BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

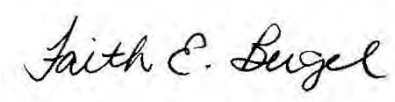
ILLINOIS POWER HOLDINGS, LLC, and AMERENENERGY MEDINA VALLEY COGEN, LLC,	)	PCB 2014-010 (Variance - Air)
Petitioners,	)	
AMEREN ENERGY RESOURCES, LLC,	)	
Co-Petitioner,	)	
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on September 24, 2013, I electronically filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois the **POST-HEARING COMMENTS** of Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,



Faith Bugel
Andrew Armstrong
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
312-795-3708

Dated: September 24, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS POWER HOLDINGS, LLC, and AMERENENERGY MEDINA VALLEY COGEN, LLC,	)	PCB 2014-010 (Variance - Air)
Petitioners,	)	
AMEREN ENERGY RESOURCES, LLC,	)	
Co-Petitioner,	)	
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

POST-HEARING COMMENTS OF ENVIRONMENTAL LAW & POLICY CENTER, NATURAL RESOURCES DEFENSE COUNCIL, RESPIRATORY HEALTH ASSOCIATION, AND SIERRA CLUB

Pursuant to 35 Ill. Adm. Code 104.224(d), Environmental Law & Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club (collectively, "Citizens Groups") submit the following comments on the Petition for Variance ("the Petition") filed by Illinois Power Holdings, LLC ("IPH"), AmerenEnergy Medina Valley Cogen, LLC ("Medina Valley"), and Ameren Energy Resources, LLC ("AER") with the Illinois Pollution Control Board ("Board") on July 22, 2013.

The Board should deny this improper Petition for "advisory" variances from the Multi-Pollutant Standard's ("MPS") fleet-wide SO_2 emission limits from 2015 through 2019. These variances would confer a benefit to a handful of corporations, at an unacceptably high cost to the general public. Petitioner IPH would benefit, because IPH would receive a pre-transaction approval of its plan to operate five AER coal plants for five extra years without installing needed

pollution controls. Petitioner IPH's parent company, Dynegy Corporation ("Dynegy"), would benefit, because Dynegy's creation of IPH as a new acquisition vehicle, with none of Dynegy's capital needed to install pollution controls, will have allowed Dynegy to place a risk-free bet on the power markets. Finally, the Ameren companies also would benefit, because AER could rid itself of over $800 million in debt that would be transferred to IPH—debt that Dynegy itself could walk away from if (most likely "when") the critically undercapitalized IPH ultimately fails.

It is the rest of the State that would bear the cost of the variances. State air quality as a whole would suffer from five more years of excess sulfur dioxide ("SO_2") pollution and resulting fine particulate matter. Locally, the communities around AER's three unscrubbed plants—E.D. Edwards, Newton, and Joppa—will continue to bear pollution in excess of the recently adopted National Ambient Air Quality Standard ("NAAQS") for maximum hourly concentrations of SO_2. These communities also would be tied to the undercapitalized IPH, and therefore would gain little more certainty about the future of the plants than they have now. The Board should deny the Petition because the variances' negative environmental impact outweighs the hardship to IPH in being required to comply with the MPS, and because its request for "advisory" variances is legally improper.

I. Petitioners Have Failed to Prove That Any Hardship is Not Self-Imposed.

The Board should deny the Petition, first, because any hardship IPH claims in complying with the MPS would be self-imposed. In order for the Board to grant a variance, the petitioner has the burden of presenting adequate proof that immediate compliance with regulations would impose an "arbitrary or unreasonable" hardship (including that the claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public). 415

ILCS 5/35(a); *see also*, *e.g.*, *Willowbrook Motel P'ship v. IPCB*, 135 Ill. App. 3d 343, 345 (1985); *Land and Lakes Company v. IEPA*, PCB 96-198 (Sept. 5, 1996), at 4; *We Shred It, Inc. v. IEPA*, PCB 92-180 (Nov. 18, 1993), at 3.

Importantly, however, a petitioner cannot meet this burden if the hardship it complains of is "self-imposed"—such a "hardship" simply cannot be deemed "arbitrary and unreasonable." *See*, *e.g.*, *City of Salem v. IEPA*, PCB 98-1 (July 3, 1998), at 4; *Bravo-Ernst v. IEPA*, PCB 81-62 (Dec. 3, 1981). Financial hardship resulting from a business decision—including a decision to acquire assets—is the very type of "self-imposed" hardship that cannot form the basis for a variance. *See*, *e.g.*, *Willowbrook Motel P'ship*, 135 Ill. App. 3d at 345 (holding that hardship was self-imposed where, as here, purchaser conditioned an offer to purchase property on its ability to obtain a variance); *IEPA v. Lindgren Foundry Co.*, PCB 70-1 (Sept. 25, 1970) (holding that hardship was self-imposed where petitioners purchased of a foundry with knowledge of environmental compliance issues and the fact that the foundry could not be operated profitably without a variance); *Ekco Glaco v. IEPA*, PCB 87-41 (Dec. 17, 1987) (holding that "any hardship in complying with the 1983 regulations is largely self-imposed, in that it results from prior business decisions"); *Skyway Realty v. IEPA*, PCB 75-249 (Sept. 18, 1975), at 2 (holding that hardship was not arbitrary or unreasonable where an entity proceeded with the construction of new homes while having full knowledge of a costly existing regulation, therefore making its hardship self-imposed).

In the present case, IPH's claimed "hardship" is plainly self-imposed. Most basically, the alleged financial hardship is solely the result of an intentionally risky business strategy that Dynegy— IPH's parent—is seeking to implement. This business strategy—a gamble on future energy prices—could be potentially lucrative for Dynegy shareholders if energy prices

unexpectedly increase. More likely, however, IPH will ultimately fail, and while Dynegy will not be harmed, citizens of Illinois will have suffered from years of increased air pollution by subsidizing Dynegy's gamble. All of this is a direct result of the intentionally irresponsible way in which Dynegy and IPH have chosen to structure the proposed acquisition.

The structure of the proposed transaction is examined in detail in the expert report ("ACM Report")[1] submitted by David Johnson[2] of ACM Partners in connection with the Petition. In his report, Mr. Johnson makes extremely clear that the structure of the proposed transaction, and the projected financial hardship at issue, is the direct result of an intentional business strategy being pursued by IPH and its corporate parent, Dynegy.

The proposed structure of the transaction, as well as the economics of the assets being acquired, makes the ACM Report's conclusion fairly apparent. Dynegy, acting through IPH (which it, in fact, formed for this purpose), is only proposing to acquire the AER plants because it has negotiated what it views as a potentially lucrative business deal where it proposes to: (a) acquire the AER plants in a bankruptcy remote subsidiary (*i.e.*, IPH)[3]; (b) not properly capitalize IPH or otherwise risk any significant amount of its own money;[4] and (iii) only commit to acquiring the AER plants if it gets advance approval of a variance such that IPH is not required

[1] The report includes an economic and financial analysis of the proposed transaction between Illinois Power Holdings, LLC ("IPH"), a subsidiary of Dynegy, and Ameren Energy Resources ("AER"), as well as an assessment of the strength of the financial hardship claim brought by the Petitioners. The analysis contained in Mr. Johnson's Report is incorporated herein by reference.

[2] Mr. Johnson is a recognized expert in his field, with a deep background in advising management, creditors and other key stakeholders on restructurings, distressed transactions, and the adequacy of proposed capital structures. He has authored over twenty articles in trade publications, and he routinely presents to management groups, lenders, and professional associations. He is also a frequent lecturer at business schools and has been cited in numerous business publications as a subject matter expert.

[3] *See* ACM Report at 5, 17.

[4] IPH's "thin" initial capitalization is coming from Ameren. Ameren, the seller, is committing $226 million to divest—*i.e.*, get rid of—the Coal Plants. *See* ACM Report at 4, 6.

to immediately comply with the MPS in operating the AER plants.[5] After a careful analysis of the structure and economics of the proposed transaction, Mr. Johnson concludes that:

> The precarious financial situation that IPH will immediately find itself in is plainly not an accident. Dynegy has gone to lengths to structure the transaction in this exact manner to keep it from having to invest money in or otherwise properly capitalize IPH. It has highlighted the non-cash nature of the deal to investors, presumably to assuage concerns about what might otherwise appear to be a questionable acquisition. After all, Ameren—itself a financially troubled public company—is affirmatively devoting $226 million (not counting risk sharing on future liabilities) to divest the Coal Plants and shed expected future losses (and likely restructuring costs).
>
> In light of the above—*i.e*. the problematic nature of the assets being acquired and the likelihood that a restructuring or bankruptcy of IPH will be necessary in the relative short term (absent an turnaround in energy prices that even IPH does not predict)—Dynegy management has also been at pains to assure its investors that IPH is "ring-fenced" (*i.e*. Dynegy will not be harmed by IPH failing).
>
> In short, it appears that Dynegy—a financially viable company that could properly capitalize IPH if it chose to—is attempting to structure the acquisition to position itself to make a low risk "gamble" on future energy prices. If wholesale electricity prices climb unexpectedly fast, the acquisition could be a great success, and if not—the far more likely outcome—Dynegy loses little even if IPH fails spectacularly.
>
> *Dynegy's conscious and strategic decision not to capitalize IPH and to generally structure the proposed transaction in a manner that will allow it to speculate on future energy prices, more than any other factor, is the overriding cause of any financial hardship claim IPH is currently claiming. Any financial hardship is thus plainly self-imposed, and to allow a variance under the circumstances would set very troubling precedent*. It would in essence give future buyers of environmentally problematic assets a "blueprint" for how to structure the acquisition so as to manufacture a perception of "financial hardship" and thereby avoid environmental compliance costs.

ACM Report at 30 (emphasis added).

[5] *See* ACM Report at 4.

In sum, this is the *exact* situation that the "self-imposed hardship" standard is designed to protect against. In fact, granting the Petition would set an extremely dangerous precedent. This precedent would allow any company looking to acquire distressed assets subject to environmental compliance costs to (1) put the asset into a shell entity; (2) propose to insufficiently capitalize it; and then (3) seek advance approval of a variance to remove the burden of environmental compliance.

IPH has preemptively attempted to distinguish its situation from several "self-imposed" hardship cases. *See* Petition PDF pages 52-53. This is both misleading and inaccurate at multiple levels. First, even the cases IPH cites plainly stand for the proposition that a hardship resulting from an affirmative business decision cannot form the basis for a variance. *See*, *e.g.*, *Ekco Glaco v. IEPA*, PCB 87-41 (Dec. 17, 1987) (denying variance application as a result of finding that "any hardship in complying with the 1983 regulations is largely self-imposed, in that it results from prior business decisions"); *Marathon Oil Co. v. IEPA*, PCB 95-150 (May 16, 1996) (holding that one's own decision-making cannot be the basis for a claim of arbitrary or unreasonable hardship). IPH's attempt to distinguish these cases factually—which itself is a stretch—does nothing to undermine the basic principle that they stand for.

Second, Dynegy has failed to address additional case law that is on point both factually and legally. Specifically, in *Willowbrook Motel Partnership*, purchasers formed an entity—just like Dynegy has formed IPH here—which agreed to purchase an interest in land where a motel was proposed to be developed. *See Willowbrook Motel P'ship v. Pollution Control Bd*., 135 Ill. App. 3d 343, 345 (1985). Just as in the present case, the proposed acquisition was conditioned on the partnership receiving a variance. *Id*. In other words, as here, the purchaser was only willing to proceed on the economic terms proposed if the variance request was approved. Thus,

the Board properly found that there had been "no showing of arbitrary or unreasonable hardship" and denied the petition for a variance. *See Willowbrook Motel P'ship v. IPCB*, PCB 81-149 (July 14, 1983), at 4. The appellate court affirmed the decision of the Board, holding that the proposed purchaser knew about the environmental restrictions, that "its development plans constituted a gamble to obtain permits," and that as a result its alleged hardship was self-imposed. *Willowbrook*, 135 Ill. App. 3d at 345.

Not only was the Board's decision affirmed on appeal, the appellate court also cited to the case of *IEPA v. Lindgren Foundry Co.*, PCB 70-1 (Sept. 25, 1970), where purchasers of a foundry argued that they were facing an "arbitrary and unreasonable" hardship because they could not profitably operate the foundry without a variance from environmental regulations. According to the Appellate Court in *Willowbrook*:

> The Board [in the *Lindren Foundry* case] stated that the new owners had reason to know when they invested that they could not operate the foundry without a favorable decision on their petition for a variance, and so their loss of investment was a self-imposed hardship. The Board considered the losses to creditors and former employees more sympathetically, but concluded that it was fair that the hardship be borne by those who would benefit from the operation.

135 Ill. App. 3d at 1036. In other words, just like *Willowbrook*, the *Lindgren Foundry* case makes clear that companies cannot structure an acquisition so as to require a variance—doing so is plainly creating a "self-imposed" hardship.

In the present case, just like in the foregoing cases, Dynegy and IPH have intentionally structured the proposed transaction so that they can now argue that IPH will not be able to operate profitably without a variance. The transaction does not have to be structured this way. If Dynegy really thought this was a good bet, Dynegy has the financial resources to properly

capitalize IPH in order to allow it to meet its environmental obligations.[6] It has chosen not to, thereby imposing upon IPH the projected "hardship" IPH complains of.[7] Alternatively, if the AER fleet is so over-leveraged that it cannot be operated profitably and in compliance with environmental regulations, another possibility would have been a restructuring where bondholders take a "haircut" as part of a transaction that results in a viable company.[8] Dynegy is instead asking the public to subsidize the transaction, preventing it or current debt-holders from having to face up to the compliance obligations associated with the assets.

In sum, any hardship IPH may face if the transaction goes through is plainly the result of the manner in which it and Dynegy have chosen to structure the proposed acquisition. Petitions for variances have routinely been denied where the hardship imposed on the petitioner was entirely self-imposed. This is especially true where the petitioner has made a business decision to attempt to acquire assets without assuming the environmental costs that go with it. In this case, the denial of a variance would not place any arbitrary or unreasonable hardship upon IPH or Dynegy, as any hardship imposed would be of their own making.

---

[6] ACM Report at 15 ("It is well within the financial capability of Dynegy to properly capitalize IPH, and Dynegy's failure to do so, more than any other factor, is the overriding cause of any financial hardship claim IPH may have.").

[7] These facts—that IPH will be undercapitalized from the start, that Dynegy has set IPH up as a bankruptcy remote subsidiary, and that Dynegy is not agreeing to invest any of its own cash into the deal and has been at pains to let investors know that it does not intend to support IPH going forward—cut directly against IPH's hardship claim. For example, in the *Lindgren Foundry* case (discussed above), purchasers of a foundry had put in little of their own money, and like Dynegy here, had structured the transactions so that they could easily dump the investment if it did not work out. The Board took this into account in denying the variance request, holding that:

> We are not greatly impressed by the owners' own alleged losses. In the first place, they can cut and run if prospects dim; they will not be stuck with a million-dollar plant they cannot sell or with the obligation to pay half a million in old debts. They will lose, at most, $70,000 by their own evidence.

Lindgren Foundry, PCB 70-1 (Sept. 25, 1970)

[8] In fact, a potential restructuring is likely only being postponed by structuring the transaction in this manner. *See* ACM Report at 16 ("Based on the high fixed costs that independent power producers wrestle with, and the highly leveraged capital structure of a post-transaction IPH, there is a reasonable concern that such a restructuring will not be avoided, but only deferred.".)

II. IPH's Proposed Variance Would Threaten Public Health.

The Petition also should be denied because IPH's proposed variance would have a significant negative environmental impact that outweighs IPH's self-imposed hardship. The excess SO_2 emissions permitted by the variance would cause both 1) local health impacts in the communities around unscrubbed AER plants through direct short-term exposure to SO_2 and 2) degradation of air quality throughout the State (and region) through transformation of SO_2 into fine particulate matter ("PM2.5").

In evaluating whether a proposed variance is necessary to avoid an "arbitrary or unreasonable hardship," 415 ILCS 5/35, the Board must balance individual hardship against environmental impact. *Monsanto Co. v. IPCB,* 67 Ill. 2d 276, 292 (1977). IPH bears the burden of demonstrating that "the hardship resulting from a denial of the variance outweighs any injury to the public or the environment from a grant of the variance." *Marathon Oil Co. v. IEPA*, 242 Ill. App. 3d 200, 206 (5th Dist. 1993). This entails an analysis of both 1) "the nature and amount of emissions . . . if the variance is granted, compared to those that would result if immediate compliance were required" and 2) a "qualitative and quantitative description of the impact of petitioner's activity on human health and the environment if the requested variance is granted, compared to the impact of petitioner's activity if immediate compliance is required." 35 Ill. Adm. Code 104.204(g).

In this case, IPH has understated both the amount of excess SO_2 emissions that would be attributable to its proposed variance and the emissions' impact on public health. In calculating the amount of emissions if the variance is granted, IPH relied upon outdated average heat inputs for the AER plants from up to seven years ago. That is inconsistent with the approach the Board approved in assessing the environmental impact of the variance granted to Midwest Generation

earlier this year. *See Midwest Generation, LLC v. IEPA*, PCB 13-24 (Apr. 4, 2013), at 66 (relying upon average annual heat input of four most recent years to assess environmental impact). IPH also improperly relies upon "credits" from the shutdowns of the Meredosia and Hutsonville plants, even though those plants are no longer relevant for MPS compliance purposes. As discussed in Section III.B, below, Citizens Groups' analysis of the variance using appropriate heat inputs, and excluding Meredosia and Hutsovnille, shows that the variance would yield almost 50,000 tons more SO_2 emissions from the fourth quarter of 2013 through 2020 than would compliance with the MPS. Citizen Groups' analysis is attached hereto as Exhibit A.

Even more, IPH has failed to adequately characterize the public health impacts of the AER plants' SO_2 emissions. IPH does not acknowledge the localized impact that the three unscrubbed AER coal plants—E.D. Edwards, Joppa, and Newton—have on surrounding communities. This impact is demonstrated by the United States Environmental Protection Agency's ("U.S. EPA") recent designation of the community surrounding the E.D. Edwards plant as nonattainment for the latest National Ambient Air Quality Standard ("NAAQS") for SO_2, as well as by the dispersion modeling analyses presented by Mr. Steven Klafka. Mr. Klafka's analyses predicted that each of the three unscrubbed plants cause NAAQS exceedances, whether based on permitted or measured actual emissions. Contrary to Petitioners' attempts to minimize the harm of SO_2 pollution in general, NAAQS exceedances reflect that current emissions from the AER plants already are threatening public health. Any further delay in MPS compliance will mean further harm.

A. The Proposed Variance Would Cause Localized Environmental Harm By Allowing the Continued Operation of Unscrubbed Coal Plants.

IPH has failed to acknowledge that its proposed variance would delay the installation of pollution controls or curtailment of operations for one or more of AER's three unscrubbed coal plants. As a consequence, the variance would allow a negative environmental impact—local exceedances of the 2010 NAAQS for SO_2—to continue through the end of the decade.

IPH in this proceeding appears to question the premise that direct SO_2 exposure has any demonstrable negative health impact. IPH is flatly wrong. U.S. EPA has found that direct short-term exposure to SO_2 is linked to "an array of adverse respiratory effects including bronchoconstriction [i.e., the constriction of airwaves] and increased asthma symptoms." U.S. EPA, http://www.epa.gov/airquality/sulfurdioxide/health.html. To address direct short-term exposure, U.S. EPA in 2010 promulgated a new primary NAAQS setting a maximum hourly ambient air concentration for SO_2 of 75 parts per billion. U.S. EPA, *Primary National Ambient Air Quality Standard for Sulfur Dioxide*, 75 Fed. Reg. 35520 (June 22, 2010).[9] In setting the standard, U.S. EPA considered a "broad range of scientific information" and ultimately concluded that the new NAAQS was "necessary to provide increased public health protection for at-risk populations against an array of adverse respiratory health effects related to short-term (i.e., 5 minutes to 24 hours) exposures to ambient SO_2." *Id*. at 35541.

U.S. EPA set the NAAQS pursuant to Section 109(a) of the Clean Air Act, 42 U.S.C. § 7409, which directs the U.S. EPA to promulgate "primary" and "secondary" NAAQS for pollutants for which air quality criteria have been issued. Section 109(b)(1) defines a "primary" standard as one "the attainment and maintenance of which in the judgment of the Administrator,

[9] Specifically, the standard is based on the 3-year average of the 99th percentile of the yearly distribution of 1-hour daily maximum SO_2 concentrations. *Id*. at 35222.

based on the air quality criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The Clean Air Act's legislative history indicates that a primary standard is to be set at "the maximum permissible ambient air level . . . which will protect the health of any sensitive group of the population." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 10 (1970). The U.S. Court of Appeals for the D.C. Circuit has explained:

> NAAQS must protect not only average healthy individuals, but also 'sensitive citizens' such as children, and if a pollutant adversely affects the health of these sensitive individuals, EPA must strengthen the entire national standard.

Coalition of Battery Recyclers Ass'n v. U.S. EPA, 604 F.3d 613, 618 (D.C. Cir. 2010) (internal quotations and citations omitted).

In its Petition and at the September 17, 2013 hearing before the Board, IPH has misconstrued the significance of U.S. EPA's promulgation of the 2010 NAAQS. For example, IPH witness Dr. Lisa Bradley stated at hearing that "there are misconceptions about what the scientific research is telling us" about the health effects of exposure to SO_2. Transcript at 74, lines 20-21. She asserted that the U.S. EPA's Integrated Science Assessment ("ISA") supporting the new NAAQS concluded that studies "do not provide sufficient evidence to infer a causal relationship between *long-term* exposure to SO_2" and negative health outcomes. *Id*. at 79, line 14, to 80, line 2 (emphasis added). Only after questioning from the Board did Dr. Bradley mention that U.S. EPA's ISA also had addressed impacts of *short-term* exposure to SO_2—the very subject of the 2010 NAAQS. *Id*. at 80, line 16, to 81, line 3. Even then, Dr. Bradley implied that the NAAQS had been based on only one epidemiological study showing a statistically significant correlation between SO_2 exposure and negative health impacts. *Id*. Dr.

Bradley further asserted that later evaluations of epidemiological studies had shown that "correlations with health effects are actually due to other pollutants." *Id*.

Dr. Bradley's statements are both factually incorrect and legally irrelevant. Contrary to Dr. Bradley's implication, the U.S. EPA did not adopt the NAAQS based on a single epidemiological study. As discussed in the Federal Register notice adopting the rule, U.S. EPA considered controlled human exposure studies; "numerous epidemiologic studies [that] reported positive associations between ambient SO_2 concentrations and respiratory symptoms in children, as well as emergency department visits and hospitalizations for all respiratory causes and asthma across multiple age groups"; and toxicological studies demonstrating that the basic physical effect of SO_2 exposure is bronchoconstriction. 75 Fed. Reg. at 35525. In the same notice, U.S. EPA also specifically addressed the contention from industry commenters that negative health impacts associated with SO_2 exposure actually are caused by other pollutants, stating:

> Although EPA has recognized that multiple factors can contribute to the etiology of respiratory disease and that more than one air pollutant could independently impact respiratory health, *we continue to judge, as discussed in the ISA, that the available evidence supports the conclusion that there is an independent effect of SO_2 on respiratory morbidity* . . . . It is therefore important to note that when the ISA evaluated U.S. and international epidemiologic studies employing multi-pollutant models, SO_2 effect estimates generally remained positive and relatively unchanged when co-pollutants, including PM, were included.

Id. at 35531 (emphasis added).

The Board should disregard IPH's attempts to relitigate the merits of the 2010 SO_2 NAAQS. The U.S. Court of Appeals for the D.C. Circuit already has rejected similar challenges, and affirmed that U.S. EPA did not act arbitrarily in setting the NAAQS. *National Envtl. Development Assoc.'s Clean Air Project v. EPA*, 686 F.3d 803, 805 (D.C. Cir. 2012), *cert. denied* 133 S. Ct. 983 (2013). IPH should acknowledge the significance of U.S. EPA's action.

Pursuant to its statutory mandate to set a SO_2 standard "requisite to protect the public health"—including specifically the health of particularly sensitive subgroups—U.S. EPA promulgated a maximum hourly standard of 75 parts per billion. Exceedances of this standard now must be regarded as constituting a threat to the health of the public exposed to heightened levels of SO_2.

Indeed, the Board in earlier variance cases has evaluated environmental impact in connection with NAAQS compliance, and has relied on air quality modeling to do so. In *Central Illinois Light Co. v. IEPA*, PCB 99-80 (Apr. 15, 1999), the Board evaluated a petition for a variance from regulatory sulfur dioxide limits at the E.D. Edwards plant sought by AER's successor. The Board assessed whether granting the variance would threaten the area's compliance with the then-applicable NAAQS for SO_2. The Board reviewed an air quality modeling analysis provided by the petitioner which showed that the emission changes from the variance would result in a total concentration of SO_2 in the area that was still "well below the NAAQS for sulfur dioxide." *Id*., at 5. The Board therefore concluded that the variance would not have a negative environmental impact because "the analysis shows that the proposed variance will not threaten the area's compliance with the NAAQS, the standard that the USEPA has established to 'protect the health and welfare of all citizens.'" *Id*., at 5, 6. *See also Wallace Pharmaceuticals v. IEPA*, PCB 02-207 (Sept. 19, 2002), at 3 ("The Agency agrees that the requested variance should result in no significant environmental harm, as Wallace is not out of compliance at this time and the requested relief will not result in an increase in VOM emissions that will threaten violation of the ozone NAAQS in the area.").

Therefore, it is significant in this case that all three of AER's unscrubbed coal plants all have been predicted to cause NAAQS exceedances. With respect to the E.D. Edwards plant, this is demonstrated by the fact that U.S. EPA has designated Hollis Township in Peoria County, the

area surrounding the plant, as non-attainment, because on monitored exceedances of the NAAQS. U.S. EPA, *Air Quality Designations for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standards*, 78 Fed. Reg. 47191, 47198-99 (Aug. 5, 2013).

For all three plants, though, the reports submitted by Mr. Klafka further indicate that that the plants' permitted and actual emissions are predicted to cause exceedances of the NAAQS.[10] Mr. Klafka conducted a dispersion modeling analysis for each plant to assess compliance with the 2010 SO_2 NAAQS. *See*, *e.g.*, Klafka Edwards Report at 2. Following the most recent federal and state guidance, Mr. Klafka utilized U.S. EPA's AERMOD air dispersion model to predict the downwind SO_2 concentrations associated with each plant's emissions—both currently permitted and measured actual. *See*, *e.g.*, *id* at 2. For each plant, Mr. Klafka's analysis predicted exceedances of the NAAQS throughout their respective regions, to a maximum distance of fifty kilometers for the Edwards and Joppa plants, and to a maximum distance of eight kilometers for the Newton plant. *Id*. at 3; Klafka Joppa Report at 3; Klafka Newton Report at 4.

Petitioners have questioned how Mr. Klafka's analysis of one-hour NAAQS compliance is relevant to a variance proceeding from the MPS. The answer is simple. Compliance with the MPS's lower annual fleet-wide emission limits will in any case require significant reductions in SO_2 emissions from one or more of the three unscrubbed AER plants. This could come in the form of completion of the Newton scrubber project; the installation of dry sorbent injection at one or more plants; or significant curtailments in operation at one or more of the plants. Delaying compliance with the MPS means continuing localized NAAQS exceedances at the

[10] Mr. Klafka is an environmental engineer with over thirty years of experience in air quality modeling. He is a registered professional engineer in several states, including Illinois. He works for Wingra Engineering, a consulting business he started two decades ago. Serving a broad mix of clients, including utilities, industries, environmental groups, and neighborhoods, Mr. Klafka has conducted numerous air dispersion modeling analyses to determine facilities' compliance with air quality standards.

three unscrubbed plants. As the Board's precedent demonstrates, NAAQS exceedances are a touchstone of a variance's negative environmental impact. The Board accordingly should deny the Petition.

B. The Proposed Variance Would Negatively Impact State and Regional Air Quality By Allowing More Fleetwide SO_2 Emissions

SO_2 also is a precursor to fine particulate matter, which is "associated with a number of serious health effects including premature mortality, aggravation of respiratory and cardiovascular disease . . . , lung disease, decreased lung function, asthma attacks, and certain cardiovascular problems." U.S. EPA, *Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals*, 76 Fed. Reg. 48208, 48218 (Aug. 8, 2011). The MPS was adopted, in part, to address the particulate matter formed by SO_2 emissions at Illinois coal plants.[11] U.S. EPA has found that Illinois coal plants' emissions of SO_2 and nitrogen oxides contribute to PM2.5 issues throughout the Midwest, from Indiana to Michigan to Ohio, and all the way south to Alabama and Georgia. *Id*. at 48,241-45. Within Illinois, Illinois EPA has cited the MPS as supporting continued attainment of the 1997 PM2.5 NAAQS in the Chicago region. *See*, *e.g*., U.S. EPA, *Approval and Promulgation of Air Quality Implementation Plans; Illinois; Redesignation of the Chicago Area to Attainment of the 1997*

[11] Discussing the MPS in testimony before the United States Congress, then-Director of the Illinois EPA, Doug Scott stated:

> SO_2 is a precursor to particulate matter . . . . Particulate matter related annual benefits include fewer premature fatalities, fewer cases of chronic bronchitis, fewer non-fatal heart attacks, fewer hospitalization admissions (for respiratory and cardiovascular disease combined) and should result in fewer days of restricted activity due to respiratory illness and fewer work loss days. Moreover, there should be health improvements for children from reduced upper and lower respiratory illness, acute bronchitis, and asthma attacks.

Exhibit B, Scott Testimony, at 9.

Annual Fine Particulate Matter Standard (Proposed Rule), 78 Fed. Reg. 48103, 48119 (Aug. 7, 2013).

Therefore, in addition to the localized impacts of AER's unscrubbed plants, it is important to consider the AER plants' fleetwide emissions, as the Board has done in earlier proceedings for variances from the MPS. Petitioners assert, and Illinois EPA agrees, that the variance would yield a "net environmental benefit." *See* Petition at PDF page 61; Illinois EPA Recommendation at 2. However, Petitioners' analysis includes three features that significantly overstate the baseline fleet emissions to which Petitioners compare emissions expected under the variance. Together, these features disguise a significantly negative environmental impact.

First, in their original analysis, Petitioners compared emissions during two different timeframes: 2010 to 2020, and 2013 to 2020. *See* Petition at PDF page 65. Neither timeframe is appropriate. In Ameren's 2012 variance proceeding, the Board held that pre-variance emissions are not relevant when assessing a proposed variance's environmental impact. *Ameren Energy Resources v. IEPA*, PCB 12-126 (Sept. 20, 2012), at 57. Citizen Groups therefore support the Board's indication in its September 12, 2013 questions to the Petitioners that it views the fourth quarter of 2013 as a proper starting point for assessing environmental impact.

Second, Petitioners' analysis is based on average heat inputs at the AER plants that are now far outdated. Specifically, IPH's analysis relies upon a baseline heat input for the AER fleet (including Meredosia and Hutsonville) of 340,446,252 MMBtu annually. *See*, *e.g.*, Petition at Exhibit 10, Tables 1 and 2. IPH's baseline heat input without Meredosia and Hutsonville is 312,003,694 MMBtu annually. *Id*. These figures originate from AER's analysis of fleetwide emissions in its 2009 docket amending the Multi-Pollutant Standard, *In the Matter of: Proposed Amendments to 35 Ill. Adm. Code 225: Control of Emissions From Large Combustion Sources*

(Mercury Monitoring), R09-10. *See AER*, PCB 12-126 (July 30, 2012) (AER's Responses to the Illinois Pollution Control Board Technical Unit's Questions) at 8. This figure represents the average heat input at the plants from 2006, 2007, and 2008. *Id*. Ameren also used this figure in seeking a variance last year. *Id*.

Whatever the merits of this approach in earlier proceedings, these average heat inputs no longer reflect reality for the AER plants. Citizen Groups urge the Board to follow its approach in evaluating Midwest Generation's proposed variance earlier this year. In that case, the Board evaluated the impacts of the proposed variance using the fleet's average heat inputs from 2008 to 2011, the four most recent full years of available data at the time the petition was filed. *See Midwest Generation, LLC v. IEPA*, PCB 13-24 (Apr. 4, 2013), at 66. In this case, based on U.S. EPA Air Markets data, the average heat input for the five remaining AER plants is 283,259,518 MMBtu. *See* Exhibit C, 2009-2012 AER Fleet Emissions.

Third, Petitioners' analysis includes "credits" related to the shutdowns of the Meredosia and Hutsonville plants. This is inconsistent with the Board's June 6, 2013 order stating that any variance request related to the five plants IPH proposes to purchase would require "a new analysis specifically related to the five facilities in the requested variance." *AER* (June 6, 2013), at 11. There is no legitimate regulatory reason for Medina Valley to seek a variance related to Meredosia and Hutsonville, and therefore no reason that the plants should factor into the analysis of IPH's proposed variance. Both plants are shut down and no longer produce electricity for sale, as is required by the MPS' definition of "EGUs" subject to the MPS. 35 Ill. Adm. Code 225.233(e)(3)(c)(iii). Therefore, under the MPS, they simply are not a factor in MPS compliance. *See In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources*, R06-25 (Tr. Aug. 15, 2006) at 350-51 (containing testimony

from Illinois EPA witness stating that shutdown MPS units "no longer have to worry about the complexities of [MPS compliance]").

Moreover, there is no reason to conclude that the existing Meredosia and Hutsonville units ever will ever generate electricity again. As stated by Illinois EPA witness Chris Romaine during the original MPS rulemaking: "I don't believe that power plants usually shut down for ten years and start back up." *Id*. This point is further supported by Illinois EPA's August 23, 2013 release for public comment of two draft construction permits for the FutureGen 2.0 project, to be built at the site of the retired Meredosia plant. *See* Illinois EPA, *Project Summary for the Construction Permit Applications from Ameren and the FutureGen Industrial Alliance, Inc., for Construction of an Oxy-Combustion Power Plant at the Meredosia Energy Center in Meredosia, Illinois* at 2 (available at http://www.epa.state.il.us/public-notices/2013/ameren-futuregen-meredosia/project-summary.pdf).[12]

In the FutureGen 2.0 Project Summary, Illinois EPA states it does not consider the FutureGen 2.0 project to trigger the applicability of federal Prevention of Significant Deterioration of Air Quality ("PSD") regulations for major new projects because of "decreases from the permanent shut down of the existing coal and oil fired boilers at the Meredosia Energy Center." *Id*. at 4-5. In other words, Illinois EPA contends, the net difference of emissions from the proposed FutureGen 2.0 project and the now-shuttered coal and oil fired units at Meredosia are not significant enough to warrant PSD review. Illinois EPA's approach demonstrates the permanence of Meredosia's shutdown.

Attached as Exhibit A is an analysis of emissions under the MPS and under IPH's proposed variance, from the fourth quarter of 2013 through 2020, using an average baseline heat

[12] The permit applications were submitted by Ameren Energy Resources Generating Company and the FutureGen Industrial Alliance.

input of 283,259,518 MMBtu for the AER fleet, and disregarding the closure of Meredosia and Hutsonville, but including adjustments for the 2017 retirement of E.D. Edwards Unit 1 and opening of FutureGen 2.0. The analysis shows that baseline SO_2 emissions at the AER fleet under the MPS are expected to be 279,719 tons through 2020. This is 48,227 tons fewer than IPH's recently proposed fleetwide emission cap of 327,996 tons from the fourth quarter of 2013 through 2020. The variance therefore will have a negative environmental impact.

The insufficiency of IPH's recently proposed cap also is demonstrated by considering AER's 2012 emissions. In 2012, the AER fleet emitted only 45,711 tons of emissions. Over seven-and-a quarter years, that would amount to 331,404 tons of SO2. In other words, IPH's commitment to a fleetwide cap of 327,996 tons would allow it to emit SO_2 at nearly the same average rate that AER did in 2012—even though IPH purportedly will be installing an FGD system at Newton and retiring Unit 1 at E.D. Edwards during this time period. Whether assessed for its localized impacts at unscrubbed AER plants, or on a fleetwide level, IPH's proposed variance will have a negative environmental impact that outweighs IPH's self-imposed hardship.

III. Petitioners Cannot Be Granted Variances Because They Do Not Own Plants Regulated By the MPS.

Finally, the Board should reject the Petition because Petitioners are improperly seeking "advisory" variances applicable to facilities they do not yet own. Granting these variances would be contrary to law and would set a terrible precedent for future cases.

Petitioners' proposed transaction remains hypothetical.[13] As discussed at length in Citizen Groups' August 15, 2013 Objection, granting Petitioners "advisory" variances in this

[13] As of the filing date of these comments, the Federal Energy Regulatory Commission ("FERC") has not authorized the transaction. Instead, FERC has requested additional information of the Petitioners, and several parties have filed oppositions. Also, as discussed in the comments and in Section III.B, above, Petitioner Medina Valley will not own facilities subject to the MPS even if the transaction closes.

case would be contrary to the Board's regulations, *see* 35 Ill. Adm. Code 104.202(a); the Board's previous decision in *The Ensign-Bickford Co. v. IEPA*, PCB 02-159 (Apr. 3, 2003), in which the Board provided that the proposed buyer of a facility should seek variance relief only after it had purchased the facility at issue; and the Board's long-standing disfavor of the issuance of advisory opinions.

Notably, the Illinois EPA has not endorsed Petitioners' approach. In its Recommendation, Illinois EPA stated that it "neither supports nor objects" to the Board's granting the Petition. Recommendation at 1. However, the Board noted the Citizen Groups' objection to the legal sufficiency of Petitioners' request for variances related to facilities they had not yet purchased, and stated:

> As to whether or not Petitioners may properly seek the variance relief requested given the pendency of the related transaction that would transfer ownership of the Energy Centers in question, the Illinois EPA posits that any ruling by the Board be specifically limited to the unique facts of the situation presented.

Recommendation at 6 n.2. In other words, Illinois EPA appears to contend that, if the Board determines to grant the proposed variances, the Board should not regard such advisory variances as generally acceptable.

Yet granting the proposed variances in this case would set a terrible precedent for future cases. Granting the variances would send a signal to companies doing business in Illinois that they can create brand-new, undercapitalized acquisition vehicles, unable to comply with environmental requirements, and then obtain a variance from those environmental requirements ***because of*** that undercapitalization. Moreover, the decision would signal that undercapitalized companies could seek an advisory opinion from the Board whether their proposed level of undercapitalization is acceptable, or if they should come back with a "better offer." That is not

how Illinois law should work. The baseline rule should be that environmental compliance requirements be factored into transaction prices. Variances should be reserved for cases where a company has made a good-faith effort to comply with environmental requirements but through no fault of its own has run short of time or money. IPH is not that company, and this case demonstrates why granting advisory variances reflects bad policy.

What is most troubling about Petitioners' request is the manner in which it has come to pass. Last year, AER received a variance by representing a deep commitment to its plants and their communities. Closing its post-hearing comments with multiple pages of comments from plant workers and community leaders, AER concluded that "it is not ready to give up on the completion of the Newton scrubber and *it certainly is not prepared to give up on the plants*." *AER*, PCB 12-126 (Aug. 15, 2012) (AER Post-Hearing Comments), at 55 (emphasis added). Despite this ringing proclamation, Ameren in December 2012 announced its intention to exit the Illinois merchant generation business. Lisa Brown, *Ameren to exit merchant generation business*, ST. LOUIS POST-DISPATCH (Dec. 20, 2012), *available at* http://www.stltoday.com/business/local/ameren-to-exit-merchant-generation-business/article_9b768f23-bd51-566a-8d6e-fdc1dd36f483.html (attached as Exhibit D). And just months after that announcement, in March 2013, Dynegy announced its intention to purchase and operate the AER plants through the newly-created subsidiary IPH—but only if it were allowed the same variance from the MPS that AER had been allowed.

Now, again, IPH has made the same arguments that AER did last year regarding the economic impacts of the affected plants. Citizen Groups ask the Board to closely examine IPH's claims. An undercapitalized IPH will not provide the stability that Dynegy has represented to Illinois communities. In the past year, in the community of a closed coal plant in

New York, Dynegy has litigated with local property tax authorities over the amount of back taxes Dynegy owes, based on Dynegy's claimed devaluation of the plant. *See* Jessica DiNapoli, *Dynegy: Cut tax assessments 90%: Decision could mean millions*, TIMES HERALD-RECORD (Aug. 22, 2012), *available at* http://www.recordonline.com/apps/pbcs.dll/article?AID=/20120822/NEWS/208220330; Jessica DiNapoli, *Danskammer power plant sale dragging due to taxes: Company still owes $11M*, TIMES HERALD-RECORD (July 2, 2013), *available at* http://www.recordonline.com/apps/pbcs.dll/article?AID=/20130702/NEWS/307020326 (attached as Exhibit E). How would Dynegy contend that the AER fleet should be valued, given that IPH would be paying nothing for it? Any assertions of IPH in this case of preserved jobs and property taxes should be viewed in light of Mr. David Johnson's summary of the proposed transaction: "If wholesale electricity prices climb unexpectedly fast, the acquisition could be a great success, and if not—the far more likely outcome—Dynegy loses little even if IPH fails spectacularly." ACM Report at 30. The Board should not sanction this risky proposed transaction, which entails a certain negative environmental impact, with no such corresponding benefit to the Illinois public.

IV. Conclusion

For the reasons set forth in these Post-Hearing Comments, the Board should deny the Petition for Variance.

Respectfully submitted,

Faith Bugel
Andrew Armstrong
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
312-795-3708
FBugel@elpc.org
AArmstrong@elpc.org

DATED: September 24, 2013

CERTIFICATE OF SERVICE

I, Faith Bugel, hereby certify that I have filed the attached POST-HEARING COMMENTS on behalf of the Citizens Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club in PCB 2014-10. The aforementioned documents have been served upon the attached service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on September 24, 2013.

Respectfully submitted,

_____

Faith Bugel
Senior Attorney
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
312-795-3708

SERVICE LIST
September 24, 2013

Gina Roccaforte, Assistant Counsel
Illinois EPA
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Renee Cipriano
Amy Antoniolli
Schiff Hardin, LLP
6600 Willis Tower
233 South Wacker Drive
Chicago, IL 60606

Claire A. Manning
William D. Ingersoll
Brown, Hay & Stephens LLP
205 South Fifth Street, Suite 700
P.O. Box 2459
Springfield, Illinois 62705-2459

AER Fleet Emissions Under MPS Baseline and Under Proposed IPH Variance

Year	Heat Input (mmBtu) (Average of 5 AER Plants from 2009-2012)	MPS Baseline SO2 Emission Limit (lb/mmBtu)	MPS Baseline SO2 Allowed Emissions (tons)	Proposed Variance SO2 Emission Limit (lb/mmBtu)	Proposed Variance SO2 Allowed Emissions (tons)	Annual Increase in SO2 Allowed Emissions Because of Variance (tons)	Cumulative Increase in SO2 Allowed Emissions Because of Variance (tons)		Edwards Unit 1 at 8,617,891 mmBtu/yr (Average from 2009-2012)	FutureGen	Cumulative Decrease From Edwards Unit 1 and FutureGen	Cumulative Increase, with Edwards Unit 1 and FutureGen
4Q 2013	70,814,880	0.50	17,704	0.35	12,393	-5,311	-5,311		0	0	0	-5,311
2014	283,259,518	0.43	60,901	0.35	49,570	-11,330	-16,641		0	0	0	-16,641
2015	283,259,518	0.25	35,407	0.35	49,570	14,163	-2,478		0	0	0	-2,478
2016	283,259,518	0.25	35,407	0.35	49,570	14,163	11,685		0	0	0	11,685
2017	283,259,518	0.23	32,575	0.35	49,570	16,996	28,680		1,508	590	918	27,762
2018	283,259,518	0.23	32,575	0.35	49,570	16,996	45,676		1,508	590	1,836	43,840
2019	283,259,518	0.23	32,575	0.35	49,570	16,996	62,671		1,508	590	2,754	59,917
2020	283,259,518	0.23	32,575	0.23	32,575	0	62,671		1,508	590	3,672	60,769
Total Baseline			**279,719**		**342,390**		**62,671**		**6,032**	**2,360**	**3,672**	**60,769**
IPH's Proposed Cap:			**327,996**									
Difference Between Baseline and												
IPH's Proposed Cap			**48,077**									

Written Testimony of Douglas P. Scott
Director, Illinois Environmental Protection Agency
Before the:
U.S. Senate Committee on Environment and Public Works/
Subcommittee on Clean Air and Nuclear Safety
On the Issue of:
"Oversight: Environmental Protection Agency's Clean Air Regulations –
One Year after the CAIR and CAMR Federal Court Decisions"
July 9, 2009

Mr. Chairman and Members of the Committee: My name is Doug Scott and I am the Director of the Illinois Environmental Protection Agency. I want to thank Senator Carper and the other members of the Senate Subcommittee on Clean Air and Nuclear Safety for this opportunity to testify on Illinois' regulations to control sulfur dioxide, nitrogen oxides and mercury emissions from the State's coal-fired power plants.

I received a Bachelor's Degree with honors from the University of Tulsa in 1982, and received a graduate Juris Doctor law degree with honors from Marquette University in 1985. I served as Assistant City Attorney and City Attorney for the City of Rockford, Illinois from 1985 to 1995. I also represented the City on a number of environmental issues. From1995-2001 I served as an Illinois State Representative for the 67th District and served on the House Energy and Environment Committee, and was a member of the committee that rewrote the States' electric utility laws. I was elected to the Office of the Mayor of Rockford in April 2001 and served a four-year term and served as President of the Illinois Chapter of the National Brownfields Association. I was appointed as the Director of the Illinois EPA by Governor Rod Blagojevich in July 2005, and have served as Chair of the Air Committee of the Environmental Council of the States (ECOS), the national organization of state environmental agency leaders.

I am pleased to be here to provide testimony on the "three pollutant" approach and Illinois' experience in reaching agreements with our state's three largest coal-fired power plant system owners. My testimony will provide background information and a broad overview of the

development of Illinois' multi-pollutant reduction agreements. I will address some of the measures the Illinois EPA took during rule development to ensure that we relied on accurate and current information as we crafted the rule.

Illinois Multi-Pollutant Regulatory Approaches

Illinois is a large industrial state with a population of about 13 million people and a gross state product of $522 billion. Each of these are approximately four percent of the U. S. total and ranks Illinois as fifth among the nation in these categories. Illinois obtains more than 40 percent of its electricity from coal-fired power plants and sits on top of 38 billion tons of coal, giving it the third largest coal reserves in the nation. Coal-fired power plants in Illinois constitute the largest source of man-made emissions of mercury (Hg) and sulfur dioxide (SO_2), and one of the largest sources of nitrogen oxides (NO_x). Illinois is home to 21 large coal-fired plants that operate electric generating units.

Over the last several years in Illinois, exceptional progress has been made in reducing the emissions that contribute to ozone and particulate matter (PM) air pollution, as well as reducing toxic Hg emissions that deposit into and contaminate Illinois' waters and fish. In particular, the Illinois Environmental Protection Agency (Illinois EPA) reached landmark multi-pollutant standard agreements with the three largest coal-fired power plant systems operating in Illinois: Midwest Generation, Ameren and Dynegy. These three companies represent 88% of Illinois' 17,007 megawatts of coal-fired electric generating capacity and account for hundreds of thousands of tons of air emissions each year.

These multi-pollutant standards (MPS) are expected to result in measurable air quality improvements in Illinois and also in regional air quality by dramatically reducing Hg, SO_2, and NO_x emissions from Illinois' coal-fired power plants. The agreed-to multi-pollutant standards are one of the most important environmental and public health advances in Illinois in recent decades. They represent the largest reductions in air emissions ever agreed to by individual companies in Illinois under any context, whether through an enforcement action or regulation.

As a result of the knowledge and experience gained through Illinois' efforts, the Illinois EPA supports a comprehensive national strategy for reducing emissions of multiple pollutants from electric generating units. A comprehensive, integrated approach benefits both regulators and the regulated community. Multi-pollutant approaches should supplement, not replace, the existing Clean Air Act programs such as New Source Review (NSR), Maximum Achievable Control Technology (MACT) standards and regional haze, as well as other important statutory requirements for achieving and sustaining clean air.

In meeting emission goals, the regulated community should be afforded flexibility, where appropriate, which may include an emissions trading mechanism for NOx, and SO_2, but not pollutants where local impacts are of great concern or where concentrated emissions at a local scale may occur – as in the case of Hg. Any multi-pollutant strategy must also ensure that regions, states and localities retain their authority to adopt and implement measures which are more stringent than those of the federal government.

A 3-pollutant approach for controlling the emissions of Hg, SO_2, and NO_x from coal-fired power plants can have numerous advantages over the traditional, single pollutant schemes. For example, a well crafted multi-pollutant standard can increase the protection of public health and the environment, reduce pollution more cost-effectively, and offer greater certainty to both industry and regulators. Since Hg emission reductions can be obtained as a "co-benefit" from the control devices used to reduce SO_2 and NO_x, it makes sense to allow companies the option to synchronize the control of these pollutants, provided that public health and the environment are likewise positively impacted. Whereas the federal Clean Air Mercury Rule (CAMR) single-mindedly tackled mercury emissions, and the federal Clean Air Interstate Rule (CAIR) addressed SO_2 and NOx, Illinois was able to use a multi-pollutant strategy that accomplishes the aforementioned benefits in a unified regulatory framework accounting for planning, engineering, availability of financing and other issues that accompany a multi-pollutant control strategy.

Illinois believes the most feasible method of obtaining reliable emission reductions in a cost-effective manner is through a combination of emission rate based limits along with emissions trading. Although sources under the MPS are not allowed to utilize allowances to meet the

numeric emissions standards, sources are free to sell or trade allowances that are generated as a result of emissions being below the allowable emission rates. This provides an incentive for companies to go beyond the reductions required under the MPS in order to recover some of the costs associated with the control measures taken. Moreover, emissions' trading is recognized to provide market incentives for sources to control emissions as far and as fast as reasonably possible. Of note is that emissions trading under a cap and trade program has historically resulted in the highest emitting plants making the deepest reductions in emissions – a key finding that strongly supports the inclusion of emissions trading into any control strategy.

Illinois Multi-Pollutant Agreements

The catalyst for Illinois' agreements was the position taken in early 2006 that Illinois would propose an aggressive mercury regulation focused on cutting mercury emissions by 90% from coal-burning power plants by mid-2009. After the Illinois EPA presented its findings in support of the mercury rule during two weeks of well-attended and hotly contested public hearings, the Agency was approached by Ameren who expressed a desire to work with the Agency toward common goals. Subsequent to long hours of negotiation, an alternative standard was proposed that involved allowing some flexibility in complying with the mercury standards in exchange for commitments to also significantly reduce SO_2 and NOx emissions from Ameren's coal-fired power plants. This initial agreement led to similar discussions and agreements with Illinois' other two large coal burning systems, Dynegy and Midwest Generation.

The agreements reached and memorialized in the Multi-Pollutant Standard (MPS) and Combined Pollutant Standard (CPS) are significant not only for the magnitude of emissions reductions that occur, but also for the rule support that accompanied the agreements. The Illinois mercury rule was vehemently opposed by a unified coal-fired power industry. The initial agreement established that mutual goals were achievable, set the guiding principles, and opened the door for other companies to follow –which they did. Ultimately, the mercury rule was unanimously approved in 2006 by both the Illinois Pollution Control Board and the Joint Committee on Administrative Rules, the two governing oversight bodies for regulations in Illinois.

Both the MPS and CPS provisions provide some flexibility on the timing of mercury reductions in exchange for commitments to make significant reductions in both SO_2 and NOx. All of the provisions include some level of trading restrictions on SO_2 and NOx allowances provided under CAIR. Ameren, Dynegy and Midwest Generation will install a multitude of pollution control equipment on their boilers costing several billion dollars, including wet and dry scrubbers, selective catalytic reduction (SCR) and selective non-catalytic reduction (SNCR) devices, and fabric filters. Recent discussions with representatives of Illinois' coal-fired power plants indicate that they are all preparing to meet the requirements of the MPS and CPS, which initiate in 2010. In doing so, a wide array of emissions control equipment costing billions of dollars will come on-line in Illinois over the next several years. Illinois coal-fired power plants have already installed and begun operating numerous halogenated activated carbon injection (ACI) systems for mercury control. The first of many new scrubbers for SO_2 control will begin operation shortly. Fabric filter controls will accompany the installation of many of the scrubbers and result in the co-benefit of particulate matter reductions. Selective catalytic reduction devices and other new NOx controls are being scheduled for installation across Illinois. The shutdown of a few of the older, most polluting electric generating units began in December 2007 with two more units scheduled for shutdown by December 2010.

Illinois Mercury Rule

The Illinois mercury rule is designed to achieve a high level of mercury control, based on Illinois EPA's finding that there exists mercury control technology that is both technically feasible and economically reasonable. Mercury emissions may be reduced through the application of control technology specifically designed to control mercury (e.g., activated carbon injection), or through co-benefit from other control technologies designed to control SO_2, NOx, and PM. Depending on several variables, including coal and boiler type, there are a number of control technologies that will achieve 90+% removal of mercury. Mercury emissions control technology is a rapidly advancing field, with halogenated sorbents being an affordable and effective option for most applications. Although there may be some challenges to achieving 90% removal of mercury for

all applications, in almost every case each of these challenges can be overcome or addressed through technology that is economically reasonable and available today.

The Illinois mercury rule provides substantial flexibility in order to reduce the costs of compliance and risk of noncompliance for power plants. This flexibility includes the ability to meet either a 90% reduction or an output based standard of 0.0080 pounds mercury/GWh, phasing in standards over a period of 3 ½ years with a less restrictive standard in phase one, compliance by averaging of emissions, and the avoidance of installing controls on units that will be shutdown in the near future provided companies make an enforceable commitment to shutdown those units by a date certain.

Additional flexibility is provided via a "Temporary Technology Based Standard" (TTBS) that provides relief for units that install appropriate mercury controls but do not achieve full compliance. Eligible units only need to operate the mercury controls in an optimal manner to comply. This provision is available through June 2015 and can be used by up to 25% of a company's generating capacity.

Companies may choose to voluntarily comply with the MPS or CPS as an alternative to the otherwise applicable requirements of the mercury rule. These provisions provide additional flexibility in regards to mercury control in return for companies achieving significant reductions in the emissions of SO_2 and NOx.

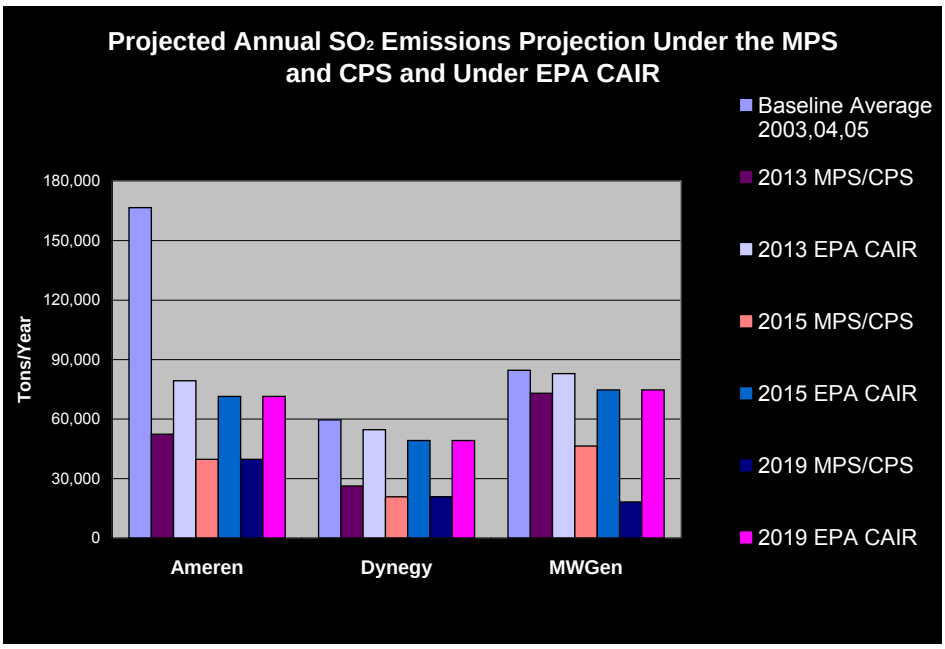
Under the MPS and CPS, companies can commit to voluntarily meet numerical emission standards for both NOx and SO_2 and in return are provided additional flexibility in complying with the mercury emission standards. The MPS and CPS provisions also contain restrictions on the trading of NOx and SO_2 allowances provided under CAIR. By regulating the emissions of NOx and SO_2 and restricting the trading of allowances, the MPS and CPS have obvious implications for the proposed CAIR NOx and SO_2 cap and trade program. As modeling has demonstrated, the benefits of these reductions will mostly impact Illinois and a few of the closest neighboring states (i.e., Indiana, Wisconsin and Missouri) with lesser benefits further downwind. While the positive impacts of the reductions are most significant within Illinois and its closest

neighbors, Illinois does support emissions trading as the most cost effective controls will be installed and the timing of controls is likely to occur more quickly than under a command and control option.

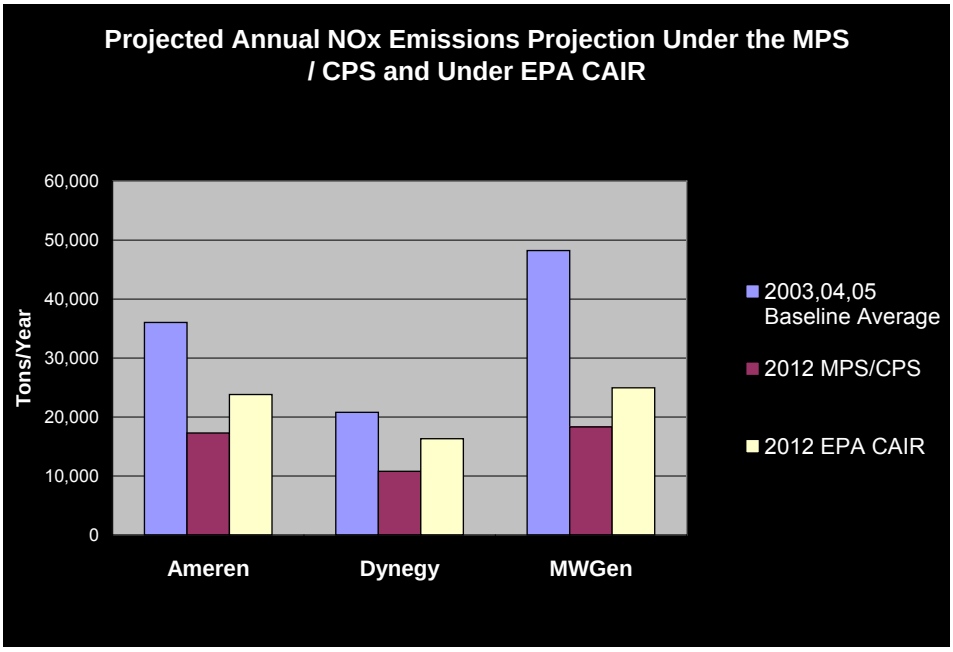
Emission Reductions

The combination of the Illinois mercury rule, CAIR, and the MPS and CPS will have enormous positive impacts, reducing mercury, SO_2 and NOx emissions far beyond the levels required under the federal CAMR and CAIR alone.

Under CAIR, U.S. EPA estimates that coal-fired power producers in Illinois would only have been required to reduce their SO_2 emissions by 34%, not the estimated 76% for Ameren, 65% for Dynegy, and 80% for Midwest Generation required under the MPS and CPS. The emissions of NOx are likewise expected to be reduced beyond the levels obtained by the model CAIR. In addition, both the MPS and CPS contain trading restrictions designed to ensure that the SO_2 and NOx reductions occur in Illinois.



The reductions agreed to under the MPS and CPS for SO_2 and NOx are expected to go a long way toward helping Illinois achieve attainment of the ozone and PM standards. The modeling demonstrates that the emission reductions are very substantial.



The Illinois EPA estimates the total emission reductions from all three power companies at:

- SO_2 = 233,600 tons per year eliminated
- NOx = 61,434 tons per year eliminated
- Mercury = 7,040 pounds per year eliminated

Under CAMR, coal-fired power producers in Illinois would have only been required to reduce their mercury emissions by 47% in 2010 and 78% by 2018, not the 90% reduction by 2009 specified in the Illinois rule. The timing of mercury reductions for

those sources that opt-in to the MPS or CPS is essentially the same, and the amount of reduction is expected to be close to 90%, although the companies will not be required to comply with the 90% reduction requirement on a 12 month rolling basis until 2015. Sources under the MPS and CPS are expected to have mercury emission reductions that exceed the required 90% after 2015 due to the co-benefit reductions achieved from the installation of controls needed to comply with the corresponding SO_2 and NOx standards.

Impacts of Emissions Reductions

Under the agreements between the Illinois EPA and Midwest Generation, Ameren and Dynegy, the decreases in Hg, SO_2, and NOx emissions are estimated to far exceed the reductions required under the federal CAMR and CAIR.

In regards to mercury, over time Illinois expects to see reductions in deposition of Hg to Illinois' lakes and streams and corresponding mercury decreases in Illinois' fish, making those fish caught in Illinois waters safer to eat. There will be several recognized benefits to the State from tighter mercury controls beyond the expected public health benefits that come with a reduction in deposition to Illinois' waters and fish. Such benefits include support for existing jobs and the potential for additional jobs resulting from the installation and operation of additional pollution control devices.

The benefits of removing SO_2 and NO_x are well established and most notably will result in reductions in both particulate matter and ozone. SO_2 is a precursor to particulate matter and NO_x is a precursor to both particulate matter and ozone. Particulate matter related annual benefits include fewer premature fatalities, fewer cases of chronic bronchitis, fewer non-fatal heart attacks, fewer hospitalization admissions (for respiratory and cardiovascular disease combined) and should result in fewer days of restricted activity due to respiratory illness and fewer work loss days. Moreover, there should be health improvements for children from reduced upper and lower respiratory illness, acute bronchitis, and asthma attacks.

Ozone health-related benefits are expected to occur during the summer ozone season and include fewer hospital admissions for respiratory illnesses, fewer emergency room admissions for asthma, fewer days with restricted activity levels, and fewer days where children are absent from school due to illnesses. In addition, there should be ecological and welfare benefits. Such benefits include visibility improvements; reductions in acidification in lakes, streams, and forests; reduced nutrient replenishing in water bodies; and benefits from reduced ozone levels for forests and agricultural production.

CAMR and CAIR Vacatur Impact on Illinois Regulations:

On February 8, 2008, the United States Court of Appeals for the District of Columbia Circuit vacated the federal CAMR. The Illinois mercury rule is separate from the federal CAMR and therefore the vacatur of CAMR had minimal impact on the Illinois rule. However, this court action raised concerns regarding the status of certain federal provisions dealing with the monitoring of mercury emissions. Given the uncertainty surrounding federal mercury monitoring provisions, the Illinois EPA determined that a revision to the Illinois mercury rule was appropriate. The revisions focused on the methods used to measure or monitor mercury emissions, and did not include any revisions to the control standards themselves. The rule was amended to allow a source to demonstrate compliance for a three year period using stack testing. The Illinois mercury rule remains in full effect and all Illinois companies began complying with the rule on July 1st of this year.

In July of 2008, the U.S. Court of Appeals for the District of Columbia Circuit (DC Court of Appeals) vacated the CAIR rule in its entirety. After entertaining motions for reconsideration from the parties, on December 23, 2008, the same court issued an opinion stating that the federal CAIR was remanded to U.S. EPA without vacatur. U.S. EPA subsequently confirmed that it has begun implementation of CAIR starting January 1, 2009. Illinois CAIR is in full effect. For a number of reasons, the vacatur and reinstatement of Phase I of CAIR have had minimal impact on Illinois sources and the MPS and CPS remain in effect. However, for the reasons discussed below, Illinois strongly favors federal multi-pollutant legislation to “remedy” the flaws in CAMR and CAIR.

The decision of the DC Court of Appeals vacating CAIR in part, i.e., vacating Phase II of CAIR but reinstating Phase I of CAIR, has thus far had minimal impact on Illinois. CAIR Phase I required reductions up until the beginning of CAIR Phase II in January 1, 2015. Although Illinois relied upon CAIR Phase I as part of our 8-hour ozone (85 ppb) and annual PM2.5 attainment plans, air quality in Illinois' two 8-hour ozone (85 ppb) and annual fine particulate matter nonattainment areas has improved to a very significant degree without these expected reductions. As a result, all but one monitor is in attainment for these standards, and it is expected to be in attainment in 2012. Because the MPS and CPS result in significant reductions before 2015, Illinois is not dependent on CAIR Phase II reductions for the newest 8-hour standard (75 ppb) or the newest daily fine particulate matter standards, and for which attainment plans are not yet due. Despite the improvement in air quality, Illinois would have much more significant problems in demonstrating attainment in it state implementation plan if CAIR Phase I was not reinstated.

There is some concern that Illinois coal-fired power plants may delay or cancel some controls that were being installed to comply with CAIR Phase I due to the loss of value in SO_2 and NOx allowances. The market value of these allowances is uncertain, because there is controversy over whether the DC Court of Appeal's opinion has disallowed an emissions trading program. As a result, companies have no incentive to go beyond the reductions required by CAIR Phase I because the incentive to install controls early due to the cost recovery benefit of the allowances obtained is removed. Also, many companies have a significant number of banked allowances available for their use or for sale, and these banked allowances will be depleted rather than companies meeting the "emissions cap" through installation and operation of pollution control equipment, perhaps even to the extent of not operating existing or recently installed controls. However, we believe the MPS and CPS should keep Illinois sources on track for installation and operation of the planned control devices and reductions.

After the vacatur of CAIR, the Northeast and Midwest states began a process, called the "State Collaborative Process", the stated intent of which was to develop a multi-pollutant strategy to achieve levels of NOx and SO_2 reductions from the electric utility sector in the 28-state CAIR

region as expeditiously as possible that would remedy CAIR's flaws in accordance with the Court's July 11, 2008 opinion and satisfy the requirements of the Clean Air Act to attain the 1997 national ambient air quality standards (NAAQS) for ozone and PM. While significant progress was made in developing a framework for a CAIR replacement rule, no final recommendation to USEPA has yet been developed. The participating states disagree over the level of reductions that should be required, whether best available controls should be required on every power plant or just the larger/largest units, the timing of controls, whether emissions trading (or even intra-state emissions averaging) is allowable under the Court's decision, and whether a replacement rule can forestall Section 126 petitions under the Clean Air Act.

It is Illinois' experience that emissions trading will result in the greatest amount of reductions at the lowest cost. More importantly, emission trading will encourage companies to install controls earlier, and go beyond required reduction levels, as compared to a command and control strategy. Under a command and control strategy, the regulatory compliance deadline must be set such that there is 100% assurance that every affected source will be able to comply in consideration of the time necessary for planning, engineering and construction deadlines. In other words, there must be sufficient availability of engineering firms, control equipment and construction companies to plan, engineer, build and install all of the pollution control equipment required for compliance. Such a regulatory compliance date would certainly be difficult to establish and likely result in far fewer reductions in the near term when compared to an approach that includes emissions trading. Also, the construction season in many of the affected CAIR states is limited to a 7 to 8 month window, when electric demand is at its highest, further complicating this approach.

In addition to regulatory compliance deadlines, sources (and the states) must be concerned with power outages. In Illinois' opinion and experience in negotiating the MPS and CPS, within the CAIR region, it is not practical (and may not be possible) to retrofit all coal-fired power plants of any significant size (e.g., 25 MWe or more) in the same 3-year window (or even 5-year window). A command and control strategy necessarily sets a date certain for compliance for each affected and similarly situated source. Emissions trading will allow those time frames to be compressed, as source by source compliance is not required.

As Illinois discovered during its MPS and CPS negotiations, there are very significant costs associated with installing pollution controls of the magnitude negotiated under Illinois' rules – estimated in excess of 3 billon dollars. While this cost may be seem small on a kilowatt hour basis, these companies must obtain a rate increase if they are in a regulated state or financing if they are in a deregulated state like Illinois. The ability to obtain a rate increase or financing for these projects is uncertain and takes time, which must be accounted for in a compliance date for any command and control strategy. Emissions trading will allow those time frames to be compressed as well, as source by source compliance is not required.

The vacatur of both CAMR and CAIR emphasizes the high risk associated with moving forward with federal regulations subject to widespread opposition and controversy. Federal regulations will almost certainly be challenged, potentially resulting in further delay of a vital strategy for the states to achieve attainment of the federal air quality standards. Section 126 petitions will surely also be filed by any state that believes its neighbor and upwind states could do more to address nonattainment, even if the complaining state's air quality issues are largely a result of emissions from its own sources (area, mobile and point) and even if the targeted other state(s) has done more to address emissions from its coal-fired power plants than the complaining state. Section 126 petitions will use precious resources that are needed to address the newest recent daily PM2.5 standard, the revised 8-hour standard (75 ppb), the newest lead standard, and the recently-announced, revised NO2 standard. Federal multi-pollutant legislation represents the best option for addressing the points of disagreement among the states, without being bound by interpretations of the scope and flexibility provided under the 1990 Clean Air Act amendments, and in a way that best serves the goal of obtaining the greatest reductions in SO_2, NOx and Hg, in the shortest possible time frame, while taking into account electric costs and reliability.

In conclusion, the multi-pollutant approach taken in Illinois for controlling the emissions of Hg, SO_2, and NO_x from coal-fired power plants has numerous advantages. Whereas the federal CAMR focuses solely on mercury emissions, and CAIR concentrates on SO_2 and NO_x, Illinois' has taken a combined approach that exceeds the goals in the context of a single regulatory framework, accommodating engineering and construction issues and outage schedules, as well as

financing issues. The result has been a tremendous win-win-win for the environment, public health and the regulated community.

Multi-Pollutant Standard & Combined Pollutant Standard – Required Emissions Rates and % Reductions

	CAIR in IL[1]	CAIR in IL[1]	Midwest Generation		Ameren		Dynegy	
	Emission Rate (lbs/mmbtu)	% Reduction	Emission Rate (lbs/mmbtu)	% Reduction	Emission Rate (lbs/mmbtu)	% Reduction	Emission Rate (lbs/mmbtu)	% Reduction
SO2								
2010					0.50	52%		
2013	0.50	31%	0.44	13.7%			0.24	56%
2014			0.41	19.6%	0.43	56%		
2015	0.45	34%	0.28	45.1%	0.25	76%	0.19	65%
2016			0.195	61.8%				
2017			0.15	70.6%	0.23	78%		
2018			0.13	74.5%				
2019	0.45	34%	0.11	78.4%[2]	0.23	78%	0.19	65%
NOx								
Annual – 2012	0.15	44%	0.11	62%[3]	0.11	52%	0.10	48%
Annual - 2015	0.12	55%	0.11	62%[3]	0.11	52%	0.10	48%
Seasonal - 2012	-	-	0.11	51%	0.11	22%	0.10	25%

[1]CAIR emission rate numbers from page 5 of the June 28, 2005 USEPA presentation to LADCO (http://www.ladco.org/reports/rpo/Regional%20Air%20Quality/June28_2005/June-Workshop/CAIR%20LADCO%20.pdf).
Percent reductions from the USEPA website that provides CAIR reductions expected in Illinois (http://www.epa.gov/cair/il.html).
Emissions used for calculations are from Clean Air Markets Divisions of USEPA.

[2]80% including planned shutdowns.

[3]68% including planned shutdowns.

Note: Ameren SO2 rates reflect changes to allowable rates as contained in proposed revision to Illinois mercury rule.

Percent Mercury Reductions from CAMR, Illinois Combined Pollutant Standard (CPS) and Multi-Pollutant Standard (MPS)

Beginning Period	CAMR	Midwest Gen - CPS	Dynegy - MPS	Ameren - MPS
Mid 2008		21%		
Mid 2009		84% (ACI installed on most units)	(ACI installed on most units)	(ACI installed on most units)
2010	47%		86%	86%
2011		90% (ACI on all units)		
2013[1]		90%	90%	90%
2015[2]		>90%	94.4%	93.5%
2018	78%	95%		

[1]All units have controls installed that are designed to achieve 90% reduction in mercury emissions.

[2]Several units at plant have combination of Scrubber, Baghouse, SCR and/or ACI and many units will achieve greater than 90% reduction in mercury emissions.

All numbers are Illinois EPA estimates.

AER Fleet Heat Inputs, 2009-2012

State	Facility Name	Facility ID (ORISPL)	Year	SO2 (tons)	Heat Input (MMBtu)
IL	Coffeen	861	2009	13398.074	47566048.5
IL	Duck Creek	6016	2009	506.11	21407744.51
IL	E D Edwards	856	2009	11734.455	53116957.8
IL	Joppa Steam	887	2009	24238	77314386.41
IL	Newton	6017	2009	24755.123	82537779.61
			TOTAL:	74631.762	281942916.8
IL	E D Edwards, Unit 1	856	2009	2069.99	9053098.616

State	Facility Name	Facility ID (ORISPL)	Year	SO2 (tons)	Heat Input (MMBtu)
IL	Coffeen	861	2010	210.818	57019175.45
IL	Duck Creek	6016	2010	756.371	28849322.93
IL	E D Edwards	856	2010	12009.979	52842841.94
IL	Joppa Steam	887	2010	25896.713	85465053.05
IL	Newton	6017	2010	23501.798	78862613.16
			TOTAL:	62375.679	303039006.5
IL	E D Edwards, Unit 1	856	2010	2114.741	8781808.481

State	Facility Name	Facility ID (ORISPL)	Year	SO2 (tons)	Heat Input (MMBtu)
IL	Coffeen	861	2011	82.526	57500363.25
IL	Duck Creek	6016	2011	167.093	24159532.43
IL	E D Edwards	856	2011	12596.199	55404148.49
IL	Joppa Steam	887	2011	26180.048	83823895.86
IL	Newton	6017	2011	20870.966	75980200.38
			TOTAL:	59896.832	296868140.4
IL	E D Edwards, Unit 1	856	2011	2148.064	9189275.078

State	Facility Name	Facility ID (ORISPL)	Year	SO2 (tons)	Heat Input (MMBtu)
IL	Coffeen	861	2012	103.296	54159484.31
IL	Duck Creek	6016	2012	295.852	25219962.03
IL	E D Edwards	856	2012	11802.717	44200087.69
IL	Joppa Steam	887	2012	16990.769	71583571.45
IL	Newton	6017	2012	16519.06	56024904.65
			TOTAL:	45711.694	251188010.1
IL	E D Edwards, Unit 1	856	2012	1973.891	7447380.695

STL ST. LOUIS POST-DISPATCH

Ameren to exit merchant generation business

DECEMBER 20, 2012 8:56 AM • BY LISA BROWN
LBROWN@POST-DISPATCH.COM 314-340-8127

Ameren Corp. plans to get out of the merchant generation business, which produces power for the competitive wholesale electricity market, as power prices remain weak and the cost of environmental compliance increases.

As a result, Ameren will incur a non-cash charge ranging from $1.5 billion to $2 billion in the fourth quarter.

However, investors liked the news that the company would exit a business that held weak profit prospects. The utility's stock shot up nearly 4 percent to close Thursday at $31.17 a share.

"It's the ongoing low pricing environment," said Andy Smith, a senior analyst with Des Peres-based Edward Jones, which changed its recommendation on Ameren's stock from sell to hold Thursday. "They're not generating enough money for what it costs them."

The merchant generation business is operated by the St. Louis-based company's Ameren Energy Resources subsidiary, which serves commercial and wholesale power markets in the Midwest.

Collinsville-based AER, which employs about 900 people, was formed in 2000 following Illinois' deregulation of the state's electricity markets, and its customers include municipal utilities and rural cooperatives.

The merchant generation business represented only about 15 percent of Ameren's $5.3 billion of revenue in the first nine months of the year. The remainder of Ameren's business is derived from regulated utilities Ameren Missouri and Ameren Illinois.

Ameren said in a regulatory filing Thursday that the merchant generation business has experienced decreasing earnings and cash flows for several years.

In the filing, Ameren also cited environmental regulations that have resulted in significant investment requirements.

Ameren spokesman Brian Bretsch said a timeline for exiting the business has not been set for the exit, and the announcement has "no immediate impact on Ameren Energy Resources' operations ... or facilities."

Genco, a subsidiary of AER, will likely sell at least one of its three natural gas-fired power plants to improve liquidity, according to the filing. The three Illinois plants are in Elgin,

Gibson City and Grand Tower.

The decision to leave this business "resulted from Ameren's analysis of the current and projected future financial condition of its merchant generation business segment, including the need to fund Genco debt maturities beginning in 2018, and its conclusion that this business segment is no longer a core component of its future business strategy," according to the filing.

Ameren already closed two of its merchant power plants in Illinois in 2011.

Danskammer power plant sale dragging due to taxes

Company still owes $11M

By Jessica DiNapoli
Times Herald-Record
Published: 2:00 AM - 07/02/13

TOWN OF NEWBURGH — Sale negotiations for the Danskammer power plant have dragged out far longer than anticipated, leaving about $11 million in overdue taxes in the balance and the future of the plant increasingly uncertain.

The heart of the stalemate is the property assessment and taxes on 62-year-old Danskammer, currently planned to be demolished.

Owner Dynegy, in a court filing Monday, says the value of Danskammer and sister plant Roseton combined is less than the total amount of overdue taxes, and is seeking to have the amount due reduced to $8 million.

The town, Orange County and the Marlboro School District should not be entitled to penalties and interest, Dynegy argues.

The back taxes are based on the town's $313 million valuation of Danskammer. That number comes from a 2008 settlement for Danskammer and Roseton that pegged their combined value at $890 million.

That figure is "divorced from the economic realities of the value" of the plants and their operating results, according to Dynegy's filing. The taxes ultimately contributed to Dynegy's bankruptcy, the filing states.

Dynegy finalized the sale of Roseton to Castleton Commodities International this spring for $19.5 million.

Steve Durkee, the president of ICS NY Holdings, which won last year's bankruptcy auction of Danskammer with a bid of $3.5 million, said the property taxes and the assessment for Danskammer going forward are the last issues to resolve before the deal can close.

Durkee said it makes no sense to pay taxes that are three times the purchase price of the plant. "Why would anyone do that?"

Durkee has formally contested the 2013 assessment of the retired plant — $189 million, which he called a "deal-killer."

In an assessment grievance filed with the town in May, he sought to reduce the assessment to $0, claiming the property's value is actually negative because of the costs associated with contamination on the site.

Newburgh, however, didn't budge on the assessment.

It's still $189 million, said Supervisor Wayne Booth.

David Murphy, the attorney representing Newburgh in the assessment issue, said the town wouldn't reconsider the assessment until the site has changed hands. The town is not sure if ICS NY Holdings has the financing to buy it.

"Suppose we reduce the assessment to zero, and then the deal fell through. We'd look a little ridiculous, wouldn't we?" Murphy said. "I don't want the Town of Newburgh looking ridiculous."

Durkee is barred by the court from walking away from the deal until July 9. Dynegy can look for other buyers, but has been focused on working through the sale process with Durkee, according to spokeswoman Katy Sullivan.

For Orange County, the problem would get "exponentially worse" if ICS abandoned the deal, Durkee said.

"The asset sits and becomes a massive liability right on the river," Durkee said.

jdinapoli@th-record.com

Dynegy: Cut tax assessments 90%

Decision could mean millions

Dynegy is suing to have tax assessments on its Roseton and Danskammer plants reduced by more than 90 percent. The Marlboro School District stands to lose $17 million, more than 40 percent of its tax revenue. Newburgh could lose $5 million, which worries Supervisor Wayne Booth, who stands before the Roseton plant. Dynegy has already failed to pay its taxes due in January.

By Jessica DiNapoli

Times Herald-Record
Published: 2:00 AM - 08/22/12
Last updated: 8:51 AM - 08/22/12

The owners of the Roseton and Danskammer power plants have filed lawsuits asking for a more than 90 percent reduction in their 2012 assessments, a move that could have major consequences for taxpayers in the Town of Newburgh and Marlboro School District.

Those taxpayers would have to come up with most of the money the plants normally pay if Dynegy, which is also in Chapter 11 bankruptcy, wins its assessment challenge. Altogether, it may mean around $23 million in lost revenues for the Marlboro School District, the Town of Newburgh and Orange County. The potential loss is "such an ominous number for the town and school district," Newburgh Town Supervisor Wayne Booth said.

The most severe effects would be in Marlboro, where the tax base is mostly farms and homes. The district covers most of the Town of Marlborough and parts of the Towns of Newburgh and Plattekill.

District officials are expecting the power plants to pay about $17 million in taxes, more than 40 percent of all the taxes the district will raise for the upcoming school year.

District may have to borrow

Superintendent Raymond Castellani said Dynegy needs to pay its taxes until a decision is made on the lawsuits.

"It doesn't concern me as much as them not paying," Castellani said.

If the Houston power company skips out on the bill in the fall, the district will likely have to borrow money until April, when Orange County would have to make it whole, said Neysa. Sensenig, the assistant superintendent for business. Sensenig added the scenario could change if the plants are sold — a key part in Dynegy's plan to pay back its creditors in bankruptcy.

If Dynegy wins its new lawsuits, taxpayers in Newburgh will have to come up with an extra $5 million, according to this year's budget and levy. The assessments Dynegy is targeting are used for a January 2013 tax bill, David Murphy, an attorney for the Town of Newburgh, said.

Dynegy says value has tanked

Dynegy says in court papers that the two plants together have a market value of $64.9 million, a drastic decrease from the agreed-upon value of about $895 million reached in a settlement almost five years ago.

The terms of that settlement are in effect through the end of this year and affect some taxes next year. But Dynegy is trying to alter the final year with its current lawsuits, Murphy said. The company's backtracking will be a part of his defense in court.

Booth said it's possible that Dynegy, in its new lawsuits, could again get retroactive judgments despite the existing settlement.

Since the previous Dynegy settlement, Marlboro has reduced staff by 20, while Newburgh laid has off nine full-timers. The recession also played a role in the staffing changes.

The $64.9 million price tag for the plants is a lowball figure, Murphy said.

Expert appraisals ordered during the legal proceedings usually determine the new value of the properties, he said.

The upcoming auction of Roseton and Danskammer in bankruptcy court may also show what the best price is, Murphy said. The auction is tentatively scheduled for November, according to bankruptcy court filings.

2012 town, county taxes unpaid

Dynegy already owes the Town of Newburgh and Orange County money. The company skipped out on a $7.5 million tax bill due in January because it was unsure of who would ultimately own the plants.

That bill — now more than $8 million because of penalties —is scheduled to be discussed at Dynegy's Aug. 31 hearing.

But ongoing negotiations may mean it will be settled before then, said attorney Lewis Wrobel, who is representing the Town of Newburgh in Dynegy's bankruptcy case.

jdinapoli@th-record.com