BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

AMEREN'S POST-HEARING COMMENTS

NOW COME Ameren Energy Generating Company, AmerenEnergy Resource Generating Company, and Electric Energy, Inc. (collectively "Ameren"), by their attorneys, McGuireWoods LLP, and submits these Post Hearing Comments in support of the proposed 35 Ill. Adm. Code Part 225, Control of Emissions from Large Combustion Sources amended by the Temporary Technology Based Standard ("TTBS") and the Multi-Pollutant Standard ("MPS") provisions.

Ameren fully supports the Governor's and the Illinois Environmental Protection Agency's ("Agency") goal of significantly reducing mercury emissions from the state's coal-fired electric generating units ("EGUs"). During the course of these proceedings, Ameren provided the Board with detailed written testimony and two days of oral testimony from its witnesses that compliance with the Agency's proposed mercury rule with the addition of the MPS is both technically feasible and economically reasonable. Ameren further provided testimony that the proposed rule as amended by the MPS balances the Agency's environmental goal of establishing effective mercury controls while supporting industry's goal of a more stable and certain regulatory framework. Therefore, Ameren respectfully requests that the Board adopt

the Agency's proposed mercury rule with the amended language as presented by Dynergy Midwest Generation, Inc. on August 21, 2006.

INTRODUCTION AND PROCEDURAL HISTORY

The proposed rulemaking now before the Board is intended to meet the State of Illinois' obligations under the federal Clean Air Act ("CAA"), 42 U.S.C. § 7401, *et seq.* and to satisfy the requirement to submit a state plan under the federal Clean Air Mercury Rule ("CAMR"), 70 *Fed. Reg.* 28606. In CAMR, USEPA established an annual budget for mercury emissions from coal-fired EGUs for selected states, including Illinois, for 2010 and thereafter. *See*, 70 *Fed. Reg.* 28649-50. Each state's plan under CAMR must contain appropriate emission control requirements and compliance procedures to assure compliance with the state's annual mercury budget by specified dates. *Id.* Under CAMR, "[s]tates remain authorized to require emission reductions beyond those required by the State Budget" and nothing in CAMR precludes "[s]tates from requiring such stricter controls" than the federal rule. *Id.* at 28632. CAMR further requires states to submit these plans to the USEPA by no later than November 17, 2006. 70 *Fed. Reg.* 28649; 40 CFR § 60.24(h)(2).

To address these CAMR requirements, the Agency filed the proposed 35 Ill. Adm. Code Part 225 rules on March 14, 2006, to control the emissions of mercury from Illinois EGUs. The Agency's proposal requires that, beginning July 1, 2009, the owner or operator of an Illinois EGU system comply with one of the following standards on a rolling 12-month basis: (1) An emission standard of 0.0080 lb mercury/GWh gross electrical output; or (2) A minimum 90-percent reduction of input mercury. Through December 31, 2013, the proposed rule allows the owner or operator of an EGU to comply by means of an Averaging Determination which shows that the actual emissions of mercury are less than the allowable emissions of mercury from all

EGUs covered by the Determination on a rolling 12-month basis. The EGUs covered by the Determination must comply with one of the following emission standards on a source-wide basis for the period covered by the Determination: (1) An emission standard of 0.020 lb mercury/GWh gross electrical output; or (2) A minimum of 75-percent reduction of input mercury. The proposed rule's emissions standards do not apply to units that are scheduled for permanent shut down so long as the owner or operator notifies the Agency as provided in the rule.

On May 23, 2006, the Agency filed an amendment to add the TTBS to its proposal to provide an additional level of compliance flexibility. Under the TTBS, those EGUs that satisfy relevant eligibility requirements may demonstrate compliance with control requirements for mercury emissions for a limited time through June 30, 2015. Specifically, to be eligible for the TTBS, an EGU must be equipped and operated with emission controls systems that include the injection of halogenated activated carbon and either (1) a cold side electrostatic precipitator or (2) a fabric filer. Further, the TTBS is limited to only 25-percent of the total rated MW capacity for the owners or operators of more than one existing EGU.

Beginning on June 12, 2006, and continuing through June 23, 2006, the Board conducted public hearings in Springfield on the proposed mercury regulations and the TTBS. The Agency presented testimony supporting the proposed mercury rule and the TTBS. Ameren appeared and participated in that hearing.

On July 28, 2006, Ameren and the Agency filed the new Section 225.233 MPS provisions along with a Joint Statement supporting the inclusion of the proposed MPS amendments to the Agency's proposed mercury rule. Like the TTBS, the MPS is a voluntary provision that allows Illinois EGUs additional flexibility in complying with the proposed

mercury rule. Unlike the TTBS, the MPS provides that compliance flexibility in exchange for the commitment to make significant and specified reductions in NOx and SO_2 emissions.

Ameren's MPS amendment to the proposed mercury rule provides as follows:

- Pollution control equipment installation deadlines for owners and operators of EGUs covered by Part 225 who commit to achieve by January 1, 2012, seasonal and annual emission rates for NOx of no more than 0.11 lbs/mmBtu and an annual emission rate for SO_2 of 0.33 lbs/mmBtu;
- All units with a capacity greater than 90 MW are required to install halogenated active carbon injection control equipment ("HACI") to reduce mercury emissions by December 31, 2009.
- By January 1, 2015, all units with a capacity greater than 90 MW are required to meet an emission standard of 0.0080 lb mercury/GWh gross electrical output, or a minimum 90-percent reduction of input mercury. By January 1, 2013, all units with a capacity less than 90 MW are required to install and operate HACI.
- These systems are to be operated with specified injection rates that are designed to prevent noncompliance with regulatory requirements for opacity or particulate matter;
- A prohibition of the sale to third parties of SO_2 and NOx allowances generated as a result of compliance with the provisions of Section 225.233;

The Board conducted additional public hearings from August 14, 2006 through August 23, 2006 in Chicago on the proposed mercury regulations and the MPS amendments. Ameren's witnesses, along with representatives from the Agency, presented testimony on the provisions of the MPS and its technical feasibility and economic reasonableness for two days during the August hearing. *See*, Exhibits 75-77; August Tr. at 96-442.

On August 21, 2006, Dynegy Midwest Generation, Inc. ("Dynegy") and the Agency submitted a Joint Statement to the Board supporting a slightly revised version of the Ameren MPS. *See*, Exhibit 125.[1] Dynegy's MPS amendment to the proposed mercury rule provides as follows:

- The "Base Emission Rate" during the ozone season would be the average emission rate of NOx from the EGUs subject to the MPS, in pounds per million Btu heat input, for the 2003 through 2005 ozone season;
- The annual NOx emission standard, beginning in calendar year 2012 would be no more than 0.11 lb/mmBtu or a rate equivalent to 52-percent of the Base Annual Rate of NOx emissions, whichever is more stringent;
- The annual SO_2 emission standard, during calendar years 2013 and 2014 would be no more than 0.33 lb/mmBtu or a rate equivalent to 44-percent of the Base Rate of SO_2 emissions, whichever is more stringent;
- The annual SO_2 emission standard, during calendar years 2015 and thereafter, would be no more than 0.25 lb/mmBtu or a rate equivalent to 35-percent of the Base Rate of SO_2 emissions, whichever is more stringent;
- The control technology requirement for emissions of mercury would allow EGUs that will be controlled by either an SO_2 scrubber or a fabric filter to install a listed sorbent, an alternative sorbent, or other techniques to control mercury emissions by December 31, 2009;
- The MPS would allow up to 6-percent of the capacity of the MPS group or each electric generating unit in an MPS group with a capacity of less than 90 MW electing

[1] This exhibit was resubmitted to the Board on August 23, 2006, in a corrected form.

to comply with the MPS to postpone installation of a listed sorbent, an alternative sorbent, or other techniques to control mercury emissions until January 1, 2013;

- For any cyclone fired EGU fueled with subbituminous coal that will install a scrubber and baghouse by December 31, 2012 that demonstrates a 75-percent reduction in mercury or an emission rate of 0.02 lb mercury/GWh of gross electrical output, as of July 1, 2009, the minimum rate of sorbent injection would be 2.5 pounds per million actual cubic feet.

In their Joint Statement, Dynegy and the Agency stated that they agree that compliance with the revised MPS is both technically feasible and economically reasonable. *Id.* The only minor differences between Ameren's MPS proposal and the subsequent MPS amendment introduced by Dynegy are in the base emission rates and the required dates for installation of control technology. Ameren fully supports the revised MPS amendments as proposed by Dynegy.

On August 23, 2006, Kincaid Generation LLC ("Kincaid") also presented to the Board its own option for amending the proposed mercury rule. *See*, Exhibit 138. The Kincaid proposal, however, was submitted without the support of the Agency.

Only Midwest Generation LLC ("MWG") and Southern Illinois Power Cooperative ("SIPC") have indicated continued objection to the proposed mercury rule. Unlike Ameren, Dynegy and Kincaid, these companies failed to offer any alternative proposals for amendments to the mercury rule. Furthermore, MWG and SIPC did not present any witnesses from their own respective companies to testify at the public hearings on how the proposed mercury rule will directly impact their companies or whether they are able to comply with the proposed rule as amended.

In four weeks of hearings, the Board heard from 27 witnesses, examined 138 exhibits and received over 6,000 public comments on the proposed rule and its technical feasibility and economic reasonableness. The extensive record now before the Board fully supports the adoption of the proposed rule as amended by the MPS which is technically feasible, economically reasonable and will be protective of human health and the environment in Illinois.

THE RECORD SUPPORTS THE MPS AMENDMENT TO THE PROPOSED MERCURY RULE

Ameren offered the MPS amendments to the proposed mercury rule because a multi-pollutant approach for controlling the emissions of mercury, SO_2 and NOx has numerous advantages over a traditional, single pollutant regulatory scheme. Since mercury emissions reductions can be obtained as a "co-benefit" from control devices used to reduce SO_2 and NOx, it is important for environmental regulations directed at EGUs to allow companies the option of synchronizing the control of these emissions in a way that is technically feasible, economically reasonable and protective of human health and the environment. The MPS provisions contained in the proposed Illinois mercury rule accomplishes these goals.

Evaluations by Ameren, in conjunction with Ameren's technical consultants ADA, revealed that mercury emission reductions that would approach 90-percent removal using current technologies would require either a FGD/SCR system for those units still burning bituminous coal, or a fabric filter plus sorbent injection for units burning subbituminous coal. *See*, Exhibit 76. The addition of a fabric filter to a subbituminous unit would also allow the unit to reduce or cease SO_3 conditioning, and would further improve the performance of the sorbent over an ESP configuration. *Id.* The installation of fabric filters in these applications, however, is substantially more expensive than an ACI-halogenated sorbent system and would take much

longer to design, procure and install. *Id.* Ameren therefore concluded that fabric filter installations on subbituminous units, and SCR/FGD or fabric filters on bituminous units, would need to be coordinated with the company's overall NOx and SO_2 emissions reduction strategy. Ameren would also need to install these emission controls to comply with CAIR.

Accordingly, Ameren developed the alternative MPS proposal of general applicability to be included within the proposed mercury rule that would reduce mercury emissions in a way that would satisfy the spirit of the Agency's originally proposed rule as well as making significant reductions in NOx and SO_2 emissions. On July 28, 2006, after negotiations with the Agency, Ameren submitted the MPS amendment to the Board.

During the August hearings, Mr. Michael L. Menne, Vice President of the Environmental Safety and Health Department for Ameren Services Company, a subsidiary of Ameren Corporation, along with Messrs. Jim Ross and Christopher Romaine of the Agency, testified extensively as to how the MPS would be applied and how the MPS fits within the broader provisions of the proposed mercury rule. *See*, August Tr. at 100-388. Specifically, Mr. Menne testified that the MPS provisions of the proposed rule provide an additional level of compliance flexibility for mercury controls if the facilities committed to control SO_2 and NOx to specified levels within certain timeframes. *See*, Exhibit 76. Mr. Menne further stated that the MPS will meet the state's goal of 90-percent mercury emissions on most units, on a time frame extended by only three years, as well as making significant reductions in NOx and SO_2, above those required by CAIR. *See*, Exhibit 75, 76. Thus, Illinois EGUs electing to use the MPS alternative will provide an additional public health benefit that was not initially included in the proposed rule or otherwise required by CAIR.

In response to questions during the August hearing, Jim Ross, testified that the MPS provisions are of general availability to all Illinois EGUs. *See*, August Tr. At 133; 149-50. Mr. Ross stated that "[t]he most obvious candidates, we believe besides Ameren, who we fully believe will use [the MPS] are Dynegy and Midwest Generation, who have large fleets of coal-fired power plants in Illinois." *Id.* at 149-50. In addition, Messrs. Ross and Romaine testified that the Agency analyzed the MPS and determined that, even if all Illinois EGUs chose to take advantage of the MPS option, Illinois will still be under the state mercury caps set by CAMR. *See*, August Tr. at 293-327.

Furthermore, Ameren's expert witness, Dr. Anne Smith, an economist and utility decision analyst, testified during the August hearings that the Agency's proposed rule as amended by the MPS was economically reasonable for Ameren. *See*, Exhibit 77; August Tr. at 388-442. Dr. Smith performed an economic cost and benefit analysis of the MPS amendments and testified that although the total capital expenditures are larger under the MPS than under the Illinois rule without the MPS (because of the additional NOx and SO_2 controls), these expenditures are greatly smoothed out, in a manner that should be far more feasible to finance, and with a far more manageable rate of increase in demands on cash flow. *Id.* Dr. Smith concluded in her testimony that the MPS is a prudent trade-off for Illinois EGUs to make "from the perspective of corporate financial stability, corporate management of construction projects (with associated operational stability), and the creation of opportunities to achieve these environmental benefits at a lower ultimate total cost." *See,* Exhibit 77.

While the MPS is entirely voluntary, it is available to all Illinois EGUs. Both Ameren and Dynegy testified before the Board that they believe that the MPS provisions are both technically feasible and economically reasonable for their respective systems and they intend on

taking advantage of the MPS. Other Illinois EGUs may also take advantage of the MPS as well and presumably they will do so if it fits within their compliance plans. However, if other Illinois EGUs ultimately determine that the MPS provisions are not technically feasible for their systems, the proposed rule allows them to utilize either the TTBS, the output based standard or the percent reduction standard to attain compliance with the Agency's proposed mercury rule.

Therefore, the record fully supports the proposed Illinois mercury rule as amended by the MPS.

THE BOARD CAN ADOPT THE PROPOSED MERCURY RULE AND THE MPS AMENDMENTS WITHOUT LIMITING ITS AUTHORITY IN THE UPCOMING CAIR RULEMAKING

At the close of the August 2006 public hearings in Chicago on the proposed mercury rule, the Hearing Officer requested clarification from the parties on how the Board can best handle the interaction between the MPS and the Board's upcoming CAIR rulemaking (proposed 35 Ill. Adm. Code 225, Control of Emissions from Large Combustion Sources; R06-26). *See*, August Tr. at 1877.

As stated above, the MPS is a voluntary provision that requires the commitment of Illinois EGUs that opt into the MPS to achieve specified NOx and SO_2 limits as a pre-condition for an extended schedule for mercury controls. While Illinois EGUs that take advantage of the MPS are required to make reductions in NOx and SO_2, nothing in the MPS limits in any way the Board's authority to adopt NOx and SO_2 limits in the upcoming CAIR rulemaking or in any other future rulemakings.

Importantly, the adoption of the MPS requires no determination by the Board that the NOx and SO_2 controls in the MPS provisions are sufficient to attain CAIR or future non-attainment limits. The Board will have a complete opportunity to hear testimony, evaluate and

adopt appropriate CAIR limits during the upcoming CAIR hearings. Thus, there is absolutely no conflict between the MPS provisions in the Agency's proposed mercury rule and the pending CAIR rulemaking and the Board's authority is in no way prejudiced by the MPS amendments.

Rather, the MPS and the proposed CAIR rulemaking will work together to ensure significant emissions reductions for the benefit of Illinois residents. Indeed, the U.S. EPA envisioned a regulatory interplay between CAMR and CAIR. In the preamble to CAMR, USEPA stated that:

> [t]he advantage of regulating Hg at the same time and using the same regulatory mechanism as for SO_2 and NOx is that significant Hg emissions reductions, especially reductions of oxidized Hg, can and will be achieved by the air pollution controls designed and installed to reduce SO_2 and NOx. Significant Hg emissions reductions can be obtained as a "co-benefit" of controlling emissions of SO_2 and NOx; *thus the coordinated regulation of Hg, SO_2, and NOx allows Hg reductions to be achieved in a cost-effective manner.*

See, 70 *Fed. Reg.* 28606 (emphasis added). The CAMR preamble further provides that "[t]he EPA believes that a carefully designed 'multi-pollutant' approach, a program designed to control NOx, SO_2, and Hg at the same time (i.e. CAIR implemented with CAMR) is the most effective way to reduce emissions from the power sector." *See*, 70 *Fed. Reg.* 28617.

Additionally, the concept of an MPS in state mercury rulemaking proceedings is a regulatory approach that is supported by both Lake Michigan Air Directors Consortium ("LADCO") and that has been adopted by other states. As discussed by Mr. Ayers during the June hearings and Mr. Ross during the August hearings, LADCO identified a multi-pollutant strategy in its white paper on state mercury emission controls. *See*, June 20, 2006 Tr. at 62-4; August Tr. at 206. Further, the New Jersey Department of Environmental Protection issued state mercury regulations in 2004 with a multi-pollutant strategy that calls for a 90-percent reduction

in mercury from that state's coal-fired EGUs but allows an extended compliance schedule if the EGUs make reductions in SO_2, NOx and fine particulate emissions. *See*, N.J.A.C. 7:27 *et seq.*

MWG's technical expert, Mr. Ed Cichanowicz spoke to the value of a multi-pollutant strategy in his written testimony and during the August hearings in response to questions. *See*, Exhibit 84; August Tr. 1008-09. Specifically, Mr. Cichanowicz testified that "[c]oupling Hg compliance to SO_2 and NOx reduction – in terms of both equipment and schedule – provides the most cost-effective and reliable compliance path." *Id.* While the MPS requires NOx and SO_2 controls, the coordination of those controls and CAIR will be determined in the CAIR hearings. The Board need only recognize that a multi-pollutant approach is widely utilized and represents a viable and useful counterpart to the Agency's mercury reduction strategy.

MIDWEST GENERATION'S POSITION THAT THE PROPOSED RULE VIOLATES STATE AND FEDERAL LAW IS MISPLACED

A. The Proposed Mercury Rule is Consistent with State Law

MWG argued during the first day of the August hearings and in its Motion to Schedule Additional Hearings that the Board lacks the authority to adopt rules directed at specific companies or operations in the context of general rulemakings. Yet this argument is completely contradicted by the sweeping language of Section 27(a) of the Illinois Environmental Protection Act (415 ILCS 5/1, et seq.; "Act") which describes the Board's authority to adopt regulations. Section 27(a) authorizes the Board not only to adopt state wide regulations but also to adopt regulations that "may make different provisions as required by circumstances for different contaminant sources and for different geographical areas...and may include regulations specific to individual persons or sites." *See*, 415 ILCS 5/27(a). This language clearly authorizes the Board to include in regulations of general applicability different provisions as required by

different sources and different areas and regulations specific to individual companies. The breadth and flexibility of this language plainly allows the Board to adopt the MPS which allows sources to elect different compliance strategies. Indeed, it would be hard to imagine more direct statutory authority for the Board to adopt the proposed rule with its amendments.

MWG's reliance on *Commonwealth Edison Co. v. Pollution Control Board*, 25 Ill.App. 3d 271 (1st Dist. 1974) is completely without merit. That case involved a challenge to a rule of general applicability by a company which claimed that the Board's air rules were "arbitrary and capricious" only as they were applied to that company. *See*, 25 Ill.App. 3d 271 at 280-1. The court rejected this "as applied" argument as a basis for challenging the rule pointing out that the Board could not be expected to adopt rules which fit every company and that the Act provided specific statutory relief for individual companies who could claim that the general rule imposed a specific and different hardship. *Id.* The court, in dicta, stated that the legislature had determined that the appropriate remedy for companies that are unable to comply with a rule of general application is to seek a variance in accordance with the Act. *See*, 25 Ill.App. 3d 271 at 281.

MWG's argument fails because the court held only that the Board could choose not to make exceptions in general rules for individual companies and never held that the Board lacked the authority to make such exceptions. The court's decision is completely inapposite since it addressed a company aggrieved by the impact of a general rule on that company and directed the company to statutory mechanisms provided for such companies to seek relief. At no point did the court state that the Board was not authorized to adopt different rules for different situations, nor could it so hold since Section 27(a) specifically allows the Board to adopt such rules.

Finally, MWG's argument has no basis since none of the proposed rule's provisions are directed at specific Illinois EGUs. As stated above, the proposed mercury rule allows flexibility

for different EGUs to determine how they will ultimately comply with the rule including an output based standard, a percent reduction standard, the TTBS and the MPS. All of these compliance options, including the MPS, are generally available to Illinois EGUs and are not company specific. The fact that MWG may choose not to use the MPS or these other flexibility mechanisms has no bearing on whether the Board has authority to adopt it.

Thus, despite MWG's arguments, the Act clearly authorizes the Board to adopt the MPS.

B. The Proposed Mercury Rule is Consistent with Federal Clean Air Act

MWG also argued during the hearing and in its motion for additional hearing that the MPS was barred by constitutional considerations expressed in the cases involving New York's air statutes. This case involved a challenge to a New York statute which limited the ability of New York EGUs to sell allowances to upwind EGUs. As will be discussed in more detail below, the District Court held that the statute was pre-empted by Title IV of the CAA and barred by the Commerce Clause of the U.S. Constitution. The Second Circuit upheld the District Court's pre-emption ruling and did not address the Commerce Clause issues. For reasons discussed below, these cases are inapplicable to the MPS which is significantly different from the New York statute in that it is voluntary and because it has no direct impact on either out-of-state EGUs or in-state EGUs who choose not to participate. Therefore the Illinois mercury proposal with the MPS is consistent with federal law.

1. The MPS is not Pre-empted by the CAA

In *Clean Air Markets Group v. Pataki*, the 2nd Circuit determined that the New York statute effectively restricting sales of allowances by New York generators to sources in certain identified upwind states, was pre-empted by Title IV of the Clean Air Act. *Clean Air Markets Group v. Pataki*, 338 F.3d 82 (2d Cir. 2003). The court determined that while the New York law

was not expressly preempted by Title IV, nor was it preempted because Title IV was deemed so comprehensive as to occupy the entire filed of state law relating to emissions control, it was preempted because it actually conflicts with federal law in that it "interferes with the method selected by Congress for regulating SO2 emissions," and therefore was an impermissible obstacle to the full implementation of the federal statute.[2] *Id.* at 87. Specifically, the court concluded that the geographical restriction on allowances sales conflicted with Title IV's mandate that allowances be freely transferable "to any other person." *Id.* at 88.

The New York statute effectively took any revenues received from sales of SOx allowances by New York EGUs to sources located in several "upwind states" (certain states whose emission sources had been determined to contribute to SOx transport into New York), and required New York EGUs to place restrictive covenants on any allowances sold elsewhere to ensure that such allowances would not be resold to the identified upwind states. The effect of the statute was to decrease the value of allowances sold by New York EGUs (because of the restrictive covenant), and to likely increase in some small measure the costs of compliance for sources located in the upwind states.

Unlike the New York law at issue in *Clean Air Markets Group*, the MPS is a voluntary provision and thus does not in any way conflict with Title IV. The New York law imposed its effective ban upon sales of allowances to sources in the upwind states unilaterally and without the consent of the allowance holder. In contrast, EGUs in Illinois may elect to be covered by the MPS, in which case they agree to comply with the allowance requirements.

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[2] The Court also found that a conflict existed because Congress had considered and rejected the idea of imposing geographical restrictions on allowance trading, which the New York statue now imposed. *Id.* at 88. The MPS contains no geographical restrictions, and hence that is not an issue here.

The voluntary MPS election eliminates the concern of the *Clean Air Markets Group* court that the allowance surrender provision directly conflicts with Title IV's mandate that allowances be freely transferable "to any other person." By making such an election, Illinois EGUs are agreeing "freely" to transfer excess SOx allowances to the state for retirement as specifically allowed under Title IV. Since the *Clean Air Markets Group* court specifically acknowledged that "to implement [the Title IV] scheme on a national basis," Title IV specifically permits allowances to be transferred to "any other person," and the MPS is wholly consistent with that approach, there is no conflict between the MPS allowance requirements and the methods Congress provided to implement Title IV. *Id* at 88.

The MPC also avoids the *Clean Air Markets Group* court's concern that the New York statute would undermine Congress' goal of obtaining efficient and cost-effective reductions through an emissions allocation and transfer system. *Id.* at 87. Since Congress specifically permitted any person to buy and hold or retire allowances, it could not have presumed that freely elected allowance retirements in any way undermined its objectives to implement the emission reductions required under Title IV. U.S. EPA's Clean Markets Division, which administers the Title IV allowance trading program has a specific program to facilitate these transfers and procedures to effectuate such transactions. The Clean Markets division also acknowledges that environmental groups and corporations without actual emissions can purchase and surrender allowances. Consequently, Title IV authorizes sources to freely elect to transfer allowances to the state for retirement and the MPS cannot be deemed to be in conflict with it.

The Court also indicated that the New York statute was inconsistent with U.S. EPA's regulation that prohibits state Acid Rain permit programs from restricting or interfering with allowance trading in ways that are inconsistent with the acid rain program. 40 C.F.R § 72.72(a).

This provision is not, however, applicable to the MPS. The MPS allowance requirements only become an applicable and compulsory state requirement when the source elects to make it so, and which the source is entitled to do under Title IV's free transfer of allowances provision. Consequently, the state is not "interfering" in any way with allowance trading; to the extent there is any "interference," (and the ability of sources to retire allowances under Title IV's indicates there is not), it is the source which that elects to "interfere" with allowance trading, and that it is entitled "freely" to do.

Further, the U.S. EPA takes the position allowance trading scheme resulting in allowance surrenders are appropriate under Title IV. Indeed, U.S. EPA addressed the conclusions of the *Clean Air Markets Group* when it finalized its CAIR rule. 70 *Fed. Reg.* 25162, 25293-95 (May 12, 2005). In CAIR, U.S. EPA requires that states or sources subject to CAIR surrender an amount of Title IV allowances equal to the difference between the applicable CAIR cap and the Title IV allowance allocation, as "excess" allowances; i.e., "beyond Title IV." *Id.* at 25294. In addition, U.S. EPA has entered into ten NSR consent decrees with utility companies, and in each of these it has required the utility companies to surrender SOx allowances. Each of the decrees has been presented by U.S. EPA to a federal district court for approval and entry, with U.S. EPA asserting that the decrees are lawful. The standard to be applied by the courts in reviewing the decrees for approval is whether the consent decree is fair, adequate and reasonable and consistent with applicable law. *Mtro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980). Based upon this standard, the courts have approved these decrees, including most recently a decree involving Dynegy's Illinois operations.

Consequently, allowance surrender or retirement requirements are consistent with federal law. MWG's argument that the CAA preempts the MPS is not supported by the case law or the language of the MPS.

2. The MPS is Lawful Under the Commerce Clause

MWG further argues, based on the District Court's decision in *Clean Air Markets Group v. Pataki*, 194 F.Supp. 2d 147 (N.D.N.Y 2002), that the MPS requirement that unused SOx allowances be retired or surrendered to the state, and not sold or traded to any other person, may violate the Commerce Clause. Again, this argument is unsupported. The MPS allowance surrender requirement has several distinct differences from the New York statute that makes the MPS a lawful, non-discriminatory regulation, fully consistent with constitutional protections.

a. The MPS is a Permissible Even-Handed Regulation that Does Not Discriminate Against Interstate Commerce

Statutes violate the Commerce Clause if they impermissibly discriminate against interstate commerce. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987) ("The principle objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce."). Such a statute is "*per se* invalid," unless it can be demonstrated "under rigorous scrutiny" that the objective of the statute is legitimate, and there is no alternative way to accomplish the objective. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994). If the statute is not found to be discriminatory, it will be upheld, "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

Consequently, "the first step in analyzing any law subject to judicial scrutiny under the negative commerce clause is whether it regulates evenhandedly," with only incidental effects on interstate commerce, or whether it "discriminates against interstate commerce." *Oregon Waste*

Systems v. Dep't of Env. Quality of Ore., 511 U.S. 93, 99 (1994). "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism . . . " *C&A Carbone* at 390.[3] Discrimination under the Commerce Clause "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later." *Oregon Waste Systems*, 511 U.S. at 99. Thus, when New Jersey sought to conserve its dwindling landfill space by banning most imports of out-of-state solid waste, the Supreme Court concluded that the statute discriminated against interstate commerce because "it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). That is, all of the benefits of the statute, in the form of greater landfill capacity, flowed to New Jersey, while all the burdens of the statute were imposed upon the rest of the states, whose citizens were deprived of access to New Jersey's landfills.

For similar reasons, the *Clean Air Markets Group* court struck down the New York statute, concluding that since the law did not restrict or penalize transfer of allowances between New York generators, "it gave a preferred right of access to SO_2 allowances to in-state units over units in the Upwind States, and is therefore protectionist." *Clean Air Markets Group* at 161. Thus, under the New York statue, as in *City of Philadelphia*, in-state interests were benefited at the expense of out-of-state interests in the upwind states.

This infirmity is not present in the MPS. The MPS requires that excess allowances be retired or be surrendered, and provides no exceptions to that rule. Since both in-state and out-of-state utilities are deprived of access to the allowances that otherwise might have been sold, the regulation's burdens are shared equally by in-state and out-of-state generators, and no

[3] *Carbone* makes clear that "economic protectionism" is the evil sought to be avoided, and that the hallmark of "economic protectionism" is "discrimination."

preferential access to the allowances to be retired is given to Illinois generators. Consequently, existing EGUs in Illinois that do not participate in the MPS, new EGUs that are constructed within the state, and existing and any new oil and gas units in the state subject to Title IV share the same burdens that may be attendant to the loss of some allowances in the Title IV acid rain market as their out-of-state counterparts. The absence of unique preferences for in-state units, or imposition of burdens uniquely borne by out-of-state units, is the hallmark of permissible evenhanded impacts on interstate commerce.

The Supreme Court repeatedly held that even-handed legislation that imposes no greater burden on out-of-state entities than on in-state entities is not discriminatory. In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), the Court upheld an Indiana statute that had the effect of conditioning acquisition of control of an Indiana corporation on approval of a majority of the pre-existing disinterested shareholders because "It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus it "visits its effects equally upon both interstate and local businesses." *CTS Corp.* at 87, quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980). The Court repeated the argument that anti-takeover statute would apply more often to out-of-state entities than in-state entities (there being far more out-of-state corporations than in-state), reasoning: "nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce." *CTS Corp.* at 88.

The MPS passes constitutional muster because like the statutes discussed in *CTS Corp.*, the MPS provides no preferences for in-state consumers of allowances and treats them identically to their out-of-state counterparts. Although its impacts may apply more often to out-

of-state entities (there being more out-of-state EGUs than in-state EGUs), the Supreme Court makes clear that this consideration does not matter, provided both groups are equally burdened.

b. The MPS Passes Muster Under the *Pike* Balancing Test Because the Burdens on Interstate Commerce Are Not Clearly Excessive in Relation to the Local Benefits

Even though the *Clean Air Markets Group* court found the statute to impermissibly discriminate against interstate commerce, it proceeds to evaluate it under the *Pike* balancing test applicable to statutes found not to discriminate and found that it failed that test. *Pike v. Bruce Church*, 397 U.S. 137 (1970). The court reasoned that the goal of the statute did not have a sufficient connection to its requirements (*i.e.*, it was unlikely to accomplish its objectives), and that it imposed a "burden" on interstate commerce by halting certain transfers of allowances despite a federal scheme intended to promote free transfer of such allowances. However, it is clear that the court applied rationales that are inapplicable to the different factual situation presented by the MPS surrender requirement.

The *Pike* balancing test requires two assessments: (1) whether the statute effectuates a legitimate local public interest; and (2) if it does, whether the burdens it imposes on interstate commerce are clearly excessive in comparison to the identified local benefits. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). The MPS passes both of these tests and cannot be found to impermissibly burden interstate commerce.

The local benefits of the MPS reflect a legitimate local concern and are properly effectuated through the allowance requirements. Plainly, Illinois' interest in reducing SO_2 impacts in Illinois is as legitimate a local concern as reducing acid rain. Unlike the New York statute, the specific purpose of the Illinois allowance surrender requirement is to ensure that a suite of newly-freed up allowances produced by the required emission reductions in the MPS are

not used by other sources near Illinois to increase emissions, or to avoid controls that would otherwise be undertaken. By retiring the allowances freed up by the MPS' beyond-CAIR emission reductions, the state is assured that the reductions it obtains in Illinois will be firm, and will not be undone by other sources using allowances from MPS sources to avoid controls, and thereby increase (or fail to reduce) emissions elsewhere. That is clearly a legitimate public interest, and its result is absolutely assured ("guaranteed") through the retirement requirement.

This goal is both a legitimate and lawful approach because U.S. EPA follows when it enters into consent decrees requiring system-wide reductions in SOx emissions to settle NSR suits. EPA has now entered into 10 consent decrees with major coal-fired utility systems resolving alleged NSR violations. Under these decrees, EPA requires most of the units to install state-of-the-art controls for SOx and NOx, and each of these decrees requires that the utility systems surrender SOx allowances that are equal to the amount of reductions the SOx controls required under the decree are expected to produce.

Further, the MPS' burdens on interstate commerce are not clearly outweighed by the regulation's benefits to the state. The 2nd Circuit articulates the second step in the *Pike* test as requiring the statute to be upheld if "a reasonable factfinder could not have found that whatever incidental burdens exist were 'clearly excessive' in relation to the local benefits." *New York State Trawlers Assoc. v. Jorling*, 16 F.3d 1303, 1309 (2nd Cir. 1994). The *Clean Air Markets Group* court did not explicitly assess the burdens on commerce, except to suggest that the allowance sale restrictions conflicted with a "federal system designed for free transferability of SO2 allowances." *Id.*

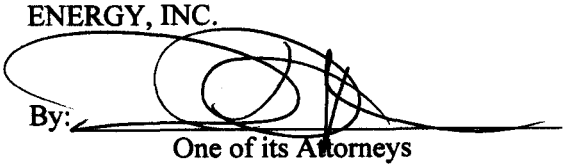
Yet, the MPS surrender requirement will affect a relatively small amount of SOx allowances, both because Illinois' total SO2 allocation is but a fraction of the total amount of

allowances allocated, and because only a subset of Title IV sources in Illinois will be subject to the surrender requirement (coal-fired units that elect the MPS). This relatively small impact is unlikely to amount to an appreciable burden in interstate commerce, or the functioning of the Acid Rain trading program. Indeed, U.S. EPA itself appears to believe that such a surrender requirement is only inconsequential. In its ten NSR settlements, well over 100,000 tons of SOx allowances per year must be surrendered. The amount to be surrendered under these decrees will be in excess of any amount to be surrendered under the MPS. Yet EPA has not found such a surrender requirement to be burdensome, or to harm the functioning of the allowance market, and indeed has found allowance surrenders to be in the public interest. In addition, the Clean Air Act itself specifically permits allowance surrenders. *See*, 42 U.S.C. § 7651b(b).

Under these facts, where the benefits to the state are substantial in that they preserve the integrity of the MPS emission reductions, and are recognized as important benefits by U.S. EPA in its NSR settlements, and where the burden on commerce is speculative in the first instance, nominal at its worst, and similar burdens have been found to be acceptable by the agency charged with administering the statute that created the commerce, a reasonable factfinder would not be able to find that the burdens on interstate commerce are clearly excessive in relation to the local benefits.

WHEREFORE, for the reasons stated in Ameren's Post-Hearing Comments, Ameren respectfully requests the Board to adopt the Agency's proposed mercury rule as amended.

AMEREN ENERGY GENERATING COMPANY, AMERENENERGY RESOURCE GENERATING COMPANY, and ELECTRIC ENERGY, INC.

By: 
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Those Individuals as Listed on attached Certificate of Service

Please take notice that on September 20, 2006, the undersigned caused to be filed with the Clerk of the Illinois Pollution Control Board the attached Ameren's Post-Hearing Comments, a copy of which is herewith served upon you.

Dated this 20th day of September, 2006.

Respectfully submitted,

AMEREN ENERGY GENERATING COMPANY
AMERENENERGY RESOURCES GENERATING COMPANY
ELECTRIC ENERGY, INC.

By: _____
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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Petitioners, hereby certifies that I served a copy of the attached document, Ameren's Post-Hearing Comments, upon those listed below on September 20, 2006 via First Class United States Mail, postage prepaid.

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