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)	**)**	

NOTICE OF FILING

To: ALL PARTIES ON THE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **Response to Post-Hearing Comments**, copies of which are herewith served upon you.

/s/ Ryan C. Granholm
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Dated: June 15, 2018

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VISTRA'S RESPONSE TO POST-HEARING COMMENTS

On June 1, 2018, Vistra submitted to the Board its Post Hearing Comments, explaining its support for IEPA's original proposed revisions to the MPS.[1] As Vistra explained in those initial comments, IEPA's proposed revisions are common sense updates to the MPS, which would reduce allowable emissions while better enabling Vistra to respond to the economic pressures facing its Illinois fleet. The entirety of the evidence presented in this rulemaking demonstrates that IEPA's proposed revisions are economically reasonable and technically feasible which, along with other statutory factors, is all that is necessary to support adoption of the proposed revisions. Nevertheless, the record *also* establishes that the proposed revisions are necessary and appropriate to address changed circumstances. The Board should, therefore, adopt IEPA's proposal.

The post-hearing comments provided by the AGO and Environmental Groups, on the other hand, provide no convincing evidence why the Board should not adopt IEPA's proposal. Instead, the AGO and the Environmental Groups have presented conflicting and speculative arguments that misrepresent the Illinois Environmental Protection Act, the Pollution Control Board's obligations in promulgating a rule, the purpose of the MPS, and Vistra's motivations in this rulemaking. They improperly attempt to substitute their judgment for IEPA's, the expert

[1] Vistra uses the same abbreviations in this Response to Comments as it did in its initial Post Hearing Comments, filed June 1, 2018.

agency charged with proposing and implementing environmental rules in Illinois. Their attempts to undercut IEPA's proposal have served only to confuse the record before the Board. As both IEPA and Vistra have explained, the evidence in the record is clear on three key points: (1) IEPA's proposal would reduce allowable emissions; (2) IEPA's proposal would not threaten attainment with any state or federal air quality standard—and therefore it will not adversely impact human health or the environment; and (3) the proposal would better enable Vistra to respond to market pressures. Further, the rulemaking record—including statements by Vistra CEO Curt Morgan—make clear that Vistra's support for IEPA's proposed revisions to the MPS is aimed at *saving*, not closing, MPS units.

I. IEPA Has Met Its Burden to Show that its Proposal is Economically Reasonable and Technically Feasible.

Throughout this rulemaking, IEPA and Vistra have established a clear, consistent case for the economic reasonableness and technical feasibility of the proposed revisions. That testimony, which focused on restoring flexibility to the MPS and removing the need to run units at a loss, demonstrates that IEPA's proposed revisions meet the Act's requirement that the Board "take into account" the "economic reasonableness" and "technical feasibility" of proposed regulations.[2] IEPA's proposal has the support of Vistra—the owner of all of the remaining facilities regulated by the MPS. It would achieve significant reductions in allowable emissions, and enable Vistra to better supply the energy market by eliminating the need to dispatch units, or constrain unit operations, solely for the purpose of MPS compliance.[3] IEPA's proposal is, therefore, technically feasible and economically reasonable and should be adopted by the Board.

[2] 415 ILCS 5/27(a).

[3] R18-20, Vistra, Post Hearing Comments at 10 (Jun. 1, 2018).

a. The AGO Has Misstated the Legal Standard for Revising a Rule.

Instead of arguing that IEPA's proposed revisions are not economically reasonable and technically feasible, the AGO and the Environmental Groups have employed a more indirect attack. Specifically, both groups attempt to argue in their post-hearing briefing that IEPA must show that the *original* MPS is no longer economically reasonable or technically feasible before the rule can be changed. This argument has no basis in law and, further, the evidence in the record clearly demonstrates why the MPS needs to be revised.

i. The Act Does Not Require IEPA to Show that the Current MPS is Not Technically Feasible or Economically Reasonable.

The AGO's and the Environmental Groups' post-hearing comments attempt to create a new legal standard by alleging that the Board cannot revise a rule unless it finds that the existing rule is no longer economically reasonable and technically feasible. The Environmental Groups, for example, state that "parties must demonstrate that the rule change is required because the current rule is not an economically reasonable way to reduce pollution."[4] The Environmental Groups' only support for this bold assertion is a naked, general citation to the Act—with no explanation or analysis.[5] Similarly, the AGO argues that IEPA has failed to carry its burden because it has not proven that the current MPS limits are not economically reasonable or technically feasible and that it failed to consider the possibility of purchasing and constructing additional pollution controls for the MPS units.[6] Like the Environmental Groups, the AGO cites no specific statutory language or case law in support of these assertions—because there is none.

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[4] R18-20, Comments of Environmental Groups at 8 (Jun. 1, 2018);

[5] *Id.*

[6] R18-20, Post-Hearing Comments of the Illinois Attorney General's Office at 1 (Jun. 1, 2018) ("Illinois EPA has failed to adequately consider the technical feasibility and economic reasonableness of simply holding . . . Vistra . . . to current limits. . . ."); *id.* at 20 ("Illinois EPA's failure to consider the technical feasibility and economic reasonableness of . . . the installation of long-promised SO_2 controls. . . .")

In fact, prior Board decisions approving proposed revisions to existing rules clearly demonstrate that the same standards are used to review proposed rule amendments as proposed new rules.[7]

IEPA's burden in this rulemaking relates solely to its proposed revisions. While these revisions relate closely to the original MPS rule, there is no statutory provision, Board precedent, or case law that requires the Board to find that the *original* MPS is no longer economically reasonable or technically feasible before it is allowed to improve the rule by revising it.

ii. Yet, The Record Establishes a Clear Need to Revise the MPS.

Nevertheless, although not required to support the rule revision, the evidence presented to the Board in this rulemaking provides a convincing case that the MPS should be amended, as originally proposed by IEPA. As both IEPA and Vistra have explained, the proposed revisions represent a significant improvement on the existing MPS from a regulatory, economic, and allowable emissions perspective. These improvements would correct several structural flaws in the MPS and better account for the substantial changes that have occurred in the energy market and the MPS fleet since the rule was first adopted over a decade ago.[8]

First, the proposed revisions would streamline the MPS by combining the two MPS groups into a single group with a common owner, with mass-based emissions limits.[9] This change would simplify MPS compliance demonstrations and would eliminate any future

[7] *See, e.g.*, R11-24, *In the matter of: Nitrogen Oxide Emissions, Amendments to 35 Ill. Adm. Code 217*, Opinion and Order at 36, 39 (Jul. 21, 2011) (looking only to the proposed changes, the Board found the revised standard to be technically feasible and economically reasonable, and adopted IEPA's proposal to amend the rule).

[8] *See generally*, R18-20, Vistra, Post Hearing Comments, at 5-9 (Jun. 1, 2018).

[9] *Id.* at 11.

confusion—such as that demonstrated by some of the parties in this rulemaking—as to what level of emissions should be expected or projected under the MPS.[10]

Second, as Vistra explained in its initial Post Hearing Comments, IEPA's proposal would remove a number of financial and operational challenges that exist under the current MPS, due to changed circumstances since the original MPS rule was enacted. Specifically, the proposed revisions would improve the economic reasonableness of the MPS by eliminating the need to run certain units at a loss, and curtail operations at other units, solely for MPS compliance reasons.[11] Further, combining the remaining MPS units into a single compliance group and converting the rate-based standards to mass emissions caps would restore the flexibility that was the hallmark of the original MPS.[12] Vistra would be able to operate the MPS units as the market demands—but, of course, in compliance with the regulatory limits that IEPA has determined are reasonable—without needing to balance emission rates between units with lower and higher emissions rates and without combusting fuel and generating unnecessary emissions at some units solely for MPS compliance. Finally, as Vistra has explained to the Board throughout this rulemaking, and openly to the public, IEPA's proposed revisions would better enable the Company to respond to market pressures by de-coupling poor performing MPS units from those in better financial positions. As explained further in Part III below, in this regard, Vistra's support for IEPA's proposed revisions to the MPS is aimed at *saving*, not closing, units subject to the MPS.

Third, as substantial testimony in this rulemaking has clearly established, IEPA's proposed revisions offer an improvement over the existing MPS because it guarantees a

[10] R18-20, IEPA, Statement of Reasons at 3 (Oct. 2, 2017); R18-20, Hearing 2 Trans. at 18:22-19:1 (Mar. 6, 2018).

[11] R18-20, Vistra, Post Hearing Comments at 9-10 (Jun. 1, 2018).

[12] *Id.* at 11.

reduction in allowable emissions.[13] As IEPA and Vistra established conclusively in their initial post hearing comments, allowable emissions are the best metric for establishing regulatory limits.[14] Moreover, the AGO does not contest that, from the standpoint of reducing allowable emissions, IEPA's proposed revisions represent an improvement over the existing MPS. This issue is discussed further in Part III below.

iii. The AGO's Focus on Pollution Control Equipment is Misplaced.

The AGO's misguided focus on the existing MPS, rather than IEPA's proposal, is also reflected in its repeated citation to statements by Vistra's predecessors regarding their anticipated compliance strategies with the original MPS rule.[15] First, by focusing on pollution controls, the AGO misses the most important fact: *the MPS's emissions reductions goals have already been exceeded.*[16] The MPS fleet has achieved emissions reductions beyond those originally projected by IEPA through a combination of events and strategies, including controls at some units, use of low-sulfur coal, and numerous unit retirements to meet the MPS emissions rates. For example, in 2016, instead of completing the costly flue gas desulfurization project at the Newton plant, IPH made the decision to shut down Newton Unit 2. This, combined with other operational changes, allowed the Ameren/IPH MPS Group to come into compliance with MPS average

[13] R18-20, Vistra, Post Hearing Comments at 12 (Jun. 1, 2018); R18-20, Post-Hearing Comments of the Illinois Environmental Protection Agency at 2-3 (Jun. 1, 2018).

[14] R18-20, Vistra, Post Hearing Comments at 13-16 (Jun. 1, 2018); R18-20, Post-Hearing Comments of the Illinois Environmental Protection Agency at 5-6 (Jun. 1, 2018).

[15] *See generally* Post-Hearing Comments of the Illinois Attorney General's Office at 15-20 (Jun. 1, 2018)

[16] R18-20, Vistra, Post Hearing Comments at 6 (Jun. 1, 2018).

emissions rates three years earlier than expected and allowed it to request that the Board withdraw a variance it had earlier granted.[17]

Second, while it is true that Vistra's predecessors previously suggested that the installation of some additional pollution controls could potentially help at that time to achieve the MPS's goals, today, the financial health of many of these plants will not support the addition of controls. Furthermore, the MPS, by design, does not mandate installation or operation of any specific pollution controls.[18]

The AGO suggests (but offers no evidence to support its argument) that Vistra may obtain the operating flexibility it requires and eliminate "must run" operations by installing new pollution controls. It criticizes IEPA for "failing" to consider this possibility.[19] But the AGO's argument on this point is mere speculation. It has offered no evidence of its own to show that the installation of additional pollution controls is economically reasonable, technically feasible, or required by the MPS. In fact, the only evidence in the rulemaking record—from Vistra—suggests that permanent controls are extremely expensive[20] and even pilot studies of temporary pollution controls are very costly.[21]

[17] PCB 14-10, Order at 7 (Oct. 27, 2016) ("IPH and Medina Valley state that, with retirement of Newton Unit 2 and effective management of remaining units in the MPS Group, they can comply with 35 Ill. Adm. Code 225.233(e)(3)(C)(iii) for calendar year 2016 without the variance. Mot. at 4, 5; Exh. 1 at 4. They also state that, without completing the Newton FGD Project, the MPS Group can comply with 35 Ill. Adm. Code 225.233(e)(3)(C)(iv) for calendar years beginning in 2017.").

[18] R18-20, IEPA, Technical Support Document at 4 (Oct. 2, 2018).

[19] R18-20, Post-Hearing Comments of the Illinois Attorney General at 15 (Jun. 1, 2018).

[20] R18-20, Pre-Filed Testimony of Dean Ellis at 5-6 (Dec. 11, 2017) (noting that Dynegy has spent over $1 billion on permanent controls on units in the MPS fleet in the past 10 years and spends between $25 and $30 million a year just to operate these controls) (Board Ex. 15).

[21] R18-20, Vistra, Response to Questions at 7 (Jun. 1, 2018) ("Total costs for the temporary DSI equipment, including equipment leasing costs and operations and maintenance expenses, have exceeded $10 million [over less than a two year period].")

Dynegy's decision to abandon construction of flue gas desulfurization units (FGDs) at the Newton plant is instructive. The AGO criticizes Vistra and IEPA for failing to explain why it could not simply "finish the job of installing pollution control equipment" at the Newton plant.[22] But Dynegy noted in 2016 that total costs of the FGD units at Newton would be approximately $500 million, about half of which it had already spent when the project was abandoned.[23] It also noted that it expected to incur several million dollars annually in operations and maintenance expenses to comply with MPS NO_X and mercury emission limits.[24] Further, Dynegy testified that annual operating costs of DSI equipment for the Ameren/IPH fleet, as an alternative to the Newton FGDs, would be from $15 – $44 million.[25] These costs, in combination with the information regarding the costs of pollution controls that was provided in this rulemaking, establishes not only that pollution controls are costly to install, but also that they require significant operations and maintenance expenditures on a continuing basis. Thus, the installation of pollution controls would likely cause affected units to become unprofitable to operate going forward. Further controls are, therefore, clearly not the solution to the economic and regulatory pressures on the MPS fleet.

Now that the original emissions reductions goals of the MPS have been exceeded—and will be guaranteed if IEPA's proposal is adopted—the method used to achieve them is irrelevant. The Board has twice stated that the MPS does not dictate the methods that units must employ to

[22] R18-20, Post-Hearing Comments of the Illinois Attorney General's Office at 16 (Jun. 1, 2018).

[23] PCB 14-10, Ex. 8 to Petition for Variance, Affidavit of D. Thompson at ¶ 25 (Jul. 17, 2013).

[24] *Id.*

[25] *Id.* at ¶ 18.

comply with MPS emission rates.[26] The focus, instead, should be on the reasonableness of IEPA's proposal to improve the MPS. As Vistra has testified, IEPA's proposal to combine the two MPS groups and adopt mass emissions caps at 55,000 tons SO_2 and 25,000 tons NO_X is technically feasible and economically reasonable, would restore flexibility, and eliminate "must run" bidding and the combustion of fuel at some units solely for MPS compliance reasons, all while providing further reductions in allowable emissions.[27]

II. IEPA is Not Required to Show an Environmental Benefit.

Just as the AGO and the Environmental Groups have misstated the burden on IEPA, the rule proponent, with respect to technical feasibility and economical reasonableness, they have also falsely argued that IEPA must prove, and the Board must find, that every rulemaking must achieve a net environmental benefit.[28] Although IEPA is not required to show a net environmental benefit, IEPA *has* shown substantial reductions in allowable emissions associated with its proposal and has therefore not only met, but exceeded the standards required for a rulemaking under the Act.

The Act does not require a rule proponent to show a net environmental benefit. In fact, as IEPA made clear in its initial post-hearing comments, the Board's precedent establishes that rulemakings may be emissions neutral, "such as identical-in-substance rules, incorporation-by-reference rules, procedural rule amendments, updates or "clean-up" rules, rules extending

[26] PCB 12-126, *Ameren Energy Resources v. IEPA*, Order at 56 (Sept. 20, 2012) ("It is significant to note that the MPS does not restrict the AER MPS Group from employing any specific methods to reach the required emission rates."; PCB 14-10, Order at 71 (Nov. 21, 2013).

[27] *See, e.g.*, R18-20, Vistra, Post Hearing Comments at 3 (Jun. 1, 2018).

[28] *See, e.g.*, R18-20, Post-Hearing Comments of the Illinois Attorney General's Office at 7 (Jun. 1, 2018)

compliance deadlines," etc.[29] No statutory provision, case law, or Board precedent cited by the AGO or the Environmental Groups clearly rebuts this point.

For example, the AGO repeatedly cites to the Board's decision in R09-10 in an attempt to show that rules may only be approved where there is a net environmental benefit.[30] But although the Board found a slight net environmental benefit in that case, and cited that benefit as a reason it approved the rule, it did not state that a net environmental benefit was *required*.[31] This point is clear from the structure and language of the Act. For instance, to obtain an adjusted standard under Section 28.1, a petitioner must show that the relief sought would not result in adverse environmental or health effects.[32] No such demonstration is required for generally applicable rules.[33] Here, IEPA's proposal was submitted and accepted by the Board as a generally applicable rule, so the requirements of Section 28.1 do not apply.[34]

Nevertheless, despite no requirement to show a net environmental benefit, IEPA *has* established that its proposal would substantially reduce allowable emissions—i.e., an environmental benefit. IEPA's proposed revisions (both its initial proposed caps and its later revised proposed caps) would actually reduce allowable emissions well *below* the levels required to protect human health (as determined by the NAAQS) and federal visibility standards (the

[29] *Id.* at 22 (Jun. 1, 2018).

[30] *See, e.g.*, *id.* at 10 (Jun. 1, 2018).

[31] R09-10, Order and Opinion at 29 (Apr. 16, 2009).

[32] 415 ILCS 5/28.1(c)(3).

[33] 415 ILCS 5/27.

[34] R18-20, Opinion and Order of the Board at 5 (Oct. 19, 2017) (accepting IEPA's proposal because it "satisfies the content requirements" of Ill. Adm. Code 102.202, which applies to "Regulations of General Applicability").

Regional Haze Rule).[35] Any further reductions would simply be reductions for the sake of reductions. This is not what the Illinois legislature had in mind. As IEPA notes, "[n]othing requires the Board to adopt regulations reducing pollution 'as much as possible,"[36] which is a stated goal of the AGO here.[37] In fact, as the Environmental Groups explain, the purpose of Title II is to prevent "pollution,"[38] which the Act defines as "the presence . . . of contaminants in sufficient quantities and of such characteristics *so as to be injurious* to human, plant, or animal life, to health, [etc.] . . . ."[39]

Yet, the Environmental Groups and the AGO continue to argue that IEPA's proposal must be ratcheted ever further downward, despite the fact that all credible evidence in the record establishes IEPA's originally proposed SO_2 cap of 55,000 tons and an NO_X cap of 25,000 tons are protective of all applicable state and federal air quality standards designed to protect human health and the environment. This evidence is clearly sufficient to allow the Board to determine that IEPA's original proposal meets the purpose of Title II—it prevents "pollution"—and, although not required, will result in an environmental benefit.[40] For this simple reason, any argument that the Act requires caps lower than IEPA's original proposed caps of 55,000 tons of SO_2 and 25,000 tons of NO_X are baseless.

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[35] R18-20, Post-Hearing Comments of the Illinois Environmental Protection Agency at 12 (Jun. 1, 2018) ("[T]he Illinois EPA analyzed potential impacts of its proposal on air quality and demonstrated that federal standards will continue to be protected in Illinois.").

[36] *Id.* at 22.

[37] R18-20, Hearing 1 Trans. at 11:23-24 ("Ideally, the air pollution should be reduced as much as possible.")

[38] 415 ILCS 5/8; R18-20, Comments of the Environmental Groups at 4 (Jun. 1, 2018).

[39] 415 ICLS 4/3.115 (emphasis added); R18-20, Comments of the Environmental Groups at 4 (Jun. 1, 2018).

[40] R18-20, Hearing 1 Trans. at 23:20-22 (noting that the AGO acknowledges that there are different ways to quantify "environmental benefit").

In contrast, the AGO has pointed to no specific evidence to establish that emissions at the levels proposed by IEPA would be "injurious" to the environment or the citizens of Illinois. Instead, the AGO posits, without presenting any supporting evidence, that all emissions are "injurious." If that were true, then *all* emissions limits should be set at zero. But that is not the case. The Act does not require emissions reductions for the sake of reductions alone.

III. IEPA's Proposal Would Substantially Reduce Allowable Emissions.

As Vistra explained in its initial Post Hearing Comments, IEPA's original proposal would substantially reduce allowable emissions from the MPS fleet. The MPS fleet is currently allowed to emit 66,354 tons of SO_2 and 32,841 tons of NO_X annually.[41] IEPA's initial proposed caps of 55,000 tons SO_2 and 25,000 tons NO_X would therefore represent 17.7% and 23.9% reductions in allowable emissions, respectively. IEPA's revised proposed cap of 49,000 tons of SO_2 would represent a 26.1% reduction in allowable SO_2 emissions from current levels. These substantial reductions in allowable emissions are a clear demonstration that IEPA's proposals would advance the Act's goals and are more restrictive than the current MPS. Vistra agrees with IEPA that the AGO's attempts to provide alternative methods for evaluating the proposed MPS revisions used methodologies that were "confusing, subjective, and problematic."[42] Testimony from IEPA, statements from U.S. EPA, and the internal inconsistency of the AGO's various methodologies all support the conclusion that allowable emissions are the only appropriate metric for establishing new MPS emissions limits.

Not only does the proposal reduce the overall allowable mass emissions of annual SO_2 and NO_X and seasonal NO_X, it also establishes other new and carefully reasoned requirements.

[41] R18-20, IEPA, Statement of Reasons at 9 (Oct. 2, 2017).

[42] R18-20, Post-Hearing Comments of the Illinois Environmental Protection Agency at 6 (Jun. 1, 2018)

These new requirements include operation of existing NO_X emission controls year round and the achievement of a lower NO_X emission rate during the ozone season.[43] Moreover, an additional annual emission cap is being established at Joppa.[44] These new requirements are in addition to and overlap the numerous other well-documented existing emission requirements that apply to these units—requirements that remain unchanged and that will continue to apply.

a. IEPA and Vistra Have Established that Allowable Emissions Should be the Focus.

As IEPA testified during the first hearing, allowable emissions are "the amount of a given pollutant that a unit source, or in this case group of sources, is allowed by rule, law or permit to emit."[45] This standard regulatory definition is used to ensure that emissions do not exceed levels required to meet both health-related standards (like the NAAQS) and other air quality standards (like the Regional Haze Rule), even in the "worst case scenario." By utilizing this standard, objective definition, regulators are able to ensure a consistent comparison of emissions that may occur under various regulatory outcomes. Since IEPA first offered a calculation of emissions allowable under the MPS in its initial Statement of Reasons,[46] no party has contested IEPA's calculations.

Instead, the AGO has created entirely new concepts and terms to attempt to argue that allowable emissions should not be used to evaluate the proposal relative to the current MPS, to determine whether it meets the purposes of the Act. Both IEPA and U.S. EPA have informed the Board that allowable emissions are the metric that is best suited to the type of analysis required

[43] R18-20, IEPA, Statement of Reasons at 5-7 (Oct. 2, 2017).

[44] *Id.*

[45] R18-20, Hearing 1 Trans. at 22:6-8 (Jan. 17, 2018).

[46] R18-20, IEPA, Statement of Reasons at 9 (Oct. 2, 2017).

to compare IEPA's proposed revisions to the current MPS.[47] In fact, both agencies agree that the AGO's methodologies are inconsistent with any regulatory approach with which they are familiar. U.S. EPA has stated unequivocally that if the Board approves revisions to the MPS, it will review those revisions, to determine if they are acceptable under the Clean Air Act, based on the revisions' impact on allowable emissions.[48] And, further, the U.S. EPA has rejected the AGO's interpretation of CAA Section 110(l) and U.S. EPA's prior implementation of that section.[49] The AGO's Post-Hearing Comments fail to rebut, or even mention, U.S. EPA's explicit rejection of the AGO's proposed methodology.

b. The AGO's Analyses Would Result in Arbitrary and Capricious Findings.

The record in this rulemaking is a prime example of the perils of attempting to create new regulatory metrics that focus on actual, instead of allowable emissions. The varying and conflicting calculations provided by the AGO demonstrate that it would be arbitrary and capricious to establish emissions limits using the methodologies employed by the AGO.

i. The AGO's Shifting Analyses Have Served Only to Confuse the Rulemaking Record.

Since December, the AGO has set out at least two completely different metrics for determining how the Board should assess emissions under the MPS. First, the AGO suggested that the Board rely on its calculations of the MPS fleet's "actual potential to emit,"[50] which it

[47] *See, e.g.*, Vistra, Post Hearing Comments at 13-15 (Jun. 1, 2018)

[48] *See* Board Ex. 47 at 1 (Apr. 12, 2018) ("[F]or a 110(l) demonstration a comparison of allowable emissions under the currently approved (aka 'existing SIP') to the allowable emissions under the SIP revision being considered.").

[49] *See id.* ("Do you agree with the [AGO's] statement, 'the United States Environmental Protection Agency ("USEPA") has consistently taken the position that an "anti-backsliding" analysis under Section 110(1) requires consideration of a proposed SIP amendment's impact on "actual," not allowable, emissions.'? *The U.S. EPA does not agree with that statement.*") (emphasis added).

[50] R18-20, Pre-Filed Testimony of J. Ginac at 17 (Dec. 11, 2018) (Board Ex. 9).

described as the "more appropriate[]" way to "consider allowable emissions under the existing MPS."[51] This methodology relied on the maximum heat input and a single year's actual (2016) emissions rates.[52] Based on these calculations, the AGO suggested that, if the Board adopts mass emissions caps, it should adopt them at levels less than 49,305 tons of SO_2 and 29,140 tons of NO_X.[53] At the second hearing, IEPA offered a compromise to assuage the AGO's concerns, and revised its proposal to recommend that the Board adopt an SO_2 emissions cap of 49,000 tons, which was below the level the AGO had itself suggested was the MPS fleet's "actual potential to emit."[54] The AGO then reversed its position and rejected that compromise.[55]

About four months later, the AGO offered a new position regarding what the appropriate calculation of "actual" emissions should be. Like its December analysis, the AGO's April analysis relied on actual emissions ("actual annual emissions") rates from a single year (2017), but this time, it relied on a different single year's (2002) actual heat input as well.[56] Applying these cherry-picked parameters, the AGO suggested that "actual annual emissions" from the MPS fleet should be considered no higher than 34,094 tons of SO_2 and 18,920 tons of NO_X.[57]

[51] R18-20, Hearing 1 Trans. at 173:2-13 (Jan. 17, 2018).

[52] *Id.* at 17-19.

[53] R18-20, Pre-Filed Testimony of J. Gignac at 17-19 (Dec. 11, 2017) (Board Ex. 9); R18-20, Hearing 1 Trans. at 183:19-184:3 (Jan. 17, 2018).

[54] R18-20, Illinois Environmental Protection Agency's Responses and Information Requested from January Hearings at 2 (Feb. 16, 2018) (Board Ex. 29).

[55] R18-20, Hearing 2 Trans. at 48:4-8 (Mar. 7, 2018) ("Mr. More: So as of today the Attorney General does not have an opinion whether or not a cap of 49,000 tons for SO2 is appropriate. Mr. Gignac: I testified earlier today, we think the number should be lower than that.").

[56] R18-20, Pre-Filed Testimony of A. Armstrong at 19 (Apr. 3, 2018) (Board Ex. 37).

[57] *Id.*

The AGO then recommended that, if the Board were to adopt mass emissions caps, it should do so at a levels below these calculations of the MPS fleet's "projected actual annual emissions."[58]

As Vistra established in its initial Post Hearing Comments, the AGO's methodologies are highly arbitrary, because the AGO provided no basis for the selection of any particular comparison time period and the methods produce drastically different results if either a different year's actual emissions rates are used or a different year's heat inputs are used.[59] In fact, the AGO's own testimony conceded that using the highest actual heat inputs from the past ten years, in combination with the MPS rate limits (rather than a specific year's actual emissions), the MPS fleet could lawfully emit 47,385 tons of SO_2 and 23,551 tons of NO_X annually.[60] As IEPA testified, avoiding this variability is one of the primary benefits of relying on comparisons of allowable emissions.[61]

ii. The AGO Continues to Modify its Analysis, Which has Served to Further Confuse the Record in this Rulemaking.

Now, at the stage of post-hearing comments, the AGO has changed position once again and recommends that the Board rely on an entirely different "actual" emissions analysis. In its latest effort to find a result it likes, it endorses an analysis that relied on applicable MPS rate limits and actual 2002 heat inputs. This analysis resulted in "projected actual emissions"—again, a new term—of 44,920 tons of SO_2 and 22,469 tons NO_X.[62] There is no basis in the

[58] *Id.* at 2, 19.

[59] R18-20, Vistra, Post Hearing Comments at 20 (Jun. 1, 2018).

[60] R18-20, Pre-Filed Testimony of A. Armstrong at 11 (Apr. 3, 2018) (Board Ex. 37).

[61] R18-20, Hearing 3 Trans. at 172:14-18 ("14 And, Mr. Bloomberg, isn't it because of that variability that you just described that you looked to the allowable comparison? MR. BLOOMBERG: Yes.").

[62] *Id.* at 12.

record to support caps at this level. Two exchanges between Chairman Papadimitriu and Mr. Bloomberg at the third hearing clearly illustrate this fact:

> *Chairman Papadimitriu*: What's the Agency's position on using updated regional[] haze projection of 44,900 tons as mass emissions cap for the MPS plants? *Mr. Bloomberg*: We do not see a reason to further reduce the cap from the 49,000 that we indicated we support at the last hearing.[63]

> *Chairman Papadimitriu*: So there is no regulatory requirements to go from the 49,000 to the 44,000 . . . ? *Mr. Bloomberg*: That's correct.[64]

Nor has the AGO provided sufficient explanation for its recommendation—which appeared for the first time in its Post-Hearing Comments—that the Board adopt group-specific unit emissions caps, totaling 44,900 tons SO_2 and 22,449 tons NO_X.[65] The AGO's proposed group-level emissions caps would reduce the operational flexibility provided by IEPA's proposed revisions and is expected to impose similar economic constraints as those Vistra is wrestling with under the current MPS. The AGO has not identified sufficient reason to justify its deviation from IEPA's proposal or even—yet again—from its own December 2017 and April 2018 testimony at this late stage in the rulemaking proceeding.

The AGO's continually changing and speculative analyses, each of which it has described with creative new names—"actual potential to emit" and "projected annual emissions"—have required the AGO to tread carefully when it describes lawful emissions, to avoid using the term and methodology that both IEPA and U.S. EPA use—allowable emissions.

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[63] R18-20, Hearing 3 Trans. at 101:9-16.

[64] *Id.* at 115:22-116:2

[65] R18-20, Post-Hearing Comments of the Illinois Attorney General at 41 (Jun. 1, 2018). Caps at these levels would be representative of a hypothetical year in which the MPS fleet operated at a 67.7% capacity factor (based on the SO_2 calculation) or 68.4% (based on the NO_X calculation), which are slightly less than the fleet's average capacity factor over the past 10 years, 69.3%. R18-20, Pre-Filed Testimony of A. Armstrong at Ex. 1 (Apr. 3, 2018). However, The AGO's analysis, which is based on 2002 heat inputs, does not consider or account for the fact that the remaining MPS units likely would have had higher heat inputs in 2002 if they were the only MPS units operating at that time.

For example, the AGO's Post-Hearing Comments takes pains to describe the levels that the MPS fleet "would . . . have been permitted to emit" at various points in time.[66] But these terms are easily confused with the much more straightforward concept of "allowable" emissions.

The Environmental Groups' initial post-hearing comment provides a case in point. In recommending the AGO's suggestion that any mass emissions caps adopted by the Board be set at 34,094 tons for SO_2 and 18,920 tons for NO_X, the Environmental Groups argue that "MPS caps at those levels would ensure that emissions . . . do not exceed levels currently *allowed* by the MPS."[67] However, at no point during this rulemaking has any party actually contested IEPA's calculation of "allowable emissions," which was over two times higher than the numbers the Environmental Groups cited. Instead, it appears that the AGO's ever changing and subjective emission assessment methods, untethered from any accepted regulatory approach have confused even some of the participants that attempt to advocate for the AGO's position. The AGO's calculations *do not* represent "allowable emissions," which is the recognized, applicable, objective, regulatory concept, according to both U.S. EPA and IEPA.

iii. The AGO's Methodology is Inconsistent with the Analysis Conducted in R09-10.

In its initial Post-Hearing Comments, the AGO has attempted to defend its methodologies for projecting future emissions based on past actual emissions by arguing that these methodologies are consistent with those that the Board employed in R09-10. Looking closely at the analysis the Board relied on in R09-10, however, it is clear that the AGO's methodology is

[66] *See, e.g.*, R18-20, Post-Hearing of the Illinois Attorney General's Office at 27 (Jun. 1, 2018) (emphasis added).

[67] R18-20, Comments of Environmental Groups at 24 (Jun. 1, 2018).

easily distinguishable. IEPA explained this persuasively in its own initial post-hearing brief.[68] Most importantly, unlike the AGO's analysis, the analysis cited by the Board in R09-10 *did not* rely on actual emissions rates or a single year's heat input, rather, it used allowable emissions rate limits and average heat input over an eight year period.[69] As IEPA explained "[t]he Agency in all analyses, then and now, has used allowable emission rates from the MPS units as a comparison to proposed rule amendments."[70] That methodology is not consistent with either the AGO's initial December calculations of the MPS fleet's "actual potential to emit," or the AGO's April calculation of the fleet's "projected actual annual emissions."

And perhaps most telling is that the AGO has made no attempt in any of its analyses or proposals to determine or demonstrate any level of additional environmental or public protection that would occur if the Board employs its suggested methodology. Rather the AGO has proceeded forward on the false premise that emissions should be reduced as low as possible without consideration of the economic reasonableness, technical feasibility or quantifiable environmental benefit (which, as noted above, is not a necessary requirement when promulgating a rule under Section 27 of the Act).[71]

The relevance of the AGO's testimony is severely limited because the MPS is not necessary—or part of any State Implementation Plan—to implement the NAAQS.[72] Simply put,

[68] Post-Hearing Comments of the Illinois Environmental Protection Agency at 9-11 (Jun. 1, 2018) (citing three reasons why the analysis used in R09-10 is not comparable to the AGO's analysis here).

[69] *See* R09-10, Post-Hearing Comments of Ameren Companies at 14, Attachment C (Mar. 6, 2009) (comparing projected emissions against a baseline using allowable emissions for each calculation).

[70] Post-Hearing Comments of the Illinois Environmental Protection Agency at 9 (Jun. 1, 2018).

[71] *See supra* Part II above.

[72] R18-20, Hearing 2 Trans. at 35:16-19 ("MR. MORE: Is the MPS part of any State Implementation Plan that is currently being used by the state to implement any NAAQS? MR. BLOOMBERG: No, not any NAAQS.").

if the MPS did not exist, the IEPA would continue to meet their air quality protection obligations for the NAAQS due to the numerous other existing and ongoing applicable emission standards.[73] Therefore, any revision to the MPS, especially one that lowers allowable emissions and contains other additional requirements, will not result in any NAAQS being jeopardized.

IV. Vistra's Support for IEPA's Proposal is Aimed at Saving, Not Closing, Units Subject to the MPS.

In addition to mischaracterizing the burden placed on IEPA in this rulemaking and the emissions impact of IEPA's proposal, the AGO and the Environmental Groups also have mischaracterized Vistra's motivations in this rulemaking. In its initial Post-Hearing Comments, the AGO alleges that this rulemaking "has always been about much more than what Illinois EPA and Dynegy have told the Board." But Vistra's comments (and Dynegy's before that), both publicly and before the Board, have been consistent in describing the real threats facing the MPS fleet.

In its very first filing before the Board, in support of IEPA's Motion to Expedite consideration of its proposal, Dynegy explained that

> If the rulemaking is not successful, Dynegy will suffer material prejudice. A series of events has severely eroded the viability of Dynegy's plants in the Illinois capacity market over the past year. These events, coupled with the challenges presented by [the] MPS structure . . . call for expedited action.[74]

Later, when the hearing process began, Dean Ellis described numerous challenges faced by the MPS fleet. For example, he explained that "[s]ince the promulgation of the MPS . . . the capacity prices established in MISO's capacity auctions . . . for the Downstate region have

[73] R18-20, Hearing 1 Trans. at 149:17-151:11 (Jan. 17, 2018) (explaining that the MPS was "never . . . intended as a NAAQS control" and that there are other air regulations in place that are "designed specifically" to attain and maintain the NAAQS).

[74] R18-20, Dynegy, Response in Support of Motion to Expedite Rulemaking at ¶ 13 (Oct. 16, 2017).

been volatile and, recently, too low to support much of the existing generation."[75] He explained that these capacity prices, along with other issues, "present[] a significant challenge to the *economic viability* of Dynegy's Downstate generation fleet."[76] IEPA's proposal, Mr. Ellis noted, would "help to ensure the viability of the entire Illinois fleet."[77]

IEPA's proposed revisions to the MPS would not completely remove the economic pressures on the MPS units, but it would offer Vistra more options for responding to those pressures. Specifically, the MPS would "help to ensure the viability" of the MPS fleet by allowing each plant to be considered on its own merits. As all parties recognized from the beginning of this rulemaking, the current MPS tethers the operations of higher and lower emissions rate units. Currently, the rule forces operation of lower emissions rate units on a "must run" basis, even when the energy market pricing will not cover their operating costs.[78] For example, some units are currently bid into MISO as *must* run in order to offset emissions from units with relatively higher emissions rates.[79]

In the long run, however, the fact that the MPS tethers together higher and lower emissions rate units represents a threat to the viability of the entire MPS fleet. If one or more of the economic or regulatory pressures (whether from environmental rules, market rules, or otherwise) facing the MPS units eventually forces the shut-down of one MPS unit, the current MPS could require that Vistra shut down other MPS units as well, to maintain a balance between units with lower and higher emissions rates. IEPA's proposal, however, would

[75] R18-20, Pre-Filed Testimony of Dean Ellis at 6 (Dec. 11, 2017) (Board Ex. 15).

[76] *Id.* at 7 (emphasis added).

[77] *Id.* at 15.

[78] *Id.* at 11.

[79] R18-20, Dynegy's Response to Questions at Exhibit B (Feb 16, 2018) (Board Ex. 24).

enable Vistra to select which units it will continue to run based on factors other than the MPS, including economics, while still ensuring that overall emissions levels remain protective.

Vistra CEO Curt Morgan has been very open about the company's goals in this proceeding. As early as February 26, 2018, Mr. Morgan noted that Vistra's goal in supporting IEPA's revisions to the MPS would be to "basically create flexibility to make decisions about what assets were in, what assets were out."[80] By allowing Vistra to potentially shut down only those units facing the most economic pressure—while maintaining fleet-wide emissions below levels IEPA has determined are protective of air quality—IEPA's proposed revisions to the MPS would actually *reduce* the number of units under threat of shutdown. For example, currently, if Vistra wishes to shut down capacity at a unit that has lower emissions rates, it would also be forced to shut down even more capacity at one or more units with relatively higher emissions rates, in order to maintain overall average emissions rates that comply with MPS limits.

The AGO seems to suggest that Vistra's attempts to close fewer units is somehow improper. But each of Vistra's MPS plants is important to the State of Illinois and communities throughout the State. Vistra has 1,300 employees in Illinois, and the company pays $39 million in state taxes and $22 million in local property taxes annually.[81] Vistra's goal is to gain flexibility that will allow each plant's operations to be evaluated separately, thus enabling continued operation of more MPS plants than if they continue to be tethered as a group. IEPA's proposal would further that goal. Keeping more plants open, in compliance with the mass emission levels proposed by the Agency, would benefit the people of Illinois by maintaining

[80] R18-20, Additional Pre-Filed Questions of the Illinois Attorney General's Office for Illinois EPA's Witnesses at 4 (Mar. 2, 2018) (Board Ex. 30).

[81] R18-20, Pre-Filed Testimony of Dean Ellis at 2 (Dec. 11, 2017) (Board Ex. 15).

social and economic benefits such as jobs and tax revenue in local communities. These numerous benefits have been described to the Board by many plant employees and community members during this rulemaking proceeding.[82] By allowing Vistra to close fewer units, IEPA's proposed revisions to the MPS are economically reasonable. They should be adopted by the Board.[83]

V. Conclusion.

IEPA's proposed MPS revisions are both economically reasonable and technically feasible. IEPA's original proposal would provide necessary reforms to the MPS, promoting Vistra's ability to continue operation of economically threatened MPS units, while also protecting public health and air quality in Illinois. Vistra therefore urges the Board to adopt IEPA's original proposed revisions, including annual emissions caps of 55,000 tons for SO_2 and 25,000 tons for NO_X.

Respectfully submitted,

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Dated: June 15, 2018

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[82] *See e.g.*, R18-20, Hearing 2 Trans. at 110:17-128:19 (Mar. 7, 2018).

[83] It is worth noting that the Illinois General Assembly has encouraged the development of balanced energy policies and called for actions by IEPA and the Board that are "in harmony with the energy needs and policy of the State, while protecting the public health and the environment." 415 ILCS 5/9.10.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 15th day of June, 2018, I have electronically served the attached **Response to Post-Hearing Comments**, upon all parties on the attached service list.

My e-mail address is rgranholm@schiffhardin.com;

The number of pages in the e-mail transmission is 26.

The e-mail transmission took place before 5:00 p.m.

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