

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)
)
AMENDMENTS TO) **R18-20**
35 ILL. ADM. CODE 225.233,) **(Rulemaking – Air)**
MULTI-POLLUTANT STANDARDS (MPS))

IBEW LOCAL 51 and ILLINOIS AFL-CIO’S RESPONSE TO ENVIRONMENTAL ORGANIZATIONS’ MOTION TO STAY

NOW COMES IBEW Local 51 and Illinois AFL-CIO, and pursuant to 35 Ill. Adm. Code § 101.500(d), respectfully submits this response opposing the motion by the Environmental Defense Fund, the Environmental Law and Policy Center, the Natural Resource Defense Council, the Respiratory Health Association and the Sierra Club (collectively, the “Environmental Organizations”) to stay the above-captioned rulemaking proceeding (“Mot. to Stay”).

Granting the Environmental Organizations’ motion would set a dangerous and inappropriate precedent regarding public participation and the Board’s authority in rulemaking proceedings. The Environmental Organizations seek to stay a rulemaking proceeding that has been underway for over three months, after stakeholders, the Illinois Environmental Protection Agency (“IEPA”), and the Board have spent considerable time and effort preparing written testimony and questions and conducting two full days of public hearing, merely because one stakeholder -- Dynegy -- may merge with Vistra Energy Corp. (“Vistra”) later this year. Because Vistra has not participated in this rulemaking proceeding to date, the Environmental Organizations allege that it is “impossible to develop an adequate record at this time” and request a stay. Mot. to Stay at 8.

In effect, the Environmental Organizations ask the Board to rule that this rulemaking cannot proceed because a potential future stakeholder, with no current legal ownership or operation interest in the facilities at issue in the rulemaking, is not participating. The precedential effect of such a ruling could create a de-facto requirement that all current and potential future stakeholders participate in the rulemaking process—a requirement not recognized by Illinois law and one that could delay and undermine the rulemaking process. Such a precedent would act as a limit on the Board’s authority, suggesting that the Board can only complete a rulemaking where it finds that all relevant stakeholders have participated whether such current and potential future stakeholders chose to participate or not. Not only could this create an often impossible duty to identify all potentially interested current and potential future stakeholders in rulemakings, there is no clear authority for the Board to compel all possible stakeholders to participate.

Illinois law requires only that the proponent of a regulation participate in the rulemaking process. *See* 45 ILCS 5/27(a) (“[a]ny person filing with the Board a written proposal for the adoption, amendment, or repeal of regulations shall provide information supporting the requested change[.]”) The Board is required to provide an *opportunity* for other parties to be heard, but those parties are not required to participate and the Board is not required to stay a rulemaking if certain parties chose not to do so. *See* 415 ILCS 5/28(a); 35 Ill. Adm. Code §§ 102.108, 102.416.¹

¹ Illinois courts have recognized that not all interested parties will participate in Board rulemakings and Section 41(a) of the Illinois Environmental Protection Act allows “any party adversely affected” to seek judicial review of Board orders and other final actions. 415 ILCS 5/41(A); *Salt Institute v. IPCB*, 2016 IL App. (1st) 152003-U, *8-9 (“[B]oth parties recognize that participating in the rulemaking proceedings is not a requirement for standing under section 29(a) of the Act when a challenge is made to a regulation.”).

Here, the Agency has followed all proper procedures and all members of the public, including Vistra, have been given the opportunity to participate in the rulemaking. As the proponent of the rule change, IEPA is the only party required to participate and the only party that could reasonably request a stay. The involvement of all other interested parties is entirely voluntary. Granting the requested stay based on the lack of participation of one or more potentially interested companies is inappropriate and would undermine the rulemaking process.

Finally, granting a stay based on a prospective event like a merger that may not occur would create precedent by which rulemakings could be stayed based on uncertain future events. Such a holding could act to chill normal merger and acquisition activity involving regulated entities, as both buyers and sellers would face the prospect of disrupting ongoing rulemaking proceedings. Further, the Board and IEPA could find the rulemaking process delayed or even blocked by stay requests whenever a potentially interested stakeholder becomes involved in a merger or acquisition during the pendency of a rulemaking.

Conclusion

WHEREFORE, IBEW Local 51 and Illinois AFL-CIO respectfully requests that the Board, consistent with the law governing Board rulemaking procedures and in the interest of avoiding the establishment of negative precedent, deny the Environmental Organizations' motion to stay.

Respectfully Submitted,

IBEW Local 51 & Illinois AFL-CIO

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