

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

**PROPOSED NEW CLEAN AIR
INTERSTATE RULES (CAIR)
SO₂, NO_x ANNUAL AND NO_x
OZONE SEASON TRADING
PROGRAMS, 35 ILL. ADM. CODE 225,
SUBPARTS A, C, D, E and F**

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 the MOTION FOR ADDITIONAL HEARING BY MIDWEST GENERATION, LLC, a copy of which is herewith served upon you.

/s/ Karl A. Karg

Karl A. Karg

Dated: July 30, 2007

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4. MWGen calculates that its air in-leakage rate of 10 to 15 percent will result in increased sorbent costs of approximately \$3 million per year. In other words, without relief on this issue, MWGen will waste \$3 million per year to inject sorbent in response to air in-leakage of clean, unpolluted air.
5. MWGen's evaluation of the sorbent market suggests that sorbent supplies are limited, very expensive, and will become more costly and scarce as CAMR and the CPS rule take effect. The issue of sorbent scarcity and waste applies to all sources required to inject sorbent under CAMR or CAIR. As such, all parties have an interest eliminating wasteful application of sorbent to help ensure an adequate, economical supply of this substance.
6. Even more important to the overall goals of CAMR and the CPS rule, if MWGen is allowed to account for the air in-leakage in the stack flow and thereby reduce sorbent injection accordingly, MWGen will **still be able to comply** with the limits for Mercury emissions set forth in the CPS.
7. MWGen identified the air in-leakage issue in an internal company meeting on April 2, 2007, then promptly contacted the Illinois Environmental Protection Agency ("Agency") and arranged a conference call on this issue for April 6, 2007.
8. At the April 6, 2007 conference, MWGen raised the issue of flow measurement under the proposed rule with the Agency. The Agency advised MWGen to submit a letter of determination explaining how MWGen would propose calculating flow at the injection point and the reasons for doing so.
9. First notice for the proposed rule was published on May 11, 2007, and the Order provided a 45 day period for submissions of written comments. *See* 31 Ill. Reg. 6789.

10. Pursuant to the Agency's guidance, MWGen developed a proposed calculation methodology for measuring air in-leakage and sent a letter to the Agency memorializing this proposal on June 14, 2007.
11. On June 19, 2007, counsel for the Agency advised that a determination letter was not the appropriate method of approving MWGen's proposed alternate flow methodology.
12. On June 21, 2007, MWGen met with the Agency and received input for the changes MWGen proposed to the formula in its comments. At the same time, MWGen circulated a proposed Joint Comment to the Agency which advocated the change to the formula discussed between the Agency and MWGen.
13. On June 25, 2007, the last day to submit written comments, the Agency indicated it could not join in MWGen's comment, and MWGen was left to raise the issue alone, which it did in its First Notice Comments of June 25, 2007.
14. This motion is brought under 35 Ill. Adm. Code §102.412(b), which provides:

If the proponent or any participant wishes to request a hearing beyond the number of hearings specified by the hearing officer, that person must demonstrate, in a motion to the hearing officer, that failing to hold an additional hearing would result in **material prejudice to the movant**.... The movant must show that he **exercised due diligence** in his participation in the proceeding and **why an additional hearing**, as opposed to the submission of written comments pursuant to Section 102.108 of this Part, **is necessary**. (Emphasis supplied).
15. MWGen will be materially prejudiced if the Board fails to hold an additional hearing on the issues raised in this Motion. As written, the current formula forces MWGen to increase the amount of sorbent it injects into its stacks to account for air-in leakage. Such leakage, however, presents no threat to environmental quality since the air in question is clean, not polluted. The proposed rule thus requires MWGen to waste millions of dollars on unnecessary sorbent without cognizable benefit to the environment. To the extent the rule as drafted mandates an inflated

level of industry-wide demand for sorbent, it will lead to scarcity in the sorbent market, thereby increasing sorbent prices and exacerbating this problem.

16. The procedural history shows that MWGen exercised the due diligence required by 35 Ill. Adm. Code §102.412(b). MWGen contacted the Agency and shared its concerns about the proposed rule four days after identifying the issue and five weeks before the First Notice was published. The timing of MWGen's actions demonstrates a proactive approach to the issue.

17. MWGen subsequently followed the guidance provided by Agency staff in developing an alternative formula and in submitting a letter determination request to the Agency. MWGen worked with the Agency in a collaborative fashion and adopted the Agency's recommended approach after reasonably relying upon the Agency's direction. MWGen was thus surprised when later told by higher Agency authority that it could not address this issue through a letter ruling. This sequence of events is relevant when considering the Agency's incorrect assertion that MWGen's proposed amendment to the Rule was a "last-minute modification." *See*

Comments of the Illinois Environmental Protection Agency On First Notice (June 25, 2007) at 7. The proposed modification was presented in MWGen's Comment because of the unexpected change in the Agency's direction to MWGen after over 10 weeks of work on the issue.

18. Failing a letter ruling, MWGen hoped to have the Agency join it in its Comments to the proposed Rule. The Agency, however, did not have adequate opportunity to review the implications of MWGen's proposed amendment partly because of the expedited schedule under which this rulemaking proceeded. *See Comments of the Illinois Environmental Protection Agency On First Notice (June 25, 2007) at 7.* This combination of events – MWGen being unexpectedly told it could not pursue a letter ruling, combined with the expedited time frame which hampered the Agency – meant that this issue became ripe concurrent with the end of the

comment period. In practical terms, the expiration of the comment period left MWGen without a forum in which to raise its concerns about the sorbent injection issue.

19. This issue cannot adequately be addressed through written comments. Indeed, the Agency itself states that it has not had an adequate opportunity to fully review the implications of MWGen's proposed change. *See* Comments of the Illinois Environmental Protection Agency On First Notice (June 25, 2007) at 7. Thus, despite the cost and environmental impact issues outlined above, the Agency, by its own admission, lacks a full understanding of the Rule's impact on regulated parties and alternatives which could serve the needs of both industry and the environment. In practical terms, the complexity of the issue is such that the parties need a live, interactive dialogue through which to consider the matter. Neither MWGen nor the affected agencies can fully understand each other's position on this matter through paper comments alone.

20. A single, additional hearing is all that is necessary to address MWGen's concerns. The hearing can be strictly limited to the issue of air-in leakage and its relationship to sorbent injection rates. Such a hearing will allow MWGen to inform the Agency, the Illinois Pollution Control Board and other affected parties about this significant issue.

21. MWGen believes that this issue is straightforward and that the proposed changes it has suggested do not in any way compromise or diminish the effectiveness of CAMR or CAIR. MWGen believes that it has acted in good faith in raising this issue early and repeatedly with the Agency, only to be left standing alone at the end of the comment period. MWGen understands the Board's desire to move this rulemaking forward, but without an additional hearing on this issue, MWGen will be materially prejudiced despite its due diligence. Moreover, MWGen submits that all parties – the Board, the Agency, and the other participants – need a better

understanding of this issue. MWGen's \$3 million annual projected costs for wasted sorbent are significant. Other sources may also have to waste resources because of this issue. Sorbent supplies are already tight and costs are projected to increase. To the extent "waste" can be eliminated, sorbent prices can be minimized. To the extent a hearing on this issue will inform all parties and result in a solution, a costly and wasteful situation can be avoided while preserving the environmental effectiveness of the underlying rules.

WHEREFORE, for the reasons stated above, MWGen moves that the Hearing Officer to grant a single, additional hearing on this matter.

Dated: July 30, 2007

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Karl A. Karg
One of its Attorneys

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AFFIDAVIT OF ANDREA CRAPISI

I, Andrea Crapisi, upon my oath, hereby state as follows:

1. I am employed by Midwest Generation LLC as an environmental engineer within Midwest Generation LLC's Environmental Services Division.
2. I have personal knowledge of the facts averred in paragraphs 7-8 and 10-13 in the attached Motion for Additional Hearing which detail the communications between Midwest Generation LLC and the Illinois Environmental Protection Agency regarding air in-leakage.
3. To the best of my knowledge, the factual information and representations contained in paragraphs 7-8 and 10-13 of Midwest Generation's Motion for Additional Hearing are true and correct.

FURTHER AFFIANT SAYETH NOT.

Andrea Crapisi
Andrea Crapisi

Subscribed and sworn to before me
this 30th day of July 2007.

K'Shea McNair-Williams
Notary Public



CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 30th day of July, 2007, I have served electronically the attached MOTION FOR ADDITIONAL HEARING BY MIDWEST GENERATION, LLC upon the following person:

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

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

/s/ Karl A. Karg

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