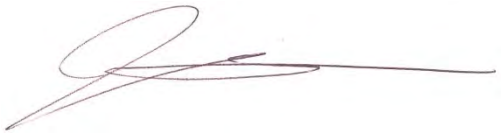
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	R2018–20
AMENDMENTS TO	)	(Rulemaking – Air)
35 ILL. ADM. CODE 225.233,	)	
MULTI-POLLUTANT STANDARDS (MPS)	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMMENTS OF ENVIRONMENTAL GROUPS**, copies of which are served on you along with this notice.

Respectfully Submitted,



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Dated: June 15, 2018

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COMMENTS OF ENVIRONMENTAL GROUPS

I. Introduction

Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club ("Environmental Groups") respectfully submit these post-hearing reply comments in the above-captioned rulemaking. The Environmental Groups request that the Illinois Pollution Control Board ("PCB" or "Board") reject the Illinois Environmental Protection Agency's ("IEPA" or "Agency") rulemaking proposal to amend 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards ("MPS").

IEPA argued in its post-hearing initial comments that its proposed amendments to the MPS benefit Illinois environment because they will lower the allowable emissions of NO_X and SO_2 from the electric generating units ("EGUs") comprising the MPS Group.[1] As explained in our initial post-hearing comments and elaborated on below, IEPA's use of allowable emissions to determine environmental benefit is improperly applied and cuts against IEPA's own reasoning in prior cases as well as the Board's historical treatment of environmental benefit. The proposed MPS changes will harm the Illinois environment and pose a risk of harming public health. The Agency and Dynegy/Vistra have not demonstrated that there are no negative health effects of SO_2 and $PM_{2.5}$ below the NAAQS.

[1] *See* Post-Hearing Comments of Ill. Envt. Prot. Agency at 22, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards,* R18-20 (June 1, 2018).

Because the Agency's proposed changes to the MPS will harm the environment, it must show that the current rule is economically unreasonable. The IEPA has argued in its statement of reasons, throughout three hearings, and in its post-hearing comments that the MPS changes are necessary to provide Vistra with "operational flexibility and economic stability."[2] The Agency claims that the rate-based emission limits of the current MPS harm Vistra by causing the company to bid some of its scrubbed EGUs into wholesale markets below their marginal cost of operations.[3] Yet the Agency has provided no information to demonstrate the magnitude of any alleged economic losses caused by these "uneconomic bids". The Board should reject IEPA's proposed rulemaking because it has failed to show that the costs to Vistra of the current MPS outweigh its benefits to the environment. The existing MPS is economically reasonable, and the proposed changes are unnecessary.

II. Legal Standard

The regulations that the Board promulgates under the Illinois Environmental Protection Act must not be arbitrary, capricious, or an abuse of discretion.[4] "While an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary."[5] Although it may be impossible to enumerate all the kinds of

[2] *Id.* at 2.
[3] This practice has been defined by the company as must-run in this rulemaking. *See* Ex. 24, Dynegy's Responses to Questions at 3, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (Feb. 16, 2018).
[4] "When an agency has acted in its rule-making capacity, a court will not substitute its judgment for that of the agency. . . . Regulations adopted by [an administrative agency] pursuant to its statutory authority will not be set aside unless they are arbitrary and capricious." *Bd. of Tr.s of Chicago Heights Police Pension Fund v. Dep't of Ins.*, 753 N.E. 2d 343, 345 (2001) (quoting *Granite City Div. of Nat'l Steel Co.*, 613 N.E.2d 719, 724.) (other citations omitted).
[5] *Id.*

acts or omissions which will constitute arbitrary and capricious conduct,[6] "*[t]he standard is one of rationality*."[7]

The Board must also take into account the economic reasonableness of such regulations. See 415 ILCS 5/27(a). Traditionally, the Board's determination of economic reasonableness has "employed a cost-benefit analysis . . . which has involved measuring the cost of [pollution control] against the benefit to the public in reducing pollution."[8] While the environmental benefits of pollution reduction need not be quantified in the analysis,[9] the Board has traditionally considered the numeric costs of a proposal.[10] Specified costs demonstrate that there is a material necessity for a rule change.

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[6] *See id.*

[7] *See Greer v. Illinois Hous. Dev. Auth.*, 524 N.E.2d 561, 581 (1988) (emphasis added); *see also 1212 Rest. Grp., LLC v. Alexander*, 959 N.E.2d 155, 171 (2011).

[8] See *Envtl. Prot. Agency v. Pollution Control Bd.*, 308 Ill. App. 3d 741, 752 (1999) (citing *Envtl. Prot. Agency v. Lindgren Foundry Co.*, Ill. Pollution Control Bd. Op. No. 70-1, 1970 WL 3663 (Ill. Pol. Bd. Sept. 25. 1970)); *see also* Board Opinion and Order, *In re Amendments to 35 Ill. Adm. Code 742: Tiered Approach to Corrective Action Objectives (TACO) (Indoor Inhalation)*, R11-09 (May 16, 2013) [hereinafter R11-09 Opinion]; Board Opinion and Order, *In re Amendments to 35 Ill. Adm. Code 618: Setback zone for Fayette Water Company Community Water Supply*, R11-25 (June 12, 2012); Board Opinion and Order, *In re Amendments to 35 Ill. Adm. Code Part 223: Standards and Limitations for Organic Material Emissions for Area Sources*, R12-8 (May 3, 2012); Board Opinion and Order, *In re Amendments to 35 Ill. Adm. Code Part 229: Hospital/Medical/Infectious Waste Incinerators*, R11-20 (Sep. 22, 2011).

[9] "Improved aquatic environment" and "reduced presence of toxic substances in the human environment" are sufficient environmental benefits when balanced against costs of "several million dollars per year". *See Granite City Div. of Nat. Steel Co. v. IPCB*, 155 Ill. 2d 149, 184 (1993) ("The Board is charged under the Act to take into account the technical feasibility and economic reasonableness of all regulatory proposals before it (Act at Section 27(a)). Compliance with the proposed regulations can be achieved with existing technology [citation]. Therefore, the substantive issue before the Board is solely whether implementation of the instant rule is economically reasonable. The Board has considered the various cost and benefit analyses presented in the record, as noted above. From this record it is reasonable to conclude that implementation of toxics control will have costs ranging upwards of several million dollars per year now and into the foreseeable future. Expected benefits include an improved aquatic environment and a benefit to human health through reduced presence of toxic substances in the human environment. Given this balance, the Board concludes that the instant rule will not be economically unreasonable.").

[10] *See, e.g.*, Board Opinion and Order, *In re Amendments to 35 Ill. Adm. Code Parts 201, 218, and 219: Vapor Recovery Rules*, R13-18 (Dec. 19, 2013); Board Opinion and Order, *In re Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504*, R12-23 (Aug. 7, 2014); Board Opinion and Order, *In re New 35 Ill. Adm. Code 106 SUBPART I: Procedural Rules for Authorization under P.A. 97-220 for Certain Landscape Waste and Compost Applications and On-Farm Composting Facilities*, R12-11 (Nov. 1, 2012); R11-09 Opinion, *supra* note 8.

III. Environmental Benefit

The Illinois Environmental Protection Act's purpose is "to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b). Rulemakings by the Board must be consistent with the purpose. The Board's authority to promulgate rules and regulations under the Act "is a general grant of very broad authority and encompasses that which is necessary to achieve the broad purposes of the Act."[11] An environmental or health benefit has also been relied upon in rulemakings in order to establish the economic reasonableness of a rule as required by the Act. 415 ILCS 5/27(a).

Traditionally, in considering economic reasonableness, the Board and Agency have used a cost/benefit analysis, thus requiring the environmental or health benefit of a rule to be assessed. "Historically, the Board has employed a cost-benefit analysis in its proceedings, which generally has involved measuring the cost of implementing pollution control technology against *the benefit to the public in reducing pollution*."[12] The Agency has argued that "nothing requires the Board to find environmental benefit in a rulemaking,"[13] yet the Agency has worked with parties in other rulemakings to ensure that there is an environmental benefit. For example, in R09-10, the Agency "worked with Ameren to ensure that the proposed revision would result in a slight environmental benefit."[14] "On the basis of its review of the record, particularly the projected

[11] *Granite City Div. of Nat. Steel Co. v. IPCB*, 155 Ill. 2d 149, 182 (1993).
[12] *Envtl. Prot. Agency. v. Pollution Control Board*, 308 Ill. App. 3d 741, 751 (2d Dist. 1999) (emphasis added) (citing *Envtl. Prot. Agency v. Lindgren Foundry Co.*, Ill. Pollution Control Bd. Op. No. 70-1, 1970 WL 3663, at *10 (Ill. Pol. Bd. Sept. 25. 1970)).
[13] Post-Hearing Comments of Ill. Envtl. Prot. Agency at 22, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[14] Post-Hearing Comments of Ill. Envtl. Prot. Agency at 12, *In re Amendments To 35 Ill. Adm. Code 225: Control Of Emissions From Large Combustion Sources (Mercury Monitoring)*, R09-10 (Mar. 6, 2009) (cited in Board Opinion and Order, R09-10, at p. 20); Board Opinion and Order, *In re Amendments To 35 Ill. Adm. Code 225: Control Of*

environmental benefit and the absence of any objection on the part of the Agency, the Board finds that the proposal by Ameren is technically feasible and economically reasonable and includes Ameren's proposed language in its order below."[15] Similarly, the Board found health benefits, analogous to environmental benefits in this context, when it originally adopted the MPS.[16] "The Board next considered arguments concerning whether the reduction of mercury emissions will result in health benefits to Illinois citizens. The Board finds that the evidence in the record indicates that health benefits can be expected. Therefore, the Board finds that the expected health benefits support the adoption of the proposed mercury emissions standards."[17]

Dynegy/Vistra argues without support that there is an environmental benefit from the proposed MPS amendment.[18] Aside from pointing out the reduction in allowable emissions that will take place on paper only,[19] Dynegy/Vistra does not point to any concrete improvement but instead argues that the absence of non-compliance and the absence of health harms equate to environmental benefit. Dynegy/Vistra simply contends that the amendment would not threaten compliance with the Regional Haze Rule or with any National Ambient Air Quality Standard and

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Emissions From Large Combustion Sources (Mercury Monitoring), R09-10 (Apr. 16, 2009) at 29 [hereinafter R09-10 Opinion].

[15] R09-10 Opinion, *supra* note 14, at 29.

[16] Health benefits and environmental benefits are analogous as the Board has found one or the other in rulemakings. In addition, the Act treats health and environment equally. "It is the purpose of this Title to restore, maintain, and enhance the purity of the air of this State in order to protect health, welfare, property, and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution." 415 ILCS 5/8. The Act defines air pollution as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." 415 ILCS 5/3.115.

[17] *See* Board Opinion & Order, *In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources (Mercury)*, R06-25, (Nov. 2, 2006) at 3.

[18] Post-Hearing Comments of Vistra at 20-25, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).

[19] Environmental Groups discussed why environmental benefits must be measured in actual reductions in emissions instead of allowables in our initial comments and will not repeat substance of that discussion here. Post-Hearing Comments of Envtl. Grp.s at 9-12, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).

would not create hot spots.[20] Dynegy/Vistra conflates a lack of a violation of a federal law, a lack of harm, and an environmental benefit.[21] In R09-10, the Board and Ameren both discussed the lack of environmental harm and environmental benefit separately. The Board pointed out that Ameren "has agreed to commit to earlier and more stringent SO_2 and NO_x emission rates, the restructuring of the MPS compliance commitments will not result in environmental harm."[22] The Board then went on to say that "[o]n the basis of its review of the record, particularly the projected environmental benefit and the absence of any objection on the part of the Agency, the Board finds that the proposal by Ameren is technically feasible and economically reasonable and includes Ameren's proposed language in its order below."[23]

IEPA's comments, in a section titled "Allowable Emissions"[24] discusses reliance on the MPS for Regional Haze purposes,[25] the need for a State Implementation Plan ("SIP") revision,[26] and approval by USEPA.[27] "Any amendments to the MPS adopted by the Board must be submitted to USEPA as a SIP revision. Section 110(l) of the Clean Air Act ("CAA") sets forth the requirements for SIP revisions . . . ."[28] Section 110(l) of the CAA is also known as the "anti-backsliding provision."[29] A SIP revision requires an anti-backsliding evaluation. The anti-backsliding evaluation should be conducted separately from an evaluation of environmental

[20] Post-Hearing Comments of Vistra at 20-25, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[21] *Compare* R09-10 Opinion, *supra* note 14 (drawing a distinction between environmental benefit and not causing environmental harm).
[22] *Id.* at 16.
[23] *Id*. at 29. *See also In re Site-specific Rulemaking for the City of East Peoria*, R84-30, Ill. Pollution Control Bd. Op. No. 84-30, 1985 WL 668026, at *3 (Jan. 9, 1985) ("[T]he Board finds no adverse environmental impact and further finds that some environmental benefits may well derive from the discharge location change.").
[24] Post-Hearing Comments of Ill. Envt. Prot. Agency at 2, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[25] *Id.* at 3.
[26] *Id.* at 3-4.
[27] *Id*.
[28] *Id.* at 4.
[29] *Id.* at 5.

benefit.[30] However, here, IEPA has confused the discussion of anti-backsliding with the discussion of environmental benefit.[31] The question of whether an anti-backsliding evaluation properly uses allowable emissions is unrelated to the question of environmental benefit calculated using actual emissions. The IEPA cites no cases to support the proposition that environmental benefit or environmental impact should be evaluated using an anti-backsliding approach.[32] Keeping the evaluation using allowable emissions for anti-backsliding and actual emissions for environmental benefit separate avoids creating confusion and a conflict between the state-level requirements under the Illinois Environmental Protection Act and federal requirements under the Clean Air Act. USEPA's preliminary approval of the SIP revision relating to the MPS amendment has no bearing on whether there is an environmental benefit and whether the MPS amendment is economically reasonable meets the requirements of the Illinois Environmental Protection Act.

In the past and before this Board, the Agency has used actual emissions to calculate environmental benefit and rejected the use of emissions calculations that do not reflect real emissions—in other words allowable emissions. As discussed at length in Environmental Groups' initial comments, in numerous rulemakings and variance cases before this Board, the Agency has consistently used actual emissions to calculate environmental benefit.[33] In fact, the IEPA has rejected the use of potential emissions or allowable emissions because a reduction that

[30] *See, e.g.*, Technical Support Document at 8, 15-19, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (Oct. 2, 2017).
[31] *See, e.g.*, Hr'g Tr. 20:9-22:18, Jan. 17, 2018; Post-Hearing Comments of Ill. Envt. Prot. Agency at 4-9, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[32] *See, e.g.*, Post-Hearing Comments of Ill. Envtl. Prot. Agency at 3, 6, 8, 10-11, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[33] Post-Hearing Comments of Envtl. Grp.s at 6-8, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).

is only reflected in potential to emit does not translate to "real environmental benefit."[34] In *D. B. Hess,* the Petitioner sought a variance delaying the compliance date with limits on volatile organic material as applied to older printing presses that the Petitioner intended to shut down. Based on the fact that there would be "a minimal environmental impact for the relatively short term of the variance" and that the environmental benefit from compliance (without the variance) would be negligible, the Board granted the variance.[35] When the Petitioner argued that there was an environmental benefit based on it voluntarily lowering its VOM emissions, the Agency argued that the Petitioner was confusing actual emissions and potential emissions.[36] "Actual emissions, the Agency claims, is defined as the 'quantity of pollutants a facility actually emits.' Reducing 'potential' emissions does not equate to a real environmental benefit especially when in fact, DB Hess does not actually emit near its PTE. (Ag. Rec. at 9.)"[37]

Also as discussed in Environmental Groups' initial comments, IEPA and Ameren worked together to calculate the environmental benefit in the form of projected actual emissions in R09-10.[38] Following R09-10, the Agency validated environmental benefit calculations that relied on actual emissions in R13-24.[39] "The Agency concedes, however, that the amounts of SO_2 emission reductions set forth by Midwest Generation are consistent with data currently available to the Agency, and that Midwest Generation's determination showing a 'net environmental benefit in SO_2 emissions over the term of the variance' is *consistent with the method used in*

[34] *D.B. Hess Co. v. Illinois Environmental Protection Agency*, I11. Pollution Control Bd. Op. No. 96-194, 1997 WL 142158, at *9 (Mar. 20, 1997). The Agency uses maximum capacity to calculate potential emissions (or potential to emit), in the same manner that it uses maximum capacity to calculate allowables under the MPS. "[T]he definition of potential to emit within the Board's rules at Section 211.4970 states that it 'means the maximum capacity of a stationary source to emit any air pollutant and under its physical and operational design.'" Testimony of David Bloomberg, H'rg Tr. 20:14-19, Jan. 17, 2018.
[35] *D.B. Hess Co.,*. Ill. Pollution Control Bd. Op. No. 96-194, 1997 WL 142158 at *7, *9.
[36] *Id.* at *9.
[37] *Id.*
[38] Post-Hearing Comments of Envtl. Grp.s at 7-8, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[39] *Midwest Generation v. Illinois Environmental Protection Agency*, Ill. Pollution Control Bd. Op. No. 13-24, 2013 WL 1492675, at *38 (Apr. 4, 2013).

similar prior variance requests."[40] In that case, Midwest Generation argued that "the requested relief results in a 'net environmental benefit' based on the actual emissions for years 2013 through 2016" and the Board agreed with Midwest Generation.[41]

It is arbitrary and capricious for the Agency to change the method by which it calculates emissions for purposes of environmental benefit. "An Agency's sudden change in policy without explanation is considered arbitrary and capricious."[42] Both the IEPA and the Board have consistently relied on actuals to calculate environmental benefit. This has been true in both variance cases and in rulemakings. The Agency attempts to explain away R09-10 but concedes that it "did provide an analysis that showed that the amended limits and schedule would provide a projected environmental benefit."[43] It is arbitrary and capricious for the Agency to oppose the reliance on actual emissions in the present case, but rely on actual emissions to calculate the environmental benefit in rulemakings such as R09-10 and variances such as *D.B. Hess*. It is also arbitrary and capricious for the Agency to argue against considering environmental benefit in the present case, but consider environmental benefit as a factor in R09-10, and health benefit as a factor in R06-25. "While an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary."[44] These changes in IEPA's policies and practices certainly seem to be sudden, unexplained changes.

The parties have testified in this proceeding about the environmental impact of the shift from a rate-based limit to a mass based limit and identified a range of possibilities as to the type of power is being offset when a scrubbed unit runs solely to achieve MPS. The greatest negative

[40] *Id.*
[41] *Id*. at *10, 67.
[42] *See Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 506 (1988).
[43] Post-Hearing Comments of Ill. Envtl. Prot. Agency at 10, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[44] *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 505-06 (1988) (quoted in *Access Ctr. for Health, Ltd. v. Health Facilities Planning Bd.*, 283 Ill. App. 3d 227, 234 (1996).).

environmental impact occurs, however, when scrubbed units, which would no longer be needed for MPS compliance, are shut down as a result of the amended MPS, and dirtier units are run more often. The expectation that Vistra will be retiring units in Illinois has been established over and over in the record in public comments made by Curtis Morgan, the CEO of Dynegy's new owner, Vistra.[45]

> [A]t some point, when you don't get the reform and you are successful at doing what you need to do around the multi-pollutant standard and freeing up the assets, we've got a portfolio optimization exercise to do no different than what we did in Texas. And I think that may result in maybe shrinking our size of our generation, whether that means we're trying to sell assets or what, I don't know yet.[46]

Dynegy/Vistra confirmed in response to questions that it closed 4,167MW of "uneconomic" coal-fired capacity in Texas.[47] In addition, it is well-established in the record that Dynegy/Vistra prefers to retain the whole cap without any reduction for retired plants in order to shift the generation of retired plants to operating plants.[48] Unscrubbed plants have a higher emissions rate than scrubbed plants because unscrubbed plants emit more SO2 pollution per MMBtu.[49] If scrubbed plants are shut down and those MMBtu's are all shifted to unscrubbed plants, there is no debate that emissions levels would increase compared to the status quo.[50] Thus on a MMBtu basis, shifting generation from retired scrubbed plants to unscrubbed plants will lead to greater SO_2 emissions.

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[45] *See* Ex. 41, *Weak MISO prices compound Ill. coal plant woes*, E & E NEWS (Apr. 13, 2018), at 2 ("We're likely going to have to retire some facilities there."); Ex. 25, Environmental Groups' Prefiled Questions for Dynegy's Witnesses at Attach. D, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (Mar. 2, 2018) ("I think that may result in maybe shrinking our size of our generation . . . .").

[46] Ex. 25, Environmental Groups' Prefiled Questions for Dynegy's Witnesses at Attach. D, *In re Amendments to 35 Ill. Adm. Code 225.233*, Multi-Pollutant Standards, R18-20 (Mar. 2, 2018).

[47] Responses to Questions Filed for Vistra Energy Corp, at 5 *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (May 1, 2018).

[48] *See, e.g.*, Hr'g Tr. 123:17-22, Jan. 17, 2018; Hr'g Tr. 163:3-8, Jan. 18, 2018.

[49] *See, e.g.*, Ex. 9, Pre-Filed Testimony of the Illinois Attorney General's Office on the Pollution Control Board's First Notice Proposal at 10, 12, *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (Dec. 11, 2017).

[50] *Id.*

IV. Health Effects

Testimony and evidence in these proceedings have established that (1) there are health benefits from the existing MPS, and (2) there would be negative health impacts from adopting the MPS amendment. Testimony from Brian Urbaszewski established that there would be negative health impacts from SO_2 increases caused by the MPS amendment. This is true even when SO_2 increases do not cause a SO_2 or $PM_{2.5}$ NAAQS violation. Dynegy/Vistra and IEPA both ignored the crux of Mr. Urbaszewski's testimony: that there can be negative health impacts from increases even below the level of the SO_2 or $PM_{2.5}$ NAAQS.[51] In their criticisms of Mr. Urbaszewski's testimony, IEPA and Dynegy/Vistra ignore the points that Mr. Urbaszewski raised about $PM_{2.5}$ and the health impacts that it causes, despite the fact that SO_2 (and the sulfate it forms in the atmosphere) is a major component of $PM_{2.5}$.

Mr. Urbaszewski's testimony states "... SO_2 reacts with other compounds in the atmosphere to form small particles and contribute to particulate matter (PM) pollution. Fine particulates penetrate deeply into the lungs and cause serious health problems including heart attacks, aggravated asthma and decreased lung function."[52] The IEPA and Dynegy/Vistra do not contest this point.[53] Mr. Urbaszewski's testimony also references studies that have found significant evidence of adverse effects of exposure to fine particle pollution at levels below current national standards—the National Ambient Air Quality Standards (NAAQS)."[54] Mr. Urbaszewski references recent studies in peer-reviewed scientific journals documenting health

[51] Post-Hearing Comments of Ill. Envtl. Prot. Agency at 16-20, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018); Post-Hearing Comments of Vistra at 23-24, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[52] *See* Ex. 34, Pre-Filed Testimony of Brian P. Urbaszewski at 2, *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (Feb. 6, 2018).
[53] Post-Hearing Comments of Ill. Envtl. Prot. Agency at 16-20, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018); Post-Hearing Comments of Vistra at 23-24, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[54] *See* Ex. 34, Pre-Filed Testimony of Brian P. Urbaszewski at 2, *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (Feb. 6, 2018).

impacts from exposure to both elevated daily and annual fine particle levels that are still below the level of the NAAQS.[55] IEPA and Dynegy/Vistra did not dispute any of these points.[56] It is a logical corollary that increases in actual emissions of SO_2 lead to increases in $PM_{2.5}$, and increases in health effects caused by $PM_{2.5}$ exposure.

In Mr. Urbaszewski's testimony, he states, "In other words the scientific consensus, including at USEPA, is that there is no safe threshold level of fine particle pollution below which there is no risk to human health from exposure."[57] In support of that statement, Mr. Urbaszewski references a letter written by then USEPA Assistant Administrator Gina McCarthy. [58] At the March 7, 2018 hearing in this rulemaking, when questioned about support for that statement, Mr. Urbaszewski read several direct quotes from that letter:[59]

> Studies demonstrate an association between the premature mortality and fine particle pollution at the lowest levels measured in the relevant studies, levels that are significantly below the NAAQS for fine particles. These studies have not observed a level at which premature mortality effects do not occur. The best scientific evidence, confirmed by independent, Congressionally-mandated expert panels, is that there is no threshold level of fine particle pollution below which health risk reductions are not achieved by reduced exposure.[60]
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> * * *
>
> We do not believe that it is scientifically defensible to look solely at benefits above 15 micrograms per cubic meter because there are peer-reviewed scientific studies showing health effects below this level. While 15 micrograms is the level of the current (2006) annual $PM_{2.5}$ NAAQS, it is not directly related to the studies

[55] *Id.*
[56] Post-Hearing Comments of Ill. Envtl. Prot. Agency at 16-20, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018); Post-Hearing Comments of Vistra at 23-24, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[57] *See* Ex. 34, Pre-Filed Testimony of Brian P. Urbaszewski at 2-3, *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (Feb. 6, 2018).
[58] *Id.*, Attach. 3, Letter from Gina McCarthy, Asst. Administrator, EPA, to Fred Upton, Chairman, US House Committee on Energy and Commerce, (Feb. 3, 2012).
[59] Hr'g Tr. 60:10-62:10, Mar. 7, 2018.
[60] *See* Ex. 34, Pre-Filed Testimony of Brian P. Urbaszewski at 2-3, *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (Feb. 6, 2018), Attach. 3, Letter from Gina McCarthy, Asst. Administrator, EPA, to Fred Upton, Chairman, US House Committee on Energy and Commerce, (Feb. 3, 2012); *see also* Hr'g Tr. 61:2-13, Mar. 7, 2018.

> we use to calculate benefits, which observed health effects associated with exposure to $PM_{2.5}$ concentrations. This is consistent with the fact that NAAQS are not 'zero risk' standards. Instead, EPA's current approach is to show the complete distribution of benefits across the entire range of $PM_{2.5}$ concentrations.[61]

Although these quotes reference benefits occurring below the levels of the 2006 $PM_{2.5}$ NAAQS, which was 15 micrograms per cubic meter, the same trend is seen in analyses of health benefits below the level of the current NAAQS of 12 micrograms per cubic meter. Mr. Urbaszewski pointed this out on a chart provided by Assistant Administrator McCarthy in that letter. The chart showed that nearly all the life-saving benefits of a rule that reduced $PM_{2.5}$ occurred in areas that ***already*** meet the current $PM_{2.5}$ NAAQS, which is 12 micrograms. These benefits resulted from reductions that took place below the current level of the NAAQS, showing that health benefits are not isolated to pollution reductions that are only made at levels above the NAAQS.[62] IEPA has chosen to ignore the clear evidence laid out by USEPA itself that there are health benefits when $PM_{2.5}$ levels are reduced, even when the $PM_{2.5}$ levels both before and after the reductions are below the levels of the NAAQS.

IEPA makes extreme and unsupported criticisms and misstatements about Mr. Urbaszewski's testimony in an attempt to discredit Mr. Urbaszewski before the Board. IEPA claims that Mr. Urbaszewski suggests that "USEPA disregarded evidence that a lower standard should have been selected."[63] IEPA ignores the fact that Mr. Urbaszewski made it clear that he was neither suggesting that the Board should substitute its judgment for USEPA's nor asking the

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[61] *See* Ex. 34, Pre-Filed Testimony of Brian P. Urbaszewski at 2-3, *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (Feb. 6, 2018), Attach. 3, Letter from Gina McCarthy, Asst. Administrator, EPA, to Fred Upton, Chairman, US House Committee on Energy and Commerce, (Feb. 3, 2012); *see also* Hr'g Tr. 61:21-62:10, Mar. 7, 2018.

[62] Figure 5.14, Letter from Gina McCarthy, Asst. Administrator, EPA, to Fred Upton, Chairman, US House Committee on Energy and Commerce, (Feb. 3, 2012), Attach. 3 to Ex. 34, Pre-Filed Testimony of Brian P. Urbaszewski at 2-3, *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (Feb. 6, 2018); *see also* Hr'g Tr. 63:15-64:5, Mar. 7, 2018.

[63] Post-Hearing Comments of Ill. Envtl. Prot. Agency at 19 *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).

Board to set a NAAQS standard itself.[64] Mr. Urbaszewski was also not arguing that USEPA was wrong in the level at which the standards are set or should have set a lower standard.[65] Instead Mr. Urbaszewski was pointing out that the USEPA itself acknowledges that there are additional health benefits to further reducing $PM_{2.5}$ levels even when those levels are below the NAAQS.[66] Conversely any increase in $PM_{2.5}$ levels causes additional health harms, even when those increases in $PM_{2.5}$ levels still remain below the level of the NAAQS.

IEPA and Dynegy/Vistra criticize Mr. Urbaszewski's use of the terms "spike" and "hot spot" and, because he indicated that they were "imprecise" and his own terms, IEPA uses this to claim that Mr. Urbaszewski's conclusions were unsupported.[67] First, Mr. Urbaszewski did define the terms: spike means "short-term increases in SO2" and hot spot means "greater concentrations at fewer locations."[68] Second, Mr. Urbaszewski also supported his conclusions both as to SO_2 increases and areas of greater SO_2 concentrations. Mr. Urbaszewski was clear that if the Board changes the rule to a cap from a rate limit, it would allow the cleanest coal power plants to close down as they would not be needed to lower the average emissions rate. All else being equal, the same amount of electricity being produced by power plants without SO_2 controls would increase the actual emissions at the plants that continue to operate.[69] This is corroborated by the fact that Dynegy/Vistra analysis shows that units from Coffeen, a scrubbed plant, must operate to meet

[64] "Are you suggesting that the Board make a different judgment call and attempt to set its own standard below the NAAQS in this rulemaking? MR. URBASZEWSKI: No." Hr'g Tr. 66:11-14, Mar. 7 2018; Hr'g Tr. 67:8-68:11, Mar. 7, 2018 (Mr. Urbaszewski agreeing that the U.S. EPA did a "thorough review" and "extensive" process in setting both the SO2 and PM2.5 NAAQS).
[65] *Id.*
[66] *See* Ex. 34, Pre-Filed Testimony of Brian P. Urbaszewski at 2-3, *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (Feb. 6, 2018).
[67] Post-Hearing Comments of Vistra at 23-24, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018); Post-Hearing Comments of Ill. Envtl. Prot. Agency at 16, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[68] Hr'g Tr. 69:6-10, 71:20-22, Mar. 7, 2018.
[69] *See* Ex. 34, Pre-Filed Testimony of Brian P. Urbaszewski at 6, *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (Feb. 6, 2018); Hr'g Tr. 72:2-4, Mar. 7, 2018 ("[W]ith the change in the rule from a rate to a cap, it would allow more concentration of SO2 to be emitted at fewer facilities.").

the current rule. This is something Dynegy/Vistra states would not be necessary if the rule was revised.[70] From there it is simply logical to assume that – all else being equal – if the absolute amount of SO_2 emitted by an individual plant increased because of increased operation (or increased output of fuel), then it would be expected for there to be a proportional increase in levels of SO_2 near those plants. To assume levels would stay the same or decrease with additional volume of SO_2 coming out of a power plant stack would be illogical.

In addition, Mr. Urbaszewski is correct about health effects occurring below the NAAQS. IEPA itself admits that the 75 ppb limit was an interpolation.[71] It was an interpolation between a level of 50 ppb where USEPA did not find sufficient evidence of harm as studies were inconclusive, and 100 ppb where USEPA believed the evidence was conclusive. It is important to note that USEPA did not say the science showed there were no health impacts at levels below 50 ppb, only that the evidence was not conclusive.[72] Similarly, 100 ppb was too high a level for setting a health standard as it was not sufficiently protective.[73] Note that USEPA has consistently reevaluated the NAAQS for adequacy in protecting the public's health, especially for vulnerable/at risk groups, and USEPA has consistently made the NAAQS more restrictive over time as the collected science has shown negative health effects at lower and lower concentrations. The fact that USEPA determined that the science was not sufficiently clear to require a standard below 75 ppb does not disprove that there are health effects below the level of the NAAQS. It only shows that USEPA believed the available science was too uncertain to act on it for purposes of setting the NAAQS. IEPA's presumption that the science is static is

[70] Prefiled Testimony of Rick Diericx at 8-10, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (Dec. 11, 2017).
[71] Post-Hearing Comments of Ill. Envtl. Prot. Agency at 20, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[72] *See* Ex. 34, Pre-Filed Testimony of Brian P. Urbaszewski at 5, *In re Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollution Standards* , R18-20 (Feb. 6, 2018).
[73] *See* Post-Hearing Comments of Ill. Envtl. Prot. Agency at 20 *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018). IEPA Comments, R18-20, at 20 (Jun. 1, 2018).

erroneous and undercut by the history of USEPA's processes and actions in tightening NAAQS standards.

V. Economic Reasonableness

IEPA argues that the Environmental Groups are using the requirement of 415 ILCS 5/27 to consider economic reasonableness "as a hammer against a company rather than a shield against unreasonable requirements that cannot be achieved without great financial burden."[74] In reality, Environmental Groups are merely applying the economic reasonableness standard as required by the Act and cost-benefit analysis that IEPA and the Board consistently use to determine economic reasonableness. Environmental Groups agree that Section 27 is meant to ensure that the costs of environmental regulation are commensurate with the benefits. However, this does not mean that a rulemaking should be adopted simply because it lowers the cost of compliance to the regulated entity. Rather, where the proposed rulemaking would lower environmental protection, the Agency must show that the costs of the existing protections outweigh the benefits--the same balancing that is used at the adoption of the rule and that is required by the Act in the economic reasonableness standard.[75] The Agency has made no such showing in this proceeding.

The Board has already found that the MPS's rate-based limits are economically reasonable.[76] In other words, the benefits to the people of Illinois and the Illinois environment outweigh the costs to Dynegy/Vistra. It is the Agency who now comes before the Board to argue that the rate-based limits are not reasonable because they cause economic harm to Dynegy/Vistra

[74] Post-Hearing Comments of Ill. Envtl. Prot. Agency at 24, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[75] *See, e.g.*, Board Opinion and Order, *In re Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504*, R12-23 (Aug. 7, 2014) at 7 ("Although the Agency acknowledged that some facilities may bear costs . . . it claimed that the economic impact of those costs will be reasonable when compared to the benefits.").
[76] *See* Board Opinion & Order, *In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources (Mercury)*, R06-25, (Nov. 2, 2006) at 78.

in the form of "financial losses" at the unit level due to the need to, at certain times, bid certain units into the MISO energy market below the marginal cost of operations. It is the Agency's burden to demonstrate that these alleged losses outweigh the benefits of the rate-based emission limits. The Agency, however, has failed to do so. In fact, the only evidence presented in this rulemaking on the financial impacts of the rate-based emissions limits indicate that the costs to Dynegy/Vistra resulting from the must-runs do not outweigh the benefits of the existing rule.

Both the Agency and Dynegy/Vistra argue the proper way to determine the economic reasonableness of a proposed rule is to examine the costs and benefits of the proposed rule.[77] In conducting a cost-benefit analysis, the Board measures "the cost of implementing pollution control technology against the benefit to the public in reducing pollution."[78] In this case, the existing rule has demonstrated significant environmental benefits,[79] and the proposed rule would harm the environment. Therefore, the Agency must show that the current MPS is economically unreasonable. To do this based on a cost-benefit analysis, the Agency must first demonstrate that there is a material cost to Dynegy/Vistra of complying with the current rate-based MPS that exceeds the environmental benefits. Because, as demonstrated above and throughout this rulemaking, the proposed MPS revisions will harm the environment, the Agency must then show the cost of compliance with the existing rule outweighs the benefits of the existing rule. The Agency has made no showing of the magnitude of the cost of compliance to Dynegy/Vistra or that the costs outweigh the benefits of the existing rule.

[77] *See* Post-Hearing Comments of Ill. Envtl. Prot. Agency at 24, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018); Post-Hearing Comments of Vistra at 4-5, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[78] *Envtl. Prot. Agency v. Pollution Control Bd.*, 308 Ill. App. 3d 741, 751 (2d Dist. 1999).
[79] The MPS has resulted in a 75% reduction in sulfur dioxide emissions and a 41% reduction in nitrogen oxide emissions. *See* Hr'g Tr. 130:24-131:3, Mar. 6, 2018.

Costs, by definition, are a specified sum of money. In this case, the cost of MPS compliance has not been disclosed. IEPA is not aware of the dollar value of the losses that it argues are the reason that the proposed MPS revision is necessary.[80] The only evidence that Dynegy/Vistra has introduced to demonstrate that there may be a cost associated with MPS compliance is a chart of the percent of annual hours dispatched as must-run and a table of the number of days with must-run dispatch and operation at a loss primarily due to MPS compliance.[81] However, the table and chart are missing the dollar value of the suggested loss, a very crucial detail that is necessary for the board to employ any type of true cost-benefit analysis. Dynegy/Vistra has not disclosed any dollar value of the loss due to MPS compliance whatsoever in this proceeding. In its Post Hearing Comments, Dynegy/Vistra states that "'must-run' bidding resulted in [Coffeen 1, Coffeen 2, and Duck Creek] being run at a loss on a combined total of 211 days."[82] This still provides no information on what the actual costs of these must-run bids were. Without disclosing the dollar value of the loss, the Board can only be left to speculate about whether the costs are large or small, and the Board has declined to speculate when conducting a cost-benefit analysis.[83] Neither IEPA nor Vistra have provided the necessary information for the Board to make an informed decision about whether the costs to Vistra of the current MPS outweigh the environmental benefits.

At the January 17, 2018 hearing, Agency witness David Bloomberg confirmed that the Agency has not received any documentation on the actual cost of compliance with the current

[80] Hr'g Tr. 92:21-95:4, Jan. 17, 2018.
[81] *See* Ex. 24, Dynegy's Responses to Questions at Ex. B, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (Feb. 16, 2018).
[82] Post-Hearing Comments of Vistra at 10, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[83] *Envtl. Prot. Agency v. Lindgren Foundry Co.*, Ill. Pollution Control Bd. Op. No. 70-1, 1970 WL 3663, at *10 (Ill. Pol. Control Bd. Sept. 25, 1970).

MPS with regard to the must-run bids of scrubbed units.[84] When asked about the specific dollar losses caused by the must-run bids, Mr. Bloomberg referred the Environmental Groups to Dynegy/Vistra.[85] When the Environmental Groups questioned Dynegy/Vistra on this matter, Dynegy/Vistra witness Dean Ellis stated, "I would fall back on the information we provide in our SEC filings that shows that the fleet as a whole is losing money on an income basis and that doesn't include capital expenditures, as I mentioned before."[86] Dynegy/Vistra points to its SEC filings in this conclusory manner without any detailed testimony that shows how the costs of the must-run bids are material.

A thorough review of Dynegy/Vistra's SEC filings revealed, however, that the MPS fleet is not losing money even after accounting for capital expenditures. As indicated in the Environmental Groups' initial comments, a reliable metric to look at for financial viability is positive cash flow.[87] Also, as discussed in those comments the fleet as a whole had positive free cash flow of $123 million.[88] This demonstrates that under the existing MPS limit, Dynegy/Vistra's Illinois fleet is financially viable and can support its operations.

Despite the Agency's claims that the financial performance and health of Dynegy is not relevant,[89] the only way to assess the financial implications of the must-runs is to examine the financial performance and viability of the MPS fleet. Dynegy witness Dean Ellis confirmed the

[84] Hr'g Tr. 92:21-95:4, Jan. 17, 2018.
[85] Hr'g Tr. 95:2-4, Jan. 17, 2018.
[86] Hr'g Tr. 129:23-130:3, Jan. 18, 2018.
[87] Post-Hearing Comments of Envtl. Grp.s at 14-16, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[88] Post-Hearing Comments of Envtl. Grp.s at 16, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018).
[89] Post-Hearing Comments of Ill. Envtl. Prot. Agency at 23, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018). The Agency states that the economic reasonableness standard is about preventing "unreasonable requirements that cannot be achieved without great financial burden." *Id.* at 24. IEPA completely begs the question of what is reasonable and what is a great financial burden. Determining reasonableness and financial burden requires not just looking at the cost of the controls but the financials of the overall company. A multi-million dollar controls may not be a burden on a billion dollar company but would be to a multi-million dollar company.

relevance when he indicated that the MPS amendment "will help to *ensure the viability of the entire Illinois fleet*."[90] The Environmental Groups' testimony based on Dynegy/Vistra's SEC filings is the only detailed and comprehensive explanation of what those documents show and the implications of the claimed losses from must-runs. It is, in fact, the only testimony presented in this case that speaks to the magnitude of the alleged costs of the existing MPS.

Additionally, Dynegy – when it still owned the fleet and to whom the Agency deferred on the economic impact of the must-run bids – has cited the need for the proposed rule change to ensure the *economic viability* of the fleet as a whole in pre-filed testimony, pre-filed answers, and testimony at hearings.[91] Now Vistra, the new owner of the MPS fleet, has shifted from Dynegy's position[92] to a position in its brief that implies the proposal is meant to not restrict the *economic potential* of the Illinois fleet.[93] This is a significant change in justification for the proposed rule. Economic viability and economic potential have very different meanings. Economic viability is about sustaining operations and economic potential is about maximizing profits. The fact that this is about economic potential and not economic viability was confirmed by Vistra in response to questions. The Environmental Groups asked Vistra whether switching the MPS from a rate-based limit to a mass-based limit is necessary for the Illinois fleet to stay in

[90] Ex. 15, Prefiled Testimony of Dean Ellis at 15, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (Dec. 11, 2017).
[91] *See, e.g.*, Response to Ill. Pol. Bd.'s Prefiled Questions for Rick Diericx and Dean Ellis at 2–3, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (Jan. 12, 2018); Prefiled Testimony of Rick Diericx at 9, 16, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (Dec. 11, 2017). *See generally* Hearing Transcript, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (Jan. 24, 2018).
[92] Ex. 15, Prefiled Testimony of Dean Ellis at 15, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (Dec. 11, 2017) ("The Illinois EPA's proposed changes to the current MPS will also allow Dynegy to make economically rational decisions on how to run the plants while complying with the MPS, which will help to *ensure the viability of the entire Illinois fleet*.") (emphasis added).
[93] Post-Hearing Comments of Vistra at 9, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018) ("The Current MPS Arbitrarily Restricts the Flexibility and Economic Potential of the MPS Fleet.").

business, and the only information Vistra provided is that doing so is "expected to improve profitability."[94]

Because neither IEPA nor Dynegy have provided any evidence on costs incurred due to MPS compliance, the Board is left to find a proxy for the effect of MPS compliance using publicly available information. As demonstrated numerous times in this rulemaking, the best way to accomplish this with the limited financial information provided in this rulemaking is to review the gross margin (operating revenues minus operating costs) of the plants at issue during the periods before and in which the must-run situation occurred. The must-run situation is depicted in the company's table and chart and meant to illustrate occurrences when marginal operating costs exceed marginal operating revenues. As previously indicated in the April 17th hearing and in the Environmental Groups' initial comments, the segment that represents the Coffeen and Duck Creek plants, depicted in the must-run dispatch table and chart, actually became more profitable on a gross margin basis each year as the must-run situation worsened.[95] This indicates that the must-run situation is immaterial. Therefore, the Board can conclude that the cost to Vistra of compliance with the current MPS due to must-run bids does not outweigh the benefit to the environment, particularly in light of the harm to the environment that will come from adopting the Agency's proposed MPS amendments. The cost-benefit analysis demonstrates that the existing MPS is economically reasonable and the proposed changes are unnecessary.

[94] Vistra Response to Questions at 2, *In re Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards*, R18-20 (June 1, 2018). The MPS fleet's profitability has in fact already improved over the course of this rulemaking, with the MISO segment reporting operating profits of $29 million for the first quarter of 2018. *See Dynegy Inc., Unaudited Consolidated Financial Statements, at 39 (Mar. 31, 2018).*
[95] Hr'g Tr. 60:2-62:17, Apr. 17, 2018.

VI. Allocation Amounts Upon Retirement

Should the Board choose to convert the MPS from a rate-based standard to a mass-based standard, any caps the Board sets should decline when an MPS unit is mothballed or retired. Environmental Groups take no position on the allocation amount at this time.

VII. Conclusion

The Board should reject IEPA's proposed rulemaking. The proposed changes to the MPS will not benefit the environment and the costs to Dynegy/Vistra do not outweigh the benefits of the existing rule. IEPA has not justified its use of allowable emissions to determine the environmental benefits of its proposed rule. Nor has the Agency or Dynegy/Vistra demonstrated that there are no negative health effects of SO_2 and $PM_{2.5}$ below the NAAQS. Finally, IEPA has not demonstrated that the costs of the existing rate-based MPS outweigh its benefits. For these reasons and the reasons explained in our initial post-hearing comments, the Board should reject IEPA's proposed rule.

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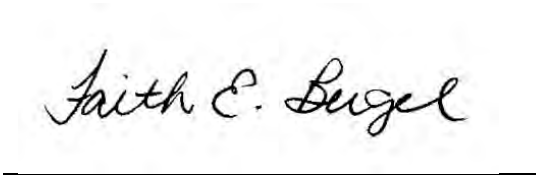

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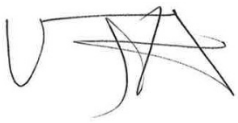
DATED: June 15, 2018

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	R2018–20
AMENDMENTS TO	)	(Rulemaking – Air)
35 ILL. ADM. CODE 225.233,	)	
MULTI-POLLUTANT STANDARDS (MPS)	)	

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing **NOTICE OF FILING** and **COMMENTS OF ENVIRONMENTAL GROUPS** in R2018-20 were served upon the attached service list by e-mail or by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on June 15, 2018.



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