

ILLINOIS POLLUTION CONTROL BOARD

July 20, 2006

IN THE MATTER OF: )  
)  
PROPOSED NEW CLEAN AIR ) R06-26  
INTERSTATE RULES (CAIR) SO<sub>2</sub>, NO<sub>x</sub> ) (Rulemaking – Air)  
ANNUAL AND NO<sub>x</sub> OZONE SEASON )  
TRADING PROGRAMS, 35 ILL. ADM. )  
CODE 225. SUBPARTS A, C, D and E )

ORDER OF THE BOARD (by T.E. Johnson):

On May 30, 2006, the Board received a rulemaking proposal submitted by the Illinois Environmental Protection Agency (Agency) pursuant to Section 27 and 28 of the Illinois Environmental Protection Act (Act) (415 ILCS 5/27 and 28 (2004)). Motions for expedited review, to hold the required hearings in Springfield and Collinsville, and for waiver of certain filing requirements accompanied the petition.

On June 15, 2006, the Board accepted the proposal for hearing, but reserved ruling on the motions accompanying the petition. On June 30, 2006, Dynegy Midwest Generation, Inc. and Midwest Generation, L.L.C. (participants) filed responses to the Agency's motions, accompanied by a motion to file the responses *instanter*.

For the reasons more fully explained in the body of the order, the Board partially grants the Agency's motion to expedite, but denies the motion to hold the hearings in Springfield and Collinsville.

**BACKGROUND**

The Agency proposes a new Part 225 to reduce intrastate and interstate transport of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>) emissions from fossil-fuel-fired electric generating units (affected units), on an annual basis and on an ozone season basis of each calendar year. As explained in the statement of reasons, the Agency proposes the adoption of the Clean Air Interstate Rule (CAIR) SO<sub>2</sub> trading program, the CAIR NO<sub>x</sub> Annual trading program and the CAIR NO<sub>x</sub> Ozone Season trading program to accomplish this objective. Stat. at 1.

The proposed rule contains five subparts. As proposed, Subpart A includes general provisions, Subpart B is reserved, Subpart C contains the CAIR SO<sub>2</sub> trading program, Subpart D details the CAIR NO<sub>x</sub> Annual trading program, and Subpart E addresses the CAIR NO<sub>x</sub> Ozone Season trading program.

The Agency asserts that its proposal is intended to satisfy Illinois' obligations under the United States Environmental Protection Agency's (USEPA) Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Revisions to Acid Rain Program (CAIR); Revisions to the NO<sub>x</sub> State Implementation Plan (SIP) Call, (Federal CAIR), 70 Fed. Reg. 25162 (May 12, 2005).

Stat. at 1. The proposal is also intended to address, in part, the Agency's obligation to meet Clean Air Act (CAA) requirements for the control of fine particulate matter (PM<sub>2.5</sub>) and ozone in the Chicago and Metro East/St. Louis nonattainment areas. Stat. at 2.

### **MOTIONS**

As previously stated, the Agency has filed three motions with the proposal – a motion for expedited review, a motion to hold the required hearings in Springfield and Collinsville, and a motion for waiver of certain filing requirements. The participants have filed a response to the motions for expedited review and to hold the hearings in Springfield and Collinsville, accompanied by a motion for leave to file *instanter*.

In the motion for leave to file *instanter*, the participants assert that it was not clear whether the motions required responses until the Board accepted the filing for hearing on June 15, 2006. Mot. for Leave at 1-2. The participants argue that the Agency is not prejudiced by the delay in receiving the responses, but that the participants would be unduly prejudiced and irreparably harmed if the Board does not grant the motion for leave to file. Mot. for Leave at 2.

To date, the Agency has not responded to the motion for leave to file. If a party files no response to a motion within 14 days the party will be deemed to have waived objection to the granting of the motion. See 35 Ill. Adm. Code 101.500(d). The Board grants the participants' motion for leave to file *instanter*. The Board will next address each of the Agency's motions in turn.

### **Motion for Expedited Review**

The motion for expedited review requests that the rule be promulgated by April 2007, and that the Board proceed to first notice without reaching a decision on the merits of the proposal. Mot. to Exp. at 3. The Agency asserts that the USEPA has adopted a CAIR Federal Implementation Plan (FIP) effective on June 27, 2006, and that the first "action of consequence" will be USEPA's making NO<sub>x</sub> allocations for the 2009 control period on July 30, 2007. Mot. to Exp. at 2. The Agency asserts that the rule needs to be adopted by April 2007, to allow Illinois to control the allocation for 2009, and to timely submit NO<sub>x</sub> allocations to avoid the USEPA start of a "FIP sanctions clock." Mot. to Exp. at 3.

In response, the participants assert that the Agency has stated that the USEPA has already proposed FIPs for those states that fail to submit SIPs providing for compliance with the emissions budgets set forth in the Federal CAIR by September 11, 2006. Resp. at 2. The participants argue that even had the Agency submitted this proposal as a fast-track rulemaking on May 30, 2006, the Board could not possibly have adopted any rule in time for the Agency to submit a SIP by September 11, 2006. *Id.* Thus, posit the participants, the Agency will have to accept a FIP until such a time as it submits a rule adopted by the Board as a replacement for the FIP. *Id.*

The participants contend that the Agency does not explain why promulgating a rule by April 7, 2007, will result in administrative confusion. Resp. at 2-3. The participants note that

the USEPA will not allocate allowances until July 1, 2007, and will not record them into EGU allowance accounts until September 1, 2007. Resp. at 3. The participants conclude that there is more than enough time for the Board to promulgate a rule without expedited review. *Id.*

The participants assert that the Board will gain neither time nor efficiency by proceeding to first notice prior to considering the merits of the proposal. Resp. at 3. The participants argue that because the Agency proposed this matter under Section 28, it should not expect the Board to proceed as the proposal were submitted pursuant to Section 28.5. *Id.* Finally, the participants object to expediting the scheduling of hearings in this matter where they would occur concurrently or back-to-back with the hearings currently scheduled in R06-25, (*see* Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources (Mercury)), because the participants have limited environmental staff, only a few of whom are available for assignment to these regulatory matters. Resp. at 4.

Requests for expedited review are governed by Section 101.512 of the Board's rules, and must contain, *inter alia*, a complete statement of the facts and reasons for the request. *See* 35 Ill. Adm. Code 101.512. In acting on a motion for expedited review, the Board considers, at a minimum, all statutory requirements and whether or not material prejudice will result from the motion being granted or denied. 35 Ill. Adm. Code 101.512(b). In addition, the Board will only grant a motion for expedited review consistent with available resources. *See* 35 Ill. Adm. Code 101.512(c).

The Board grants the Agency's motion for expedited review in part. In light of the federal deadlines referenced by the Agency, the Board will expedite review of this matter to the extent feasible given the Board's available resources and decision deadlines. The Board wishes to make clear that it intends to move this proceeding along as early as it can practicably do so, but it should be noted that the Board's calendar during the upcoming months is extremely crowded, and the Board's meeting and deliberative session calendars have regulatory adoption milestones that must be met by timely issuance of Board orders.

Nonetheless, the Board will not send this matter to first notice without commenting on the merits of the proposal. Given the expedited review of this proposal, the Board should be able to reach a final decision in a timely fashion.

### **Motion to Hold Hearings in Springfield and Collinsville**

The motion to hold hearings in Springfield and Collinsville (Mot. to Hold) asserts that there are 229 electric generating units (EGU) that will be subject to the proposed rule. Mot. to Hold at 1. The Agency argues that the city of Springfield is not only an affected area, but is centrally located for all the affected areas of the State and is an appropriate first hearing location pursuant to Section 102.412 (a) of the Board's procedural rules. *Id.* The Agency contends that state administrative and financial constraints favor a Springfield forum for the first hearing in that both the Board and the Agency maintain offices in Springfield, and a large number of the Agency's technical staff located in Springfield will be testifying and providing technical assistance in the rulemaking. Mot. to Hold at 2. The Agency asserts that the expenses to the State of Illinois due to transportation, food, and lodging for a non-Springfield venue will be

considerable, and that holding at least one hearing in Springfield will allow for the Board and the Agency to conserve resources. *Id.*

The Agency further asserts that the city of Collinsville is an appropriate location for the second hearing as it is located with respect to affected units in the Southern portion of the state. Mot. to Hold at 3. The Agency contends that Collinsville is a reasonable commute from Springfield, and that the same factors favoring a hearing in Springfield favor the second hearing be held in Collinsville. *Id.* The Agency concludes that holding the hearings in Springfield and Collinsville would provide diversely located forums for input from the public throughout the State. Mot. to Hold at 4.

In response, the participants request that at least one hearing be held in Chicago. Resp. at 1. The participants contend that the staffing hardship that the Agency describes in its motion applies to an even greater extent to the participants as well since the development and implementation of environmental regulations is not the participants' business. Resp. at 2. The participants request that the Board consider staffing constraints on the participants as it schedules hearings in this matter. *Id.*

The participants do not object to a hearing in Collinsville, but prefer that the hearing devoted to presentation of non-Agency witnesses be held in Chicago. Resp. at 2. The participants assert that its counsel, as well as the counsel for other affected sources, and of environmental groups that may participate are located in Chicago, and that Chicago offers greater ease of access to participants' witnesses. Resp. at 3. For these reasons, the participants request that the hearings not be scheduled concurrently or back-to-back with the hearings in R06-25, and that at least one hearing be held in Chicago during which the Board anticipates that participants could present witnesses. *Id.*

The Board denies the Agency's motion to hold hearings in Springfield and Collinsville. The Act requires that hearings in state-wide regulations must be held in at least two concerned areas of the state. 415 ILCS 5/28(a) (2004). Both Collinsville and Springfield meet this requirement; however, they are not in demographically diverse areas of the state and would not provide for a hearing in the northern part of the state or in the most populous area of the state. While in some circumstances it might be appropriate to hold required hearings for a statewide rulemaking in Collinsville and Springfield, in this case the Board finds that holding at least one hearing in Chicago would be administratively acceptable and beneficial to the public.

Thus, the Board denies the Agency's motion and directs the hearing officer to schedule hearings in Chicago and either Springfield or Collinsville after consultation with the Agency and other interested parties.

### **Motion for Waiver of Requirements**

In the motion for waiver of requirements, the Agency asserts that the entire proposal consists of over 2,000 pages, and requests leave to file an original and four copies of the proposal plus five partial copies, instead of the original and nine copies generally required. Mot. to Waive at 1. The Agency states that the partial copies will consist of the table of contents, the statement

of reasons, pleadings, and the proposed rules, but not the documents relied upon or the incorporations by reference. *Id.* The Agency also requests leave to serve partial copies on the Department of Natural Resources (DNR) and the Attorney General's Office (AGO). Mot. to Waive at 2. The Agency asserts that both the DNR and the AGO have informed the Agency that partial copies of the proposal are sufficient. *Id.* Leave is also requested to file no copies of five documents incorporated by reference, as well as no copies of various documents relied upon in drafting. Mot. to Waive at 3.

No reply to this motion has been received by the Board. The Board, accordingly, grants the Agency's motion to waive certain filing requirements.

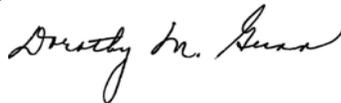
### **CONCLUSION**

The Board grants, in part, the Agency's motion to expedite, denies the motion to hold the hearings in Springfield and Collinsville, and grants the motion to waive certain filing requirements.

The assigned hearing officer is directed to proceed expeditiously consistent with this order under the rulemaking provisions of the Act (415 ILCS 5/27, 28 (2004)) and the Board's procedural rules. 35 Ill. Adm. Code 102.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 20, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board