

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

**PROPOSED NEW CAIR SO₂, CAIR NO_x
ANNUAL TRADING PROGRAMS,
35 ILL.ADM.CODE 225,
CONTROL OF EMISSIONS FROM LARGE
COMBUSTION SOURCES,
SUBPARTS A, C, D, AND E**

**R06-26
(Rulemaking – Air)**

NOTICE OF FILING

To:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Persons included on the
ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board a **RESPONSE TO MOTION TO AMEND RULEMAKING PROPOSAL** on behalf of Dynegy Midwest Generation, Inc., Midwest Generation, LLC, and Southern Illinois Power Cooperative, copies of which are herewith served upon you.


Kathleen C. Bassi

Dated: December 7, 2006

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500

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COMBUSTION SOURCES,)	
SUBPARTS A, C, D, AND E.)	

RESPONSE TO MOTION TO AMEND RULEMAKING PROPOSAL

NOW COME DYNEGY MIDWEST GENERATION, INC., MIDWEST GENERATION, LLC, and SOUTHERN ILLINOIS POWER COOPERATIVE, participants in this matter (collectively “Respondents”), by and through their attorneys, SCHIFF HARDIN LLP, and pursuant to 35 Ill.Adm.Code §§ 102.402 and 101.500(a), respond to the Illinois Environmental Protection Agency’s (“Agency”) Motion to Amend Rulemaking Proposal, filed November 27, 2006. Respondents generally support the Agency’s Motion to Amend but request or suggest clarification in some sections,¹ as follows:

1. Respondents intend that the discussions herein concerning sections contained in Subpart D should also apply to the corresponding citations to sections in Subpart E, though Respondents will for brevity, as a general matter here, cite to only Subpart D when discussing the NO_x trading programs.
2. The revision to the definition of *coal-fired* at Section 225.140 refers to Subpart B of Part 225, but Subpart B is not part of this rulemaking and is not listed in the table of contents

¹ By responding to the Agency’s Motion to Amend and suggesting or requesting clarifications in this Response, Respondents do not waive their argument, as set forth in their recently filed Motion to Dismiss, that the Board lacks authority to adopt the proposed rule.

for the rule attached to the Motion to Amend. Respondents note that Subpart B is not yet final and could be appealed. Respondents merely want to confirm that inclusion of the reference to Subpart B is appropriate in this Docket.

3. Regarding the new definition of *commence construction* at Section 225.140:

a. It is not clear what entity – the Agency or the regulated party – determines whether the commencement of construction occurs pursuant to subsection (a) or subsection (b). We suggest that the Agency clarify this point.

b. It is not clear whether the language “For purposes of this definition” at the end of subsection (b) and subsections (1) and (2) are intended to be qualifiers of subsection (b) only, as the structure of the definition suggests. The context of the definition suggests that the prefatory language and subsections (1) and (2) should apply to both subsections (a) and (b).

c. If the Agency intends that the prefatory language and subsections (1) and (2) apply only to subsection (b), then this suggests that *construction* and *reasonable time* would mean something different for subsection (a). Those meanings are not set forth in the definition and should be.

d. There appears to be an errant colon in subsection (2) following “A reasonable time.” The punctuation there should probably be a quotation mark.

e. The definition’s applicability is limited, by its terms, to Sections 225.460(f) and 225.560(f). The defined term, *commenced construction*, however, is used in at least two other sections, Sections 225.470 and 225.570. The Agency should clarify that this definition also applies in Sections 225.470 and 225.570 and in any other section that uses the term.

4. The definition of *compliance account* omits reference to Subpart C, the SO₂ trading program, yet Section 225.310(d)(8), for example, refers to a compliance account. Respondents suggest that the definition be expanded to include Subsection C.

5. It does not appear that any language in the rule geographically limits the applicability of the rule generally and, even more specifically, the extent of the CASA or the sponsors for CASA projects. Typically, the Board's rules include some limitation on the applicability of a rule, such as by geographic location for Parts 218 and 219 or by specifically identifying the sources to whom a rule applies as in Subparts U, V, and W of Part 217. Respondents suggest that the Agency and the Board reconsider this element of the rule. Whether the applicability of the general rule is sufficiently limited is a fairly straight-forward question, but Respondents offer the following questions to further develop the issue with respect to CASA projects:

- a. In order to be allocated allowances, must a CASA project be located in Illinois? For example, if a power distributor purchased wind-generated power, must the wind mills that provided the power be located in Illinois?
- b. Must the end benefit of a CASA project be located in Illinois? For example, is the power distributor described in (a) above limited to distributing that power in Illinois?
- c. Must the project sponsor be an Illinois entity or have some direct nexus with Illinois? For example, could the major financier of a CASA project located in Illinois be an out-of-state entity that has no direct nexus with Illinois, *i.e.*, no office here, no contractual obligations here? If John Doe, living in New York, gave 50% of the

capital cost of a wind mill to a group who then constructed and operated the wind mill, could John Doe qualify as a project sponsor and receive CASA allowances?

6. There should be a comma following “If a stationary boiler or stationary combustion turbine that” in the first line of Sections 225.305(a)(2), 225.405(a)(2), and 225.505(a)(2) in the attachment to the Motion to Amend.

7. The organization of Sections 225.305(b), 225.405(b), and 225.505(b) is quite awkward. The language in all three sections is substantively the same and identifies the types of units to which the three trading programs are applicable. The awkwardness lies in designating subsections (b)(1), (b)(3), and (b)(4) as identifying units not subject to the rule, while subsections (b)(2) and (b)(5) identify units that are subject to the rule. First, presenting those that are subject to the rule and that are not subject to the rule in consecutive subsections would be extremely helpful. Even better would be to separate subsection (b) into two major subsections, (1) and (2), where (1) identifies those units that are subject to the rule, perhaps in additional subsections, and (2) identifies specific unit types that are not subject to the rule, again perhaps in additional subsections.

8. At Section 225.430(c), the Agency proposed to change the dates relative to NUSA allocations, explaining in the text of the Motion to Amend that new units will not receive allocations for their first year of operation. However, the language at Section 225.430(c) does not make this clear. Respondents suggest that the rule simply state that new units will not be allocated allowances for their first year of operation and that allowances for their second year of operation will be based upon their operations during the first year, including the dates by which new units' owners or operators must apply for the allowances for the second year, and so on. Respondents note that if the allocation for the second year of operation is based upon the first

year that a new source operates, the allocation for the second year may be “short.” Because of the relatively short period of time that new units must obtain their allowances from the NUSA, they may never receive sufficient allowances from that pool. Additionally, reliance upon the beginning years of operation to determine a new unit’s allowances in the “existing source” pool will cause new units to be “short” for the first several years they are allocated allowances from that pool, as well. For example, if a new source commences commercial operation in August 2013, Respondents’ understanding is that it will be allocated no allowances for 2013.

Allowances for 2014 will be based upon operation in 2013, and allowances for 2015 will be based upon the average of operation in 2013 and 2014. Allowances for its first year as an existing source, *i.e.*, allowances from the main pool of allowances rather than from the NUSA, will be based upon 2013, and allowances for its second year as an existing source would be based upon the average of 2013 and 2014.

9. Additionally, it is not clear that Section 225.430(c) is consistent with Section 225.445(b) in terms of the timing of NUSA allowances.

10. The Agency explains in its Motion to Amend that CASA allowance requests will be submitted to USEPA by October 1 so that they will be available for use during the ozone season. However, all other allowances are to be submitted to USEPA by October 31. Respondents question the inclusion of two dates for submittal of allowances simply because of the added complexity it creates – an additional deadline.

11. The Agency’s explanation of the system required by Section 225.450 for determining gross electrical output contained in the text of its Motion to Amend does not appear to be fully consistent with the language contained in the proposed amendment. The Agency states in the Motion, “This system may be a wattmeter or other system that meets either the

requirements of 40 CFR 60 or 75, as applicable.” Respondents suggest that this statement be incorporated into the language of the rule, as well, and that “install, calibrate, maintain, and operate” and other ancillary words be deleted. If 40 CFR Parts 60 and 75 require installation, calibration, maintenance, or operation, it should be sufficient that 40 CFR 60 and 75 are incorporated by reference as to determining gross electrical output, rather than to impliedly limit any flexibilities available to the regulated community that the Agency apparently intends to allow the regulated community. This approach would avoid any potential inconsistency between federal and state requirements.

12. If it is not the Agency’s intent that sources submit both heat input and gross electrical output data by June 1, 2008, Respondents suggest that “or” be inserted at the end of Section 225.450(c)(1).

13. Respondents still do not understand why the Agency requires gross electrical output data on a quarterly basis and suggest that the frequency be extended to annually.

14. One of the suggestions or requests that Respondents had made during the Springfield hearing was to include improvements to the heat rate of coal-fired units in the CASA category for supply-side energy efficiency projects. Respondents reiterate that request here to the extent that such projects are not already included in 225.460(a)(3). The Agency should clarify that such projects are included in 225.460(a)(3) or, if not, add a section that includes them, perhaps in 225.460(c)(3). Supply side energy projects may reduce the demand for electricity and thus emissions associated with electricity generation. Similarly, coal-fired unit efficiency projects reduce emissions associated with the generation of a given level of electricity, thus also reducing emissions. Accordingly, coal-fired unit efficiency projects should be eligible for CASA allowances.

15. The Agency has moved to amend Section 225.460(d) by carving projects performed “pursuant to Section 225.233” from the exclusion in Section 225.460(d). Section 225.460(d) generally excludes from CASA eligibility projects “required to meet emission standards or technology requirements under State or federal law or regulation. . . .” Respondents understand that Section 225.460(d) does not exclude projects undertaken as part of a strategy to comply with a cap and trade program, such as CAIR, or any other program where specific pollution control requirements are not enumerated in the regulation but merely that compliance with some level of reduction is required. The Agency, however, should make this clear in Section 225.460(d). In addition, the Agency has failed to explain and Section 225.460(d) does not indicate how the determination will be made concerning whether a project is ineligible under Section 225.460(d) because it is “required to meet” some other state or federal law or regulation. The Agency should clarify how it would determine whether a project is “required to meet” some other federal or state law or regulation including that the only relevant state or federal regulations are those in effect at the time the CASA application is submitted, even though the CASA allowance stream would continue into the future, including after a new federal or state law or regulation requiring such controls goes into effect.

16. The baselines to be used for allowance allocations for 2014, 2015, 2016, and so on are not clear from the language in Section 225.435. Respondents suggest that the Agency and the Board include specific years for the first several years to serve as examples going forward.

Respectfully submitted,

DYNEGY MIDWEST GENERATION, INC.,
MIDWEST GENERATION, LLC, and
SOUTHERN ILLINOIS POWER COOPERATIVE

by:



One of Their Attorneys

Dated: December 7, 2006

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500
Fax: 312-258-5600

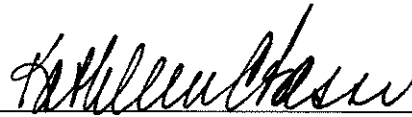
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 7th day of December, 2006, I have served electronically the attached **RESPONSE TO MOTION TO AMEND RULEMAKING PROPOSAL** on behalf of Dynegy Midwest Generation, Inc., Midwest Generation, LLC, and Southern Illinois Power Cooperative,, upon the following persons:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

and electronically and by first-class mail with postage thereon fully prepaid and affixed to the persons listed on the **ATTACHED SERVICE LIST**.

A handwritten signature in black ink, appearing to read 'Kathleen C. Bassi', is written over a horizontal line.

Kathleen C. Bassi

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500

SERVICE LIST**(R06-26)**

John Knittle Hearing Office Illinois Pollution Control Board James R. Thompson Center 100 W. Randolph Suite 11-500 Chicago, Illinois 60601 knittlej@ipcb.state.il.us	Rachel Doctors, Assistant Counsel John J. Kim, Managing Attorney Air Regulatory Unit Division of Legal Counsel Illinois Environmental Protection Agency 1021 North Grand Avenue, East P.O. Box 19276 Springfield, Illinois 62794-9276 rachel.doctors@illinois.gov john.j.kim@illinois.gov
Matthew J. Dunn, Division Chief Office of the Illinois Attorney General Environmental Bureau 188 West Randolph, 20 th Floor Chicago, Illinois 60601 mdunn@atg.state.il.us	Virginia Yang, Deputy Legal Counsel Illinois Department of Natural Resources One Natural Resources Way Springfield, Illinois 62701-1271 virginia.yang@illinois.gov
David Rieser James T. Harrington Jeremy R. Hojnicky McGuireWoods LLP 77 West Wacker, Suite 4100 Chicago, Illinois 60601 drieser@mcguirewoods.com jharrington@mcguirewoods.com jhojnicky@mcguirewoods.com	William A. Murray City of Springfield, Office of Public Utilities 800 East Monroe, 4 th Floor, Municipal Building Springfield, Illinois 62757-0001 bmurray@cwlp.com
Katherine D. Hodge N. LaDonna Driver HODGE DWYER ZEMAN 3150 Roland Avenue, P.O. Box 5776 Springfield, Illinois 62705-5776 khodge@hdzlaw.com nldriver@hdzlaw.com	S. David Farris Manager, Environmental, Health and Safety City Water Light & Power 201 East Lake Shore Drive Springfield, Illinois 62757 dfarris@cwlp.com
Faith E. Bugel Environmental Law and Policy Center 35 East Wacker Drive, Suite 1300 Chicago, Illinois 60601 fbugel@elpc.org	Keith I. Harley Chicago Legal Clinic, Inc. 205 West Monroe Street, 4 th Floor Chicago, Illinois 60606 kharley@kentlaw.edu

SERVICE LIST**(R06-26)**

Sasha M. Reyes Steven J. Murawski Baker & McKenzie One Prudential Plaza, Suite 3500 130 East Randolph Drive Chicago, IL 60601 sasha.m.reyes@bakernet.com steven.j.murawski@bakernet.com	Bruce Nilles Sierra Club 122 West Washington Avenue, Suite 830 Madison, Wisconsin 53703 bruce.nilles@sierraclub.org
Daniel D. McDevitt General Counsel MIDWEST GENERATION, LLC 440 South LaSalle Street, Suite 3500 Chicago, Illinois 60605 dmcdevitt@mwgen.com	James H. Russell Winston & Strawn LLP 35 W. Wacker Drive, 40 th Floor Chicago, Illinois 60601 jrussell@winston.com
Bill S. Forcade Katherine M. Rahill JENNER & BLOCK LLP One IBM Plaza Chicago, Illinois 60611 bforcade@jenner.com krahill@jenner.com	