ILLINOIS POLLUTION CONTROL BOARD
September 7, 2006

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE 225	)	R06-25
CONTROL OF EMISSIONS FROM LARGE	)	(Rulemaking - Air)
COMBUSTION SOURCES (MERCURY)	)	

ORDER OF THE BOARD (by G.T. Girard, A.S. Moore):

On August 24, 2006, Midwest Generation, L.L.C. (Midwest Generation) filed a motion to schedule additional hearings (Mot.). On August 31, 2006, the Board received responses from two participants in opposition to the motion and one in support of the motion. On September 1, 2006, the Board received a response in opposition to the request from the Environmental Law and Policy Center (Center). For the reasons discussed below, the Board denies the motion for additional hearings.

BACKGROUND

On July 28, 2006, Ameren Energy Generation Company, Amerenenergy Resources Generating Company, and Electric Energy, Inc. (Ameren) and the Illinois Environmental Protection Agency (Agency) filed a joint statement with the Board that was also entered into the record as Exhibit 75 during the hearings held on August 14, 2006. *See* August Tr. at 96-97. At hearing on August 21, 2006, Dynegy Midwest Generation, Inc. (Dynegy) indicated that a joint statement with the Agency had been filed with the Board. *See* PC 6283 and 6284. Both joint statements propose language to create multi-pollutant standards (MPS) to require reductions in three pollutants, SO_2, NO_x, and mercury. The reductions would take place over several years and would require incremental steps to be completed by 2015.

In response to the joint statement by Ameren and the Agency, Midwest Generation made an oral motion on the record at hearing on August 14, 2006 that additional hearings be held in this proceeding. *See* August Tr. at 75. The hearing officer asked that the motion be provided to the Board in writing with an expedited response time. *See* Hearing Officer Order of August 18, 2006.

On August 24, 2006, Midwest Generation filed the motion for additional hearings. On August 31, 2006, the Agency (Resp.1) and Ameren (Resp.2) responded in opposition to the motion for additional hearings. Also on August 31, 2006, Kincaid Generation, L.L.C. (Kincaid) filed a response (Resp.3) supporting Midwest Generation's motion.

MOTION

Midwest Generation argues that the statements filed jointly by the Agency with Ameren (Exh. 75), and the Agency with Dynegy (PC 6283, 6284) require additional hearings before the Board concerning the proposed language in each of those statements. Midwest Generation sets

forth three arguments for additional hearings: first, the MPS creates fundamental issues and questions that require additional hearings (Mot. at 2); second, the language raises state law issues and questions (Mot. at 4); third, the MPS raises federal law issues and questions (Mot. at 6). Those arguments will be summarized in turn below.

Creates Need for Additional Hearings

Midwest Generation argues that the joint statements create issues and questions that need further examination and without additional hearings other participants will have no opportunity to present evidence regarding the joint statements. Mot. at 2. Midwest Generation points out that under the current schedule for hearings, the participants had no time to investigate the effects of the MPS or to prepare evidence or arguments concerning the effect of the MPS. *Id*. For this reason, Midwest Generation argues more hearings should be scheduled. Mot. at 3.

Midwest Generation further claims that without time to analyze the joint statements and the MPS, participants cannot know whether or not the MPS is technologically feasible, economically reasonable, and generally available, or how the MPS impacts the original Agency proposal. Mot.at 3. Midwest Generation argues that the effect of the joint statements on the operations of Midwest Generation and others is unknown. *Id*. Additional hearings would allow participants to investigate these issues, according to Midwest Generation. *Id*.

Midwest Generation requests additional time for analysis to assess the following potential impacts:

1. Impacts on companies that choose the MPS and impacts of companies choosing MPS on the broader proposal including achieving required state caps under CAMR;

2. Impacts on future SO_2, and NO_x. regulations;

3. Impacts created by exchanging allegedly harmful, neurotoxin mercury emissions for particulate an ozone precursors. Mot. at 3.

Midwest Generation asserts that without expert analysis, Midwest Generation and others are unable to determine why the MPS technology cannot be applied generally to reduce emissions from all electrical generating units (EGUs). *Id*. Midwest Generation asks that if mercury controls in the joint statements are sufficient for half the coal-fired power plants in Illinois, why are the controls not sufficient for the remaining units in the state. Mot. at 3-4.

State Law Issues

Midwest Generation argues that the record contains no evidence related to the technological feasibility or economic reasonableness of controlling SO_2, and NO_x. Mot. at 4. Therefore, Midwest Generation argues that the technological feasibility and economic reasonableness of the MPS cannot be determined. *Id*. The Board is required by law to consider

technological feasibility and economic reasonableness, so Midwest Generation believes additional hearings are necessary to address this issue. *Id*.

Midwest Generation also opines that the adoption of a rule setting SO_2 emission standards could violate the provisions of Section 10 of the Environmental Protection Act (Act) (415 ILCS 5/10 (2004)). Mot. at 4. Section 10 of the Act "prohibits" the Board from adopting SO_2 emission standards for existing fuel combustion stationary emission sources located outside Chicago, St. Louis, and the Peoria Metropolitan area unless the standards are necessary to meet the Primary National Ambient Air Quality Standards (NAAQS) for SO_2. Mot. at 4, citing, 415 ILCS 5/10 (2004). Midwest Generation argues that there is no evidence in the record that the SO_2 of the MPS is necessary to meet the NAAQS. Mot. at 4-5.

Midwest Generation notes that the MPS purports to be available to all EGUs in the State and many of the Ameren and Dynegy plants are outside Chicago, St. Louis, and the Peoria metropolitan area. Mot. at 5. Midwest Generation concedes that participation in the MPS is voluntary, but once committed to the MPS, a source must follow the SO_2 emission standards described in the MPS. *Id*. Midwest Generation argues that the voluntary nature of the MPS "may not relieve the Board form the proscription of Section 10" of the Act (415 ILCS 5/10 (2004)). Mot. at 5.

Midwest Generation also argues that the language proposed in the joint statements may not be a rule of general applicability and if the MPS is not a rule of general applicability then the wrong process under Illinois law is being followed. Mot. at 5. Midwest Generation asserts that a variance or adjusted standard are the appropriate "pathway for sources needing special consideration" rather than rulemaking. Mot. at 5, citing Commonwealth Edison Co. v. PCB, 25 Ill. App. 3d 271 (1st Dist. 1974). Alternatively, Midwest Generation maintains that if every EGU has the same need for the MPS, then the proposal should be changed. Mot. at 5-6.

Federal Law Issues

Midwest Generation asserts that the MPS could violate federal law because of limitations placed on the trading of SO_2 allowances. Mot. at 6. Midwest Generation cites Clean Air Markets Group v. Pataki, 194 F.Supp2d 147 (N.D.N.Y. 2002), *affirmed* 338 F.3d 82 (2d Cir. 2003) in support of this contention. In Clean Air Markets, the court invalidated a New York rule that placed restrictions on transferring SO_2 allowances to upwind states. *Id*. Midwest Generation asserts that the MPS effectively prohibits trading of SO_2 allowances and under the reasoning of Clean Air Markets the MPS may be in violation of federal law. Mot. at 6-7.

RESPONSE

The Board received three responses to Midwest Generation's motion for additional hearings. The Agency and Ameren oppose additional hearings while Kincaid supports the request. Each of the responses will be summarized below.

Agency Response

The Agency opposes holding additional hearings in this proceeding. Resp.1 at 1. The Agency points out that the Ameren/Agency joint statement was filed on July 28, 2006, the date that prefiled testimony was due to be filed for the August 14, 2006 hearing. *Id*. Thus, the Agency asserts that Midwest Generation had sufficient time to prepare questions for Ameren and the Agency prior to the hearing beginning. *Id*. The Agency notes that Midwest Generation did prefile questions and ask follow-up at the hearings of Ameren and the Agency. Resp.1 at 2. The Agency argues that the Dynegy/Agency joint statement is a slightly revised version of the Ameren/Agency joint statement. *Id*. The Agency opines that given the questioning allowed at hearing and the slight differences in the two joint statements, there is no reason to hold additional hearings on either of the joint statements. *Id*.

The Agency also points out that the hearings were adjourned on August 23 although the hearings were scheduled to continue until August 25. Resp.1 at 2. The Agency asserts that the failure of Midwest Generation to "take advantage of the remaining time during the Chicago hearing to offer witnesses contesting the provisions of the MPS . . . highlights the lack of merit in the motion." *Id*.

The Agency argues that the impact of the MPS on the original proposal is not of concern, as the MPS was written to be a key component of the underlying proposed rule. Resp.1 at 3. The Agency notes that as written the original proposal and the MPS are company specific and the progress of one company or system toward compliance is independent of other systems. *Id*. The Agency asserts that the MPS is just one more way to comply with mercury controls and is a part of the flexibility of the proposal. Resp.1 at 5-7.

As to Midwest Generation's argument concerning the portions of the MPS dealing with controlling SO_2, and NO_x, the Agency argues that the impacts on future rulemakings should be addressed in those rulemakings. Resp.1 at 4. The Agency argues that controls for SO_2, and NO_x are only tangentially in the proposed Illinois rule. Resp.1 at 7. The MPS includes controls for SO_2, and NO_x to reduce mercury compliance uncertainty by including the co-benefits of SO_2, and NO_x controls. *Id*. Thus, the Agency asserts that the MPS and the original proposal concern mercury reduction from EGUs, not controls for SO_2, and NO_x. *Id*.

The Agency offers substantial argument concerning Midwest Generation's position that adoption of the MPS could violate state and federal law. The Agency generally disagrees with Midwest Generation's reading of state and federal law. Resp.1 at 8-23. More specifically, the Agency asserts that Section 9.10 of the Act, adopted 20 years after Section 10 of the Act (415 ILCS 5/9.10 and 10 (2004)) allows for broad-based regulation of SO_2. Resp.1 at 13. The Agency also argues that Midwest Generation cites to dicta from Commonwealth Edison in support of Midwest Generation's argument. Resp.1 at 14. Finally, the Agency notes that the United States Environmental Protection Agency directly discussed the impact of Clean Air Markets on the CAIR rule. Resp.1 at 19-21.

Ameren Response

Ameren opposes additional hearings. Resp.2 at 1. Ameren points out that the hearings beginning on August 14, 2006, addressed issues regarding the MPS and that Ameren and the

Agency provided testimony through almost three days of hearings. *Id*. Ameren asserts that Midwest Generation is a "sophisticated company" that has been involved with the mercury rulemaking from the beginning and may be negotiating an approach to mercury control with the Agency. *Id*. Ameren further argues that Midwest Generation seeks additional hearings to address the impact of the MPS on companies that do not opt in when Midwest Generation has not provided any evidence regarding the impact of the Agency's proposal on Midwest Generation. Resp.2 at 1-2. Ameren maintains that Midwest Generation has had plenty of time to examine the joint statement and appeared to have done so based on the questions addressed to the Agency and Ameren in August. Resp.2 at 2. Ameren argues that as a result nothing in the motion justifies the addition expenditure of time and resources that additional hearings would take. *Id*.

Ameren argues that pursuant to the Board's procedural rules, Midwest Generation must demonstrate that failing to hold additional hearings would result in material prejudice to Midwest Generation. Resp.2 at 2, citing 35 Ill. Adm. Code 102.412(b). Ameren asserts that Midwest Generation did not and cannot demonstrate that Midwest Generation will suffer material prejudice. *Id*. Ameren asserts that Midwest Generation cannot claim any impact from the MPS because the MPS is a voluntary program and the program places no additional obligations on those who do not choose to enter the program. Resp.2 at 3.

Ameren argues that Midwest Generation also cannot demonstrate that Midwest Generation exercised the level of due diligence necessary to justify the request for additional hearings. Resp.2 at 3. Ameren points out that Midwest Generation presented several expert witnesses during the hearings, Midwest Generation did not present a single witness to testify as to the impact specifically on Midwest Generation. *Id*. Ameren asserts that Mr. Sid Nelson introduced information concerning Midwest Generation's use of halogenated carbon injection at one of Midwest Generation's Crawford plant, but Midwest Generation did not choose to share the evaluations of mercury control. Resp.2 at 3-4.

Ameren asserts that Midwest Generation has failed to establish that the issues remaining concerning the MPS cannot be addressed in written comment. Resp.2 at 6. Ameren argues that the factual issues have been addressed at hearing in response to questions from Midwest Generation and the legal issues raised by Midwest Generation can plainly be addressed in final comment. *Id*. Ameren notes that legal issues are ill suited to being addressed during hearing and should be addressed in final comment. *Id*. Ameren maintains that in any event, Midwest Generation's legal arguments would not stand further scrutiny. *Id*. Ameren will address the legal issues more fully in post-hearing comments, but generally Ameren believes that Midwest Generation's reliance on Section 27 of the Act (415 ILCS 5/27 (2004)) and Commonwealth Edison are misplaced. Resp.2 at 6-7. Ameren also dismisses Midwest Generation's argument concerning Clean Air Markets, as being inapplicable to the MPS. Resp.2 at 7.

Kincaid Response

Kincaid specifically adopts and supports the arguments of Midwest Generation; however, Kincaid believes that the appropriate solution is to consider the MPS in a separate docket.

Resp.3 at 1. Kincaid argues that the MPS differs significantly from the Agency's proposal and must be the subject of a separate regulatory proposal. Resp.3 at 2.

Kincaid states that no evidence was submitted on the basis for and or the impacts of the MPS. Resp.3 at 2. Kincaid argues that as a result, participants will not have the opportunity to cross-examine witnesses regarding the MPS. *Id*. Kincaid asserts that MPS raises issues and questions which need to be examined, because the MPS sets new requirements for controlling SO_2, and NO_x and fundamentally changes the proposed mercury control requirements for EGUs. *Id*. Kincaid also agrees with the concerns about the insufficiency of the record regarding the MPS, set forth by Midwest Generation. Resp.3 at 3.

Kincaid argues that a separate docket is necessary to ensure compliance with both state and federal law. Resp.3 at 4-5. Kincaid reiterates the concerns of Midwest Generation that: 1) the provisions of Section 27 and 10 of the Act (415 ILCS 5/27 and 10 (2004)) may not be met if the MPS is adopted; and 2) that Commonwealth Edison does not support the adoption of a rule that is not of general applicability (Resp.3 at 4); 3) Clean Air Markets prohibits the adoption of the MPS; and 4) the MPS does not demonstrate compliance with CAMR (Resp.3 at 5). Kincaid also argues that because the provisions controlling SO_2, and NO_x have not been proposed under the Administrative Procedure Act (5 ILCS 100/5-1 *et. seq.* (2004)) and subject to public comment, the provisions cannot be adopted. *Id*.

Center's Response

The Board notes that the Center filed a response on September 1, 2005 and that the response was late pursuant to the hearing officer's order. The response was one paragraph indicating the Center's opposition to holding additional hearings. The Board accepts the response.

DISCUSSION

The Board will discuss the request for additional hearings and the request that the Board consider the contents of the joint statements in another docket in two parts. First, the Board will address the state and federal issues and law. Second the Board will address the specific arguments for holding additional hearings and opening another docket.

State/Federal Issues and Law

Midwest Generation and Kincaid present several arguments concerning issues of both federal and state law regarding the inclusion of the MPS in a rule that the Board adopts for second notice. The Board appreciates these arguments, but will not discuss or rule on those arguments here. The issues raised are more appropriately considered by the Board in determining whether or not to include the MPS at second notice, rather than in a discussion concerning additional hearings. As Ameren points out, legal issues do not profit from testimony at a hearing. Therefore, the Board will not consider these issues today, instead the Board asks that these arguments be presented in post-hearing comments and the Board will address them at that time.

Need for Additional Hearings/New Docket

Midwest Generation and Kincaid express concerns about the inability of participants to fully examine the impacts of the joint statements. Specifically Midwest Generation and Kincaid are concerned about the potential impact of the MPS on companies that do not opt-in to the voluntary MPS program, on future SO_2, and NO_x rulemakings, and the specific effect on Midwest Generation and Kincaid operations in controlling mercury emissions. To address these potential concerns, Midwest Generation seeks additional hearings and Kincaid seeks additional hearings and new docket for the changes proposed in the joint statements. Although cognizant of the concerns expressed by Midwest Generation and Kincaid, the Board is unconvinced that additional hearings will further develop a record in order to address these concerns.

As pointed out by both the Agency and Ameren, the Ameren/Agency joint statement was filed before the beginning of the August hearings. Prefiled questions were filed addressing many of these issues and follow-up questions further flushed out information relating to these issues. Also, the hearing officer specifically asked several questions on the record concerning not only the joint statements, but also proposed language from Kincaid. The hearing officer invited all participants to comment on those questions. August Tr. at 1876-78. Thus, the Board expects that additional information concerning the joint statements as well as many other aspects of the proposal will be filed in the post-hearing comments.[1]

The Board finds that the concerns expressed in the motion for additional hearing and by Kincaid in seeking a new docket, can be addressed in post-hearing comments. Certainly, the Board may revisit this issue after receipt of post-hearing comments; however, the Board finds that ordering additional hearings is premature. Therefore, the motion to hold additional hearings is denied.

CONCLUSION

After reviewing the arguments by participants, the Board finds that holding additional hearings will not assist in the development of the record in this proceeding. Therefore, the Board denies the motion to hold additional hearings.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 7, 2006, by a vote of 4-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

[1] Post-hearing comments are currently due on September 20, 2006.