

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 13-24
)	(Variance – Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

To:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Dana Vetterhoffer
Assistant Counsel
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board **MIDWEST GENERATION'S REPLY IN SUPPORT OF ITS PETITION FOR VARIANCE**, copies of which are herewith served upon you.



Andrew N. Sawula

Dated: March 4, 2013

SCHIFF HARDIN LLP
Attorneys for Midwest Generation, LLC
Kathleen C. Bassi
Stephen J. Bonebrake
Andrew N. Sawula
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
Phone: 312-258-5500
Fax: 312-258-5600
kbassi@schiffhardin.com
sbonebrake@schiffhardin.com
asawula@schiffhardin.com

Christopher M. Foley
Managing Director and Senior Counsel
Midwest Generation EME, LLC
500 West Madison Street, Suite 2640
Chicago, Illinois 60661
312-583-6003
cfoley@mwgen.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC)	
)	
Petitioner,)	
)	
v.)	PCB 13-24
)	(Variance – Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Respondent.)	

**MIDWEST GENERATION’S REPLY
IN SUPPORT OF ITS PETITION FOR VARIANCE**

Petitioner MIDWEST GENERATION, LLC (“Midwest Generation” or the “Company”) respectfully submits this Reply in Support of its Petition for Variance (“Reply”). In its Post-Hearing Brief, filed February 19, 2013, Midwest Generation demonstrated why the Board should grant its requested variance. That demonstration included the submission of an enhanced compliance plan to address questions received from the Board in writing and at hearing. This plan was presented to the Illinois Environmental Protection Agency (the “Agency”) and the Agency’s comments were incorporated prior to submittal to the Board. The Agency did not file a response brief. Five advocacy groups (the “NGOs”)¹, however, filed joint comments on February 19, 2013, opposing the variance (the “NGOs’ Comments”), which were not served on or available to the Company until after it filed its Post-Hearing Brief. While none of the NGOs’ Comments has merit, some of the comments, including new arguments raised for the first time in NGOs’ Comments, warrant a brief reply to avoid any confusion. As explained in this Reply, the NGOs’ Comments do not support denial of the variance and many already have been rebutted by

¹ The five groups are Citizens Against Ruining the Environment, Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club.

Agency positions presented through the Agency's Recommendation and its witness' testimony at hearing.

DISCUSSION

I. THE REQUESTED VARIANCE WOULD PROVIDE ONLY TEMPORARY RELIEF.

Midwest Generation carefully crafted the variance to provide only temporary relief from the Combined Pollutant Standard ("CPS") consistent with the Board's variance requirements. The NGOs disagree. Selectively omitting discussion of a key Board decision and implicitly suggesting that Midwest Generation should have sought more relief, they assert that the requested variance is forbidden because it would provide permanent relief from the CPS. According to the NGOs, this is so because Midwest Generation did not ask for the 2015 and 2016 system rates to go into effect in 2017 or after, which would have had the effect of deferring the more stringent rates applicable in 2017 and after. Ironically, the NGOs appear to argue that Midwest Generation does not seek enough relief. This is illogical and contrary to Board requirements. The NGOs are wrong on the facts and the law.

The temporary (two-year) relief sought by Midwest Generation from the CPS is consistent with the variance the Board granted Ameren Energy Resources ("Ameren") just last fall. *See Ameren v. IEPA*, PCB 12-126 (Sept. 20, 2012) ("Ameren Order"). Ameren had sought relief from two standards, a 0.25 lb/mmBtu SO₂ rate that applied in 2015 and 2016 and a 0.23 lb/mmBtu end rate that applied in 2017 and thereafter. *Id.* at 8. Ameren initially proposed to return to compliance with the 0.25 rate beginning January 1, 2020, and with the 0.23 rate beginning January 15, 2020, thus providing a short period of time when the interim rate would have gone into effect as a separate, independent standard. *Id.* The Board determined that a separate period for compliance with the interim rate following the variance was unnecessary. *Id.*

at 57. It granted relief from both rates through December 31, 2019, and ordered that Ameren comply with the more stringent end rate of 0.23 beginning January 1, 2020. *Id.* at 68. In other words, the interim rate was subsumed within the more stringent end rate at the end of the term of the variance. Midwest Generation's request that it be granted relief from the 2015 and 2016 rates but leave in place the more stringent CPS rate in 2017 is consistent with the variance the Board recently granted Ameren. Indeed, the relief sought here is of shorter duration and even more temporary. The bottom line is that the Company seeks temporary relief from the CPS and the codified CPS system rates will be in place once again when the variance ends.

Although Midwest Generation cited to the recent Ameren Order in its Petition, the NGOs' Comments do not even mention the Ameren Order. Instead, the NGOs' Comments selectively cite to an older Board order in which the Board denied regulatory relief to Ameren back in 2009. *Ameren v. IEPA*, PCB 09-21 (Jan. 22, 2009) ("*Ameren I*"). Unlike in the more recent Ameren Order, the Board denied Ameren relief in *Ameren I* on the grounds that it considered Ameren to be seeking permanent relief from a standard. It was for this reason (*i.e.*, were the Board to apply the older *Ameren I* decision in this case and not its more recent Ameren Order) that Midwest Generation included an alternative in footnote 36 of its Petition that would explicitly impose the rates from which the Company seeks relief for half a month each (*i.e.*, 0.28 lb/mmBtu from January 1 through January 15, 2017, and 0.195 lb/mmBtu from January 16 through January 31, 2017) prior to returning to compliance with the 2017 CPS rate for the period February 1, 2017, through December 31, 2017. The NGOs' Comments incorrectly suggest that the Board rejected the same type of proposal from Ameren in *Ameren I*, and they ignore the more recent Ameren Order that found such an alternative unnecessary.

Furthermore, the NGOs' position leads to an illogical result. Looking at the issue in the simplest of terms, there are three ways Midwest Generation could have proposed to come back into compliance with CPS rates after obtaining temporary relief from the CPS in 2015 and 2016. Midwest Generation selected the most stringent option, consistent with the Ameren Order, which is to come into compliance with CPS rates beginning immediately after the period of the variance in 2017. Were the Board to deem it necessary that the less stringent 2015 and 2016 rates apply for some period of time after the variance, Midwest Generation proposed the alternative summarized in the preceding paragraph. The least stringent approach, which Midwest Generation did not seek but which the NGOs appear to suggest may be the only valid option, would be to impose the 2015 and 2016 rates for one full year each after the period of the variance. Presumably, this would mean the 2015 rate would apply in 2017 and the 2016 rate would apply in 2018. That, however, would require that the 2017 and 2018 rates be shifted to 2019 and 2020, respectively, which in turn would require that the 2019 rate be deferred until 2021.

The NGOs' interpretation of "temporary" would drive the least stringent result and would take the longest period of time for Midwest Generation to return to compliance with CPS rates. This is illogical and inconsistent with Board requirements. By contrast, Midwest Generation's proposal presents the quickest return to CPS rates following the variance period and is consistent with the relief the Board recently granted Ameren. Midwest Generation urges the Board to grant the requested, temporary relief from the CPS.

II. MIDWEST GENERATION'S ENHANCED COMPLIANCE PLAN COMPLIES WITH BOARD REQUIREMENTS.

The NGOs criticize the original compliance plan that Midwest Generation proposed with its Petition. Midwest Generation notes that it proposed an addition to the compliance plan in its

Response to the Board's Questions on January 18, 2013, plus a substantially enhanced compliance plan when it filed its Post-Hearing Brief, responding to what it understood to be the Board's concerns. This enhanced plan was reviewed with the Agency and its comments were incorporated in the plan submitted to the Board. Midwest Generation explained why the enhanced compliance plan satisfies Board requirements in detail in its Post-Hearing Brief and will not repeat those arguments in this Reply. Post-Hearing Brief, pp. 15-33. There are a couple points raised in the NGOs' Comments, however, that are worth addressing because they illustrate why the NGOs' criticism is misplaced.

One of the NGOs' observations highlights the commitment required to achieve the mass emission limits that Midwest Generation has proposed, as well as the resultant environmental benefit. In footnote 1 of the NGOs' Comments, the NGOs observe that, to meet the proposed 2016 mass emission limit at the proposed alternative emission rate of 0.38 lb/mmBtu, Midwest Generation would need to reduce its annual heat input by about 65 million British thermal units from the levels it would need in 2013 to achieve the 2013 mass emission limits if operating at the 2013 CPS rate of 0.44 lb/mmBtu. The NGOs assert that, in light of the substantial requisite reduction, Midwest Generation does not explain how it will be able to achieve the 2015 and 2016 proposed mass emission limits. The NGOs are incorrect. Midwest Generation has explained that it will need to undertake one or more of the following actions to meet these limits: over-comply with the emission rate, curtail generation, or shut down units. Post Hearing Brief, pp. 15-20. This comment, however, underscores the substantial commitment Midwest Generation has agreed to undertake as a condition of the variance.

The NGOs go on to speculate that the plants might be sold to new owners "that can afford to install pollution controls on the schedule required by the CPS." This "wait-and-see"

approach is grounded in speculation about one possible future scenario. But as Midwest Generation has explained, absent a variance, by about April 2013, Midwest Generation must begin making irrevocable decisions to initiate any control work and expenditures necessary to comply with the CPS rates for 2015 and 2016 and the CPS requirement to install FGD equipment at Waukegan Unit 8 or shut down by the end of 2014. *See* Petition, p. 10. There simply is no more time to wait.

Midwest Generation's enhanced compliance plan offers detailed, significant commitments from the Company that will ensure a net environmental benefit and that the Company will be able to comply with the CPS after the variance period. The plan satisfies the Board's requirements and supports granting the variance.

III. THE VARIANCE WILL ENSURE A NET ENVIRONMENTAL BENEFIT; IT WILL NOT ADVERSELY IMPACT HUMAN HEALTH OR THE ENVIRONMENT.

The NGOs assail Midwest Generation's calculation of a net environmental benefit. The Agency, on the other hand, has stated that the credits Midwest Generation calculated are "quantifiable and creditable." Agency Recommendation, p. 8. The NGOs' arguments should be rejected.

The NGOs misplace their reliance on two facts to argue that the emission benefit calculations were somehow flawed: (1) Midwest Generation's emissions of SO₂ were reduced in 2012 leading up to the initial CPS SO₂ rate requirement in 2013; and (2) Midwest Generation has dismantled part of a stack at Crawford Station. These arguments seek to penalize early emission reductions and completely ignore the Agency's position and prior variance precedent for these types of calculations. *See* Post-Hearing Brief, pp. 11-13. The NGOs offered these arguments at hearing and they are no more compelling now. *Id.* Contrary to the NGOs' assertions, the Agency agrees with Midwest Generation's calculation of net environmental benefit, stating in its

Recommendation that the proposed “emission reduction credits . . . are quantifiable and creditable” and that the Company’s calculation of “net environmental benefit in SO₂ emissions over the term of the variance is consistent with the method utilized in similar previous variance requests.” Agency Recommendation, p.8; *see, also*, Post-Hearing Brief, p. 11.

The NGOs next criticize the testimony of Dr. Fraiser, a certified toxicologist. They incorrectly assert that Dr. Fraiser focused solely on SO₂ emissions and ignored fine particulate matter. *See* NGOs’ Comments, p. 13. The NGOs then delve into some highly technical points that Dr. Fraiser made in her testimony. The NGOs offer no expert of their own, much less under oath, and they ignore the simple premise underlying Dr. Fraiser’s conclusion. Dr. Fraiser testified that “the fact that a power plant . . . emits sulfur dioxide, does not necessarily mean that adverse health effects will occur.” Hearing Transcript (“Tr.”), p. 121. But one does not even need to rely on that statement to accept her next point, that with the “net decrease in SO₂ emissions would also come a corresponding net health benefit, if you assume that the emissions from the plants are capable of causing health effects in the first place. . . . [T]he variance will also result in reductions in emissions of a variety of other air pollutants as well . . . [which] would be expected to result in the avoidance of potential health effects, in addition to the sulfur dioxide reductions.” *Id.* p. 124-25. These other pollutant emission reductions include particulate matter reductions. *See* Exhibit 10. The Agency did not dispute Dr. Fraiser’s conclusion at hearing.

Finally, the NGOs assert, “All of [Midwest Generation’s] facilities contribute to non-attainment of the 1-hr SO₂ NAAQS in the regions in which they operate.” NGOs’ Comments, p. 20. The NGOs then try to incorporate into this proceeding the allegations they have raised in a separate proceeding before this Board. That proceeding has been stayed. *See Sierra Club v.*

Midwest Generation, LLC, PCB 13-27. This variance proceeding is neither the proper time nor place to answer the erroneous allegations in another matter. It is highly improper for the NGOs to essentially attempt to litigate another, stayed matter in this variance proceeding. Regardless, the Company notes that the NGOs' allegations in that matter are just assertions. They are untested at this point, and they do not establish anything but the NGOs' views. More importantly, these unsworn assertions and the related implication that the variance somehow would interfere with the state's ability to comply with NAAQS requirements are inconsistent with the Agency's testimony, under oath, in this proceeding. Mr. Jim Ross, Manager of the Division of Air Pollution Control at the Agency, testified at hearing as follows:

Illinois EPA believes that granting the variance request will not jeopardize its current obligations under the Illinois Sip. [sic] Current obligations to attain and maintain the NAAQS will not be jeopardized due to the net environmental benefit over the term of the variance

Illinois EPA's obligations for the 2010 SO₂ NAAQS will not be jeopardized, since the variance ends December 31st 2016, while the attainment date of the 2010 SO₂ NAAQS is no sooner than July, 2017. The variance will end prior to the 2010 SO₂ NAAQS attainment date, and, therefore, no impact is expected.

Tr., p. 136-37.

Midwest Generation has demonstrated that the variance would provide a net environmental benefit and a corresponding health benefit, and would not jeopardize the State's ability to attain or maintain the NAAQS. These benefits support granting the variance.

CONCLUSION

For these reasons set forth in its Petition for Variance, its witnesses' testimony at hearing, its written responses to the Board's questions, its Post-Hearing Brief, and in this Reply, Midwest Generation respectfully requests that the Board grant its Petition for Variance.

Respectfully submitted,

MIDWEST GENERATION, LLC

by:



One of Its Attorneys

Dated: March 4, 2013

Kathleen C. Bassi
Stephen J. Bonebrake
Andrew N. Sawula
SCHIFF HARDIN LLP
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
312-258-5500
Fax: 312-258-5600
kbassi@schiffhardin.com
sbonebrake@schiffhardin.com
asawula@schiffhardin.com

Christopher M. Foley
Managing Director and Senior Counsel
Midwest Generation EME, LLC
500 West Madison Street, Suite 2640
Chicago, Illinois 60661
312-583-6003
cfoley@mwgen.com

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 4th day of March, 2013, I have served electronically the attached **MIDWEST GENERATION'S REPLY IN SUPPORT OF ITS PETITION FOR VARIANCE**, upon the following persons:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601
brad.halloran@illinois.gov

Dana Vetterhoffer
Assistant Counsel
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
dana.vetterhoffer@illinois.gov



Andrew N. Sawula

SCHIFF HARDIN LLP
Attorneys for Midwest Generation, LLC
Kathleen C. Bassi
Stephen J. Bonebrake
Andrew N. Sawula
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
Phone: 312-258-5567
Fax: 312-258-5600
kbassi@schiffhardin.com
sbonebrake@schiffhardin.com
asawula@schiffhardin.com

Christopher M. Foley
Managing Director and Senior Counsel
Midwest Generation EME, LLC
500 West Madison Street, Suite 2640
Chicago, Illinois 60661
312-583-6003
cfoley@mwgen.com