arbitrary or unreasonable hardship. The other components included the unforeseen combination of regulatory uncertainty, declining power market prices resulting from the lingering recession, the fact that increased compliance costs cannot be recovered through rate charges, and historically low natural gas prices. Board Order, pp. 60-63; Motion, pp. 2-3. None of these factors are specific to any particular entity and each of these factors will remain the same for any new owner of these energy centers. Just like AER, IPH is a merchant generator operating in a deregulated power market subject to the same unforeseen market circumstances that have created

a financial hardship for AER. In sum, the Board recognized many hardship factors that would apply equally to any owner of the energy centers.

Further, hardship must be balanced against environmental impact. *Monsanto Co. v. Pollution Control Board*, 67 Ill. 2d 276, 10 Ill. Dec. 231, 367 N.E.2d 684 (1977) (holding the Board is required when ruling on a variance, to balance environmental impact against hardship to the Petitioner). AER worked diligently with IEPA to ensure that the variance would provide an environmental benefit, and to create a compliance plan that resulted in a more stringent interim emission rate for SO_2 through 2015, and the Board has correctly recognized that benefit. Compliance with this rate requires the company to operate the FGD systems at the Duck Creek and Joppa Energy Centers at a higher level of control, and to procure ultra-low sulfur coal for use at the Edwards, Newton, and Joppa Energy Centers on an ongoing basis, none of which is required outside of the variance. AER further committed to shutter the Hutsonville and Meredosia Energy Centers during the pendency of the variance. These commitments demonstrate conclusively that the variance relief has not been purely for the economic benefit of AER, nor will it be for IPH should it acquire the five energy centers. Accordingly, the benefits and the hardship associated with the variance have already been established, and it remains true that the costs of compliance with the MPS for IPH would be wholly disproportionate given that the terms of the variance will ultimately result in a net environmental benefit at the end of its term.

(v.) <u>The Environmental Net Benefit Remains the Same</u>.

The environmental impact analysis measures "*injury to the public or the environment* from a grant of the variance." *Marathon Oil Co. v. IEPA*, 242 Ill. App. 3d 200, 206 (5th Dist. 1993) (emphasis added). The Board has already performed an environmental impact analysis and found that the "requested variance will result in an overall reduction in emissions and

therefore [will have] no significant negative impact on the public or the environment." Board Order, p. 1. The Agency not only agreed that the variance would not cause environmental harm but agreed that a net environmental benefit would result. Board Order, p. 1. Since the Movants have not requested any substantive modifications to the variance, and have not asked to change the variance period in any respect, the environmental impact analysis should not begin anew. IPH will continue to meet the SO_2 mitigation emission rate at the operating energy centers, and will continue to keep the units at Hutsonville and Meredosia closed through December 31, 2020. *Thompson Affidavit*, pp. 7-8; *Lyons Affidavit*, p. 6. Therefore, the exact same overall reduction of SO_2 emissions will be achieved during the variance period. Because the Board has already recognized the net benefit to the environment from this variance, there is no injury that requires revisiting.

Furthermore, the focus of an appropriate environmental impact analysis evaluates the environmental consequences of the emissions or discharge, and the owner of the facility is not relevant to this analysis. *See also, In the Matter of: Midwest Generation, LLC*, AS 96-9, at 2 (in granting motion to substitute, petitioner noted that the analysis for granting an adjusted standard "did not involve the . . . operator's identity, but rather the physical characteristics related to the [facility]" and these characteristics had not changed). The Board has previously granted motions to substitute in adjusted standard cases without undertaking new analysis of the environmental impact. *See, e.g., In the Matter of: Petition of Crownline Boats*, AS 04-01; *In the Matter of: Petition of Cromwell-Phoenix*, AS 03-05; *In the Matter of: Ensign-Bickford*, AS 00-5; *In the Matter of: Midwest Generation*, AS 96-9; *Petition of Toscopetro*, AS 97-3; *In the Matter of: Petition of Commonwealth Edison*, AS 96-10; *In the Matter of: Petition of Envirite Corporation*, PCB 94-10.

The transfer of ownership from AER to IPH does not alter the environmental impact of the variance because who owns the facility seeking the variance is irrelevant to the environmental impact inquiry. As the Citizen Groups acknowledge (PC 3008, at 13), the environmental impact analysis measures "*injury to the public or the environment* from a grant of the variance." *Marathon Oil Co. v. IEPA*, 242 Ill. App. 3d 200, 206 (5th Dist. 1993) (emphasis added). It is the *facility's* environmental impact that is relevant to the Board's evaluation. *Schrock/A Tappan Div. v. IEPA*, PCB 86-205 (Mar. 5, 1987) (noting that a "necessary aspect of a variance petition is that it describe how and when *the facility* will come into compliance." (emphasis added)). *See also, In the Matter of: Midwest Generation*, AS 96-9, at 2 (in granting motion to substitute, petitioner noted that the analysis for granting an adjusted standard "did not involve the . . . operator's identity, but rather the physical characteristics related to the [facility]" and these characteristics had not changed). Because no changes have been made to the environmental impact analysis through the Motion, there is no reason to reevaluate the environmental impact of the variance.

The Citizen Groups' suggestion that IPH file a new petition for variance post-transaction (PC 3008, pp. 17-18) is misplaced as the transaction will not occur without the regulatory certainty of the requested substitution. The suggestion also ignores the carefully crafted substance of the variance compliance plan, which resulted from comprehensive negotiations with the IEPA and met the approval of the Board. The Board recognized the benefit that would occur in part due to early reductions in annual emission rates of SO_2. Board Order, p. 54. Under the variance, the applicable annual SO_2 emission rate is currently 0.35 lb/mmBtu through December 31, 2019. Without the variance, the applicable annual SO_2 emission rate would be 0.50 lb/mmBtu during 2013 and 0.43 lb/mmBtu during 2014. The Citizens Groups ignore the

commitment IPH makes here, presuming the transaction occurs, in agreeing to meet a more stringent emission rate than currently required by the MPS "on the books", higher levels of control at the Duck Creek and Coffeen Energy Centers, and procurement of ultra-low sulfur coal for use at the Edwards, Newton, and Joppa Energy Centers on an ongoing basis.

III. ACTION REQUESTED.

The Movants request that the Board substitute IPH for AER on the Board Order, on the basis of the record created herein, including the substantial information provided in the Motion. Given the substantial work already performed on this matter by the Movants, the IEPA, and the Board in the underlying variance, this action is appropriate. It is also consistent with prior Board actions in other similar cases. As IEPA confirmed, there is no procedural issue in the approach suggested; the Movants have, in fact, modeled its motion after similar motions in other Board cases, cited herein. While the Movants remain ready to provide whatever further information the Board might find useful in rendering its decision, the Movants also believe that sufficient information exists in this record to take the action requested.

The Board has already provided substantial and meaningful public input through both a public hearing and written comment period. That hearing was held despite the Citizen Groups specifically stating they did not want a hearing. Importantly, the Board has already received and considered thousands of public comments. If the Board deems it necessary to seek further input, the Movants would request that the public comment period be a short written public comment period (*e.g.*, 30 days) limited to the request at hand. The goals of public input can be accomplished equally as effectively and thoroughly through a written public comment period. Moreover, the Board gives public comments the same weight, whether oral or written.[6] *In the*

[6] "'Public comment' means information submitted to the Board during a pending proceeding either by oral statement made at hearing or written statement filed with the Board." 35 Ill. Adm. Code 101.202.

Matter of: RCRA Delisting Adjusted Standard Petition of Peoria Disposal Company, AS 08-10, at 10 (Sept. 4, 2008) (noting that "the Board will give the same weight" to written comments "as any oral comments."). If the Board determines that a public hearing is necessary on the Motion, the Movants strongly suggest that such hearing be within the framework suggested by the IEPA in its Response. *See* IEPA Response, p. 2.

Clearly, any additional comment period or hearing here should be for a limited purpose only. *See, e.g., IEPA v. A.J. Welin*, PCB 80-125, at 1 (Aug. 18, 1982) (enforcement proceeding reopened to review relief granted only). *See also, In the Matter of: Petition for Site-Specific Exception to Effluent Standards for the Illinois-Am. Water Co.*, R 85-11, at 1 (Nov. 20, 1986) (record reopened and rehearing granted to review "additional evidence regarding alternative [treatment] methods."). Consistent with the regulations, public comment should be "relevant to the subject matter," which in this case is the Motion, and not used as an opportunity to re-challenge the underlying factors considered by the Board in granting the Board Order.[7] 35 Ill. Adm. Code 101.628(b). As explained in one case where the Board granted a rehearing and reopened the record solely to address the issue of alternative relief, "[t]he merits of the decision are not at issue; the Board's findings . . . remain unchanged." *A.J. Welin*, PCB 80-125, at 1. Similarly, the Board's findings in the underlying Board Order should not be at issue.

Furthermore, the underlying Board Order is not at issue because neither a motion to reconsider nor an appeal has been filed. A final order has issued and the Movants seek to reopen that order for the limited purpose of substituting the parties. Any attempt to relitigate the essential findings the Board made in its underlying final order must be resisted. The only issue before the Board involves the Motion to Substitute AER for IPH on the Board Order.

[7] Importantly, the Citizen Groups have already begun their public assault campaign against the Movants, and this Motion, knowing that the transaction fails without it.

WHEREFORE, for the reasons set forth in the Motion to Reopen Docket and Substitute Parties and supplemented in this Reply, Movants Ameren Energy Resources and Illinois Power Holdings, LLC respectfully request that the Board grant the motion or, in the alternative, grant the motion after receiving written public comment on the motion pursuant to a Board ordered limited written comment period. Specifically, the Movants request the Board to substitute IPH for AER as the grantee of the variance relief subject to the ongoing conditions set forth in the Board's September 20, 2012 Order, contingent on the parties closing under the Transaction Agreement and to be effective on the date of transaction closing. Suggested language for a proposed order has been respectfully included with the Motion as Exhibit D.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 3rd day of June, 2013, I have served electronically the attached **REPLY IN SUPPORT OF MOTION TO REOPEN THE DOCKET AND SUBSTITUTE PARTIES,** upon the following persons:

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