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

TO: Don Brown, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **ENVIRONMENTAL GROUPS' RESPONSE TO VISTRA'S MOTION FOR EXPEDITED CONSIDERTION** in the above-captioned proceeding, copies of which are served on you along with this notice.

Respectfully submitted,

_/s/ Faith Bugel_____

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Dated: October 26, 2018

Attorney for Sierra Club

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ENVIRONMENTAL GROUPS' RESPONSE TO VISTRA'S MOTION FOR EXPEDITED CONSIDERTION

The Environmental Law & Policy Center, Environmental Defense Fund, Natural Resources Defense Council, Respiratory Health Association and Sierra Club (collectively "Environmental Groups") request that the Illinois Pollution Control Board ("Board") deny Vistra's Motion for Expedited Consideration of the Board's second first notice proposal regarding amendments to 35 Ill. Adm. Code 225.233 or the Multi-Pollutant Standard ("MPS") (collectively the "Revised Proposal"). Vistra's basis for its motion does not justify an expedited process that short-circuits the Board's full and fair consideration of this proposal.

Vistra's request fails to offer sufficient grounds for expediting review, as it does not overcome Board's precedent or the requirements in the Rules for granting a Motion for Expedited Review. First, Vistra has not met the Board's standard for an expedited review process because there are no "dire circumstances" here. The Board has consistently held that "the granting of a motion for expedited review [is] unlikely in all but the most dire circumstances." *See, e.g., In the Matter of: Ameren Ash Pond Closure Rules (Hutsonville Power Station): Proposed 35 Ill. Adm. Code Part 840.101 through 840.152, R09-21, slip op.* at 9-10 (June 18, 2009) (denying motion for expedited review). For the sole purpose of its own bottom

line, Vistra seeks a regulatory decision by February 1, 2019, sooner than the full and fair consideration of the new proposal requires. This does not constitute "dire circumstances" because there is no indication that the existing rule threatens the public interest: Vistra could continue to run these units at the same rate that it is currently running them until the Board makes a decision. And Vistra's business interests by themselves are not a lawful or appropriate basis to truncate the Board's consideration of this proposal and the normal public process. As such, Vistra has failed to demonstrate that dire circumstances warrant its request here.

Second, Vistra's motion does not demonstrate "material prejudice" would be caused if the motion is not granted, though public participation and the public interest would in fact be materially prejudiced by such a truncated schedule. *See* 35 Ill. Adm. Code 101.512. The parties and the public should have the opportunity to thoroughly analyze the changes included in the Revised Proposal, just as with the initial proposal. The MPS regulates emissions of dangerous air pollutants nitrogen oxides and sulfur dioxide, which are linked to adverse respiratory effects, cardiac complications and cancer. Compressing the Board's process of considering the Revised Proposal into fewer than three months, as requested by Vistra, would cut short the opportunities for a substantive public dialogue, meaningful public comment on the revisions, and full and fair consideration by the Board. Thus, granting Vistra's Motion would materially prejudice the public interest. The Environmental Groups do not suggest unnecessary delay, but rather the opportunity for stakeholders and the public to conduct meaningful review and offer thoughtful commentary on the revisions.

For these reasons, as further explained below, the Board should reject and deny Dynegy's and the Agency's Motion for Expedited Review.

I. Background

Vistra's Motion seeks to expedite review of the Board's second first notice proposal of revisions to 35 Ill. Adm. Code 225.233. The MPS rules were the result of a 2006 rulemaking that was collaborative in nature and saw an overwhelming amount of public participation. During the 2006 rulemaking proceedings, the Board received a total of 7,286 public comments provided by dozens of organizations and many public officials. *See* Letter from Dorothy M. Gunn, Clerk, IPCB, to Vickie Thomas, Executive Director, Joint Committee on Administrative Rules (Nov. 14, 2006). According to the Board, "the overwhelming majority of the comments support the adoption of the Agency's proposal" that led to the MPS regulations that are currently in place. *Id*. At first notice in the fall of 2017, the Board adopted a proposal filed by the Illinois Environmental Protection Agency ("IEPA") to amend the MPS, noting it was doing so without substantive review. *See* R18-20, Opinion and Order of the Board at 1 (Oct. 4, 2018), R18-20, Opinion and Order of the Board at 6 (Oct. 19, 2017). IEPA's proposal combined two existing MPS groups and replaced rate-based emissions standards for sulfur dioxide (SO_2) and nitrogen oxide (NO_X) with mass- based limits. *Id.* On October 4, 2018 after an 11-month rulemaking proceeding consisting of multiple public hearings, thousands of public comments, witness testimony, the Board proposed for second first notice revised amendments to the MPS. *Id.* The Board's Revised Proposal differs from IEPA's proposed amendments in two material ways: by reducing the mass caps for SO_2 and NO_X and by requiring a reduction of those caps when units are permanently retired or temporarily idled. *Id*.

II. Argument

Vistra's Motion should be denied not only because it is not justified or necessitated by any public interest, dire circumstances, or material prejudice, but also because it would

materially prejudice members of the public. This motion presents no emergency, but rather seeks to accommodate Vistra's business interests in the selection of a February 1, 2019 implementation date to benefit the company's bottom line. Granting Vistra's Motion, however, would result in material prejudice to the public by preventing the public from providing thorough analysis and feedback on key revisions to the proposed regulations.

A. No Dire Circumstances Exist

Vistra's Motion does not point to any dire circumstances that threaten the public interest, safety, or welfare, relying instead on the desired financial upsides for the company. The Board has consistently held, "the granting of a motion for expedited review [is] unlikely in all but the most dire circumstances." *See In the Matter of: Ameren Ash Pond Closure Rules (Hutsonville Power Station): Proposed 35 Ill. Adm. Code Part 840.101 through 840.152, R09-21*, slip op. at 9-10 (June 18, 2009) (denying motion for expedited review); *In the Matter of: Petition of Westwood Lands, Inc. for an Adjusted Standard from Portions of 35 Ill. Adm. Code 807.104 and 810.103 or, in the Alternative, a Finding of Inapplicability, AS 09-3*, slip op. at 10 (May 21, 2009 (same); *In the Matter of: City of Galva Site-Specific Water Quality Standard for Boron Discharges to Edwards River and Mud Creek: 35 Ill. Adm. Code 303.477 and 303.448, R9-11*, slip op. at 3 (Feb. 5, 2009). "In deciding a motion for expedited review, the Board considers statutory requirements and whether material prejudice will result from the motion being granted or denied." R15- 23, *In the Matter of: Amendments to Primary Drinking Water Standards 35 Ill. Admin. Code 611*, Opinion and Order of the Board at 5 (Jun. 4, 2015) (citing 35 Ill. Adm. Code 101.512(b)).

The circumstances that Vistra asserts as the basis for its request are not dire, and they will not materially prejudice the Company. Vistra argues that the MPS prevents market-driven

operation of units and causes losses as a result of "must run bidding" to comply with the MPS. Vistra Mot. at 2. Through its Motion, Vistra hopes to hasten this rulemaking process simply to meet a February 1, 2019 deadline of its own choosing for the sole financial benefit of Vistra. Nonetheless, it is virtually impossible to argue that maintaining standards that have been in place for many years will materially prejudice the Company if those standards are retained for a few more months.

Vistra argues erroneously that the standard is one in which "economic harms—including lost profits and lost cost savings—may justify expedited review." Vistra Mot. at 1. Vistra also points to only one single rulemaking of broader applicability, R15- 23, *In the Matter of: Amendments to Primary Drinking Water Standards 35 Ill. Admin. Code 611,* while the remainder of Vistra's cited Board cases are adjusted standards. Vistra Mot. at 2 (citing Opinion and Order of the Board at 3, 5 (Jun. 4, 2015).) In R15-23, however, the Board emphasized that the standard for an expedited rulemaking is whether material prejudice will result. R15- 23, *In the Matter of: Amendments to Primary Drinking Water Standards 35 Ill. Admin. Code 611,* Opinion and Order of the Board at 5 (Jun. 4, 2015). In deciding the motion to expedite, the Board emphasized the fact that the costs were being imposed upon community water supplies and, as noted elsewhere in the Board's decision, community water supplies are publicly owned and supported by tax payer dollars. Therefore, the costs being considered were public costs. *Id.* at 4, 5. Here, there are no public costs at issue. The only relevant costs are costs to Vistra, a publicly traded, out-of-state corporation, whose profits are immaterial to the people of Illinois. In arguing that it will bear additional short-term costs, Vistra has failed to apply the correct and higher standard of material prejudice (as opposed to Vistra's standard of mere "costs") and failed to demonstrate that any material prejudice would occur if the Motion for Expedited Consideration is not granted.

B. Expediting Proceedings Would Materially Prejudice Affected Communities

People in affected communities and interested persons who want to participate in this rulemaking will be materially prejudiced if the Board grants this motion and denies the meaningful review that was given to the initial proposal. Illinois law states, "In acting on a motion for expedited review, the Board will, at a minimum, consider all statutory requirements and whether material prejudice will result from the motion being granted or denied." 35 Ill. Adm. Code 101.512(b). By contrast, no material prejudice would flow to the Vistra from denial of the Agency's Motion.

Granting Vistra's Motion would materially prejudice citizens because it would impede crucial public participation in this rulemaking on newly-proposed revisions. Expedited review would decrease the amount of time that the public would have to engage in activities such as (1) reviewing the Revised Proposal, (2) participating in hearings, and (3) submitting comments on the Revised Proposal. Rushing this process would decrease the public's ability to meaningfully participate.

The new revisions to the proposal must be thoroughly analyzed, as their potential impacts differ from the previous iterations of the rule. Vistra argued that there is no material prejudice from expedited consideration because the major changes to the proposed rule appearing in the second first notice proposal—reducing the overall caps on emissions and requiring downward adjustments to those caps when units are idled or retired—are based on testimony already presented in this rulemaking. Vistra Mot. at 3 (citing R18-20, Opinion and Order of the Board at 52-55 (Oct. 4, 2018) (noting that the mass emissions caps in the second first notice proposal were based on a testimony from the AG)); *id.* at 58-59 (noting that the downward adjustments for unit idling or retirement in the second first notice proposal were recommended by the AG). The

Board's second first notice proposal to revise the MPS, however, could result in a different pattern of increased pollution across Vistra's coal fleet in vulnerable communities. If plants with scrubbers such as Duck Creek or Coffeen retire, the deduction from the overall cap is limited to 200 tons per year of SO_2 each due to the very low level of SO_2 emissions from that plant. R18-20, Opinion and Order of the Board at 60 (Oct. 4, 2018). The overall cap of 44,920 tons of SO_2 per year is far enough from actual emission levels that even with the small deduction for one retired scrubbed plant reducing the cap to 44,720, generation could be increased at an un-scrubbed plant. Generation from the whole fleet in 2016 was 27,621 tons of SO_2 per year. R18-20, Prefiled Testimony of James P. Gignac, Ex. 9 at 19. Thus after retirement of a plant like Duck Creek or Coffeen, there is a buffer of more than 17,000 tons of SO_2 per year under the cap allowing generation to be shifted from a scrubbed plant to other, mainly un-scrubbed plants to make up for lost capacity. In doing so, emissions from the remaining plants could increase significantly—thousands of tons per year, and still remain below the cap. This would result in the communities with Vistra plants that remain in operation bearing the burden of an increase in air pollution. These details of the new revisions are important, as the impacts of the changes are likely to differ from the previously-analyzed proposal. Cutting short potential analyses of these new projected impacts is prejudicial. Expedited review in this matter would serve to limit the public's, especially members of impacted communities, opportunities to comment upon this Revised Proposal and, therefore, would result in material prejudice.

The mere fact that the new elements of the Board's revised proposed rule appeared in testimony does not alleviate the material prejudice. With the hundreds of pages of prefiled testimony and hours of oral hearing testimony, it is not surprising that public commenters did not offer comments on every element in every piece of testimony. *See, e.g.,* R18-20, Exs. 1-47; Hr'g

Trs. Jan. 17, Jan 18, Mar. 6, Mar. 7, Apr. 16, Apr. 17, 2018). Despite the fact that the limit the Board selected for the overall cap was based on the AG's testimony, it differs materially from both the previous proposed rule and the AG's proposal. Further, this new proposed limit was not included in the Agency's first notice proposal and therefore the public was not previously on notice that it should offer comments on that limit. As such, cutting short the opportunity to offer comment on the new elements of the Board's proposal through an expedited process would materially prejudice individuals interested in offering public comment.

The specific timeframes in the schedule proposed by Vistra would also materially prejudice members of the public interested in offering comments. First, Vistra requests a public hearing during the week of November 26th, 2018. Vistra Mot. at 4. With the new prehearing conference scheduled on November 8, 2018, it would be nearly impossible for 21-day notice to be given for a hearing to take place that week. Notice of Rescheduled Prehearing Video and Teleconference and Hr'g Officer Order, R18-20 (Oct. 18, 2018); *See* 35 Ill. Admin. Code § 101.602. In addition, Environmental Groups recommend that 30-day notice be given for any public hearing, which is at odds with a public hearing taking place during the week of November 26, 2018. Thus, members of the public would be materially prejudiced by short notice and curtailed opportunities for public comment if Vistra's motion for expedited consideration and proposed schedule is granted.

Second, Vistra requests a post-hearing comment period of 31-36 days with the comment period ending in between state-recognized holidays. Vistra's Mot. at 4-5. The Environmental Groups do not agree that a post-hearing comment period of little more than 30 days is adequate in this fiercely-disputed rulemaking, especially when that comment period would overlap with state-recognized holidays. Once again, interested parties and citizens offering public comment

would be materially prejudiced by short comment period that would be further shortened by the holidays if Vistra's motion is granted.

Finally, Vistra asks the Board to "proceed to second notice on the Board's Proposal by February 1, 2019, or as soon thereafter as the Board's meeting schedule permits." Vistra Mot. at 4. The Environmental Groups believe that asking the Board to review and consider all post-hearing comments and make a decision in this highly-contested rulemaking in little more than 30 days, especially when that period includes the New Year's holiday, would unduly constrain the Board.

Thus, the Board should not grant Vistra's Motion for Expedited Consideration because the expedited schedule that Vistra proposes would cause material prejudice.

III. Conclusion

For the reasons stated above, Vistra's Motion is unwarranted. It would result in material prejudice of the public's interests in favor of company profits. It would cut short a process intended to allow meaningful public input and the Board's careful consideration of complex regulatory matters that impact Illinois communities. Consistent with this Board's prior decisions on similar motions, Environmental Groups request that the Board deny Vistra's Motion for Expedited Consideration of the Board's second first notice proposed amendments to 35 Ill. Adm. Code 225.233.

Respectfully Submitted,

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