Electronic Filing - Received, Clerk's Office : 09/11/2015 - ***PC# 1449 ***

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
AMENDMENTS TO 35 ILL. ADM.	)	PCB 15-21
CODE PART 214, SULFUR	)	(Rulemaking – Air)
LIMITATIONS, PART 217, NITROGEN	)	
OXIDES EMISSIONS, AND PART 225,	)	
CONTROL OF EMISSIONS FROM	)	
LARGE COMBUSTION SOURCES	)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 11th day of September, 2015, I have filed with the Office of the Clerk of the Pollution Control Board the foregoing RESPONSE COMMENTS OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE on behalf of the People of the State of Illinois, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois. Copies of the documents are attached hereto and served upon the persons listed on the attached Service List.

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Dated: September 11, 2015

CERTIFICATE OF SERVICE

I, JAMES GIGNAC, an attorney, do certify that I caused the RESPONSE COMMENTS OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE in this matter to be served upon the persons listed in the attached Service List by U.S. Mail.

JAMES GIGNAC

Dated: September 11, 2015

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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RESPONSE COMMENTS OF THE
ILLINOIS ATTORNEY GENERAL'S OFFICE

Pursuant to 35 ILL. ADM. CODE § 102.108 (2014), and the Hearing Officer Order dated August 5, 2015, the Illinois Attorney General's Office, on behalf of the People of the State of Illinois (the "People"), hereby submits the following response comments to the Illinois Pollution Control Board (the "Board") for its consideration in the above-referenced matter.

INTRODUCTION

The People have reviewed the comments filed by Citizens Against Ruining the Environment ("CARE"), the Illinois Environmental Protection Agency ("IEPA"), the Illinois Environmental Regulatory Group ("IERG"), Midwest Generation, LLC, and Sierra Club.[1] For the reasons set forth below, the People continue to urge the Board to reject the portion of the proposed rule amending the Combined Pollutant Standard, 35 ILL. ADM. CODE § 225 ("CPS" or "Part 225") and making related changes to Nitrogen Oxides limitations (codified at 35 ILL. ADM. CODE § 217 and hereinafter referred to as "Part 217")—or, in the alternative, dismiss without prejudice the request to exempt Will County 4 from the CPS by rejecting that part of the proposed rule.

[1] The People also note the hundreds of comments filed in this docket from individual citizens, many of whom express concern over the proposed exemption for Will County 4, evidencing why this issue should be considered separately, on its own merits, and not part of this rulemaking for the 1-hour sulfur dioxide standard.

DISCUSSION

I. The Illinois SO_2 Implementation Plan Does Not Need to "Lock-In" Reductions that have already occurred or are occurring.

In its initial comments, the People pointed out that amending the CPS is unnecessary for the purpose of this rulemaking, which is to develop a state implementation plan for the federal sulfur dioxide ("SO_2") standard. Several parties also discussed this question of bifurcation, originally raised by the Board in its third set of questions. *See* Board and Staff Questions for Third Hearing, No. 63 ("Comment on whether IEPA's proposed changes to Part 217 and Part 225 could be taken up in a separate proceeding before the Board such as a rulemaking, adjusted standard, or variance proceeding.").

First, Midwest Generation suggests, but does not provide supporting citations, testimony, or affidavits from the company, the notion that reductions are happening *because of*, or *to comply with*, "the Proposal" (the company's designation for the proposed rules in this docket). *See, e.g.*, Comments of Midwest Generation, LLC at 2 (The "Proposal . . . will cause major emission reductions that would not occur but for IEPA's proposed rule amendments."); *id*. at 3 (intimating that emission reductions from Joliet and Will County 3 are "resulting" from Illinois EPA's agreement to the "Proposal"). To the extent these statements are referring to Joliet and Will County 3 reductions, the statements are not supported by the record. Midwest Generation has already shut down Will County 3 and is moving ahead with repowering Joliet, with or without the proposed rules.[2] In other words, the basic element of *causation* (*i.e.*, producing an

[2] *See, e.g.*, Form 10-Q, NRG Energy, Inc., August 4, 2015, at 59 (*available at* http://www.sec.gov/Archives/edgar/data/1013871/000101387115000015/nrg2015063010q.htm) (NRG's "[c]oal generation portfolio does not include 251 MW related to Will County, which was retired April 15, 2015." NRG targets completion of the Joliet conversion to natural gas in Summer 2016. Form 10-K, NRG Energy, Inc., February 27, 2015, at 90 (*available at* http://www.sec.gov/Archives/edgar/data/1013871/000101387115000004/a201410-k.htm).

effect or result) is not present here in terms of the relationship between amending the CPS and reductions at Joliet and Will County 3.

Second, IERG suggests that the Part 225 changes are necessary to make the Joliet and Will County 3 reductions "permanent and enforceable." *See* IERG's Post-Hearing Comments at 5. The People are not opposed to doing so; but it is not *necessary* for the state's implementation plan, as we explained in our Initial Comments. *See* Initial Comments of the Illinois Attorney General's Office at 4.

Third, both Illinois EPA and Midwest Generation insist that the changes to Parts 214, 217, and 225 have become "inextricably linked" and "intertwined." But if there is no need to amend Part 225, and the Part 217 changes are related to Part 225, then these Parts cannot be irreversibly tied to Part 214 (sulfur limitations, the real subject of this rulemaking). This is especially true because the Agency's attainment modeling is not dependent on Will County 4 complying with unit-specific requirements under the CPS. Instead, the argument that the regulatory Parts are "intertwined" is more an argument to maintain the proposed rules as a vehicle for Midwest Generation's Will County 4 exemption as opposed to a persuasive reason why the Board could not, and should not, order them to be separated.

II. Midwest Generation Should Propose The Will County 4 Exemption Separately.

If the Board decides to pursue changes to Part 225 and Part 217 in this rulemaking, one change that certainly should not be included is the permanent exemption of Will County 4 from its unit-specific requirements under the CPS. Midwest Generation's and Illinois EPA's arguments as to why the Board should approve the Will County 4 exemption now, in this proceeding, are not persuasive.

Midwest Generation asserts that the Will County 4 exemption "is an integral part of the Proposal" and that the exemption will "facilitate" reductions it is making or has made at Joliet, Powerton, and Will County 3. Midwest Generation Comments at 5. But there are no citations to the record where this is established, and the company offers no affidavits stating it needs the Will County 4 exemption to move forward with its plans at Joliet and Powerton and after having already shut down Will County 3. The Board should not conclude that the Will County exemption is an "integral" part of these proposed rules without any support for that conclusion in the record.

Midwest Generation also portrays the proposed rules as essentially a contract it entered into with Illinois EPA—as if the company made an offer, the Agency accepted it, and now the deal cannot be changed or modified because Midwest Generation has relied on it. *See* Comments of Midwest Generation, LLC at 2 ("Adopting different requirements . . . would undermine . . . the good faith reliance of MWG and other businesses (and their employees) upon the rule changes as proposed by IEPA after extensive discussion with them. . . . [I]n good faith reliance upon the Proposal and IEPA's outreach, MWG has already taken significant steps to comply with the rules as proposed by IEPA, including ceasing coal-combustion at Will County 3."). But accepting this rationale would mean that the Board would essentially abdicate its role in reviewing and approving rulemakings.[3] If a company and the Agency can negotiate an agreement and the company can begin to rely on it such that the agreement cannot then be altered, it would nullify the purpose of the Board's review and the entire public process involved

[3] The Illinois EPA has the "authority to make recommendations to the Board for the adoption of regulations under Title VII of the Act." 415 ILCS 5/4(i) (2014) (emphasis added). Whereas, it is the Board that is obligated to "determine, define and implement the environmental control standards applicable in the State of Illinois" and to "adopt rules and regulations . . . ." 415 ILCS 5/5(b) (2014) (emphasis added).

in this docket. Proposed rulemakings are not contracts—the Board can and should change or modify them as needed.

Moreover, even if the Board were to follow Midwest Generation's argument, a basic tenet of a contract is not present here because the company has not offered consideration (*i.e.*, something of value) to Illinois EPA. As discussed above, and in the People's Initial Comments, Midwest Generation decided to repower Joliet and retire Will County 3 because it made financial sense—not because it wanted to trade these actions for a Will County 4 exemption.[4]

For its part, Illinois EPA has stated its belief that the Will County 4 exemption is warranted. *See* Post-Hearing Comments of the Illinois Environmental Protection Agency at IEPA Comments at 29. But this question should be considered in a separate proceeding where, as pointed out by CARE and Sierra Club, the differences between Will County 4 and the Joliet unit, and the air quality of the areas where they are located, can be fully analyzed and evaluated. *See* Comments of CARE at 2 ("Will County 4 and Joliet 5 [6] are not comparable units and operate in very different air quality regions."); *id*. at 5-6 (pointing out that Will County 4 is a substantially larger facility, generates greater megawatt-hours, operates longer, has a much greater heat rate and annual heat input, and has emitted twice the amount of SO2 than Joliet 6 [5]); *id*. at 9 (criticizing "the notion that SO2 reductions at one unit are transferable to another unit without reference to disparities of the size of the units, the volume of their emissions or the

[4] Nowhere in its announcement of the Joliet and Will County 3 decisions does NRG, Midwest Generation's parent company, ever state that the Will County 4 exemption is needed to make the decisions financially attractive. NRG Energy Quarterly Earning Call Transcript, *available at* http://seekingalpha.com/article/2396845-nrg-energys-nrg-ceo-david-crane-on-q2-2014-results-earnings-call-transcript (August 7, 2014) ("[T]he investments required to implement will be completed with an attractive economic profile, driven by optimizing the cost structure of the remaining coal plants, driving out fixed costs through fuel conversions and by taking advantage of improved market fundamentals. We believe our investment will be completed at a very low multiple, driving significant accretion to you, our shareholders."). *See also* NRG Energy, Second Quarter Results Presentation, at 12, *available at* http://investors.nrg.com/phoenix.zhtml?c=121544&p=irol-presentations (August 7, 2014) ("NRG's optimization plan significantly enhances the value of MWG.").

air quality where the individual units operate"); *see also* Comments of Sierra Club at 14 ("The community around Will County 4, nonetheless, has the right to the pollution reductions and air quality improvements that would stem from [the unmodified CPS].")

The People agree that the Board should not accept Midwest Generation's framework of simply "transferring" the Joliet exemption to Will County 4. Instead, the request is one for a variance-for-life for Will County 4, a permanent liberation from the unit's specific obligations under the CPS. *Monsanto Co. v. Pollution Control Bd.*, 67 Ill.2d 276, 286 (1977) ("[T]he concept of a variance which permanently liberates a polluter from the dictates of a [B]oard regulation is wholly inconsistent with the purposes of the Environmental Protection Act."). A separate proceeding is needed as to why the Board should grant a permanent exclusion for Will County 4.

Indeed, the Board has denied vehicles for relief requested by companies, even with the tacit agreement of Illinois EPA, when the request was not consistent with Illinois law and with sound public process.[5] It should do so again in this case and direct Midwest Generation to submit its request to exempt Will County 4 in a new and separate proceeding. This would allow the Board and the public the opportunity to fully evaluate the merits of permanently removing the requirement to install FGD or shut down Will County 4 by 2018.

CONCLUSION

For the reasons set forth above, the People urge the Board to reject amendments to the CPS, 35 ILL. ADM. CODE § 225.291 *et seq.* (2014), from the proposed rule. In the alternative, if

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[5] *Ameren Energy Resources v. Illinois EPA*, PCB 12-126, 2013 WL 2480946, at *9-10 (Ill. Pol. Control Bd. Jun. 26, 2013) (concluding that, for a new owner of coal plants to obtain a variance, the new owner must file its own petition and make its own showing of arbitrary or unreasonable hardship); *see also* Comments of the Illinois Attorney General's Office at 1, *Illinois Power Holdings, LLC v. Illinois EPA*, PCB 14-10 (Sept. 24, 2013) ("The People strongly support the Board's decision in PCB 12-126 to require Dynegy's subsidiary, Illinois Power Holdings, LLC ("IPH"), to make its own independent showing of need for a variance and to require that IPH file its request in a new docket to undergo the public process requirements set forth in 35 Ill. Adm. Code 104, Subpart B.").

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the Joliet and Will County 3 changes are accepted into the CPS here in this proceeding, the Will County 4 exemption should be stricken from the rulemaking as unrelated and procedurally improper.

Dated: September 11, 2015

Respectfully submitted,

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