

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DYNEGY MIDWEST GENERATION, LLC, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

PCB 12-135  
Variance – Air

NOTICE OF FILING

To:

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

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

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

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board **MOTION TO STAY PROCEEDINGS AND WAIVER OF DECISION DEADLINE**, copies of which are herewith served upon you.

  
 \_\_\_\_\_  
 Kathleen C. Bassi

Dated: August 14, 2013

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**DYNEGY MIDWEST GENERATION, LLC,** )  
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**Respondent.** )

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**MOTION TO STAY PROCEEDINGS AND WAIVER OF DECISION DEADLINE**

NOW COMES Petitioner, Dynegy Midwest Generation, LLC (“DMG” or “Petitioner”), by and through its attorneys, Schiff Hardin LLP, and moves the Board to grant it a stay of these proceedings, pursuant to 35 Ill. Adm. Code § 101.514,<sup>1</sup> until February 20, 2014. Because this proceeding is a variance proceeding, DMG waives the decision deadline in this matter until June 30, 2014, pursuant to Sections 101.514(b) and 101.308(c)(2). In support of its Motion to Stay Proceedings, DMG states as follows:

**PROCEDURAL BACKGROUND  
AND CURRENT STATUS OF THE PROCEEDINGS**

1. On June 8, 2012, DMG filed a Petition for Variance from certain provisions of the Multi-Pollutant Standard at Section 225.233 for a period of approximately two years. Specifically, DMG sought relief from the provisions at Section 225.233(f)(2) that would

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<sup>1</sup> Hereinafter, citations to the Board’s rules will be by section number only.

prohibit DMG from trading sulfur dioxide (“SO<sub>2</sub>”) allowances, if and when issued, under the Cross-State Air Pollution Rule (“CSAPR”), which had been adopted by the U.S. Environmental Protection Agency (“USEPA”) at 76 Fed.Reg. 48,208 (August 8, 2011) and then appealed in *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir.) Under the CSAPR, DMG would have been allocated a number of SO<sub>2</sub> allowances that DMG wished to trade on the open emissions market. *See* Petition (“Pet.”) ¶ 18. DMG sought the variance despite the CSAPR appeal in order to be situated to sell allowances as soon as the appellate court rendered its decision, assuming that the court sustained the CSAPR on appeal.

2. The Board accepted DMG’s Petition on June 21, 2012, and on July 23, 2012, the Illinois Environmental Protection Agency (“the Agency”) filed its Recommendation neither supporting nor opposing the Petition.

3. On August 21, 2012, the appellate court vacated the CSAPR. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012). At that point, aware that some parties might challenge the appellate court’s ruling, DMG waived the decision deadline in order to see whether any of the appealing parties would seek rehearing and/or appeal of the appellate court’s ruling and, if so, the outcome of any rehearing or appeal. Since then, DMG has periodically participated in status calls with the Hearing Officer and waived the decision deadline in this matter, with the expectation that the passage of time would allow DMG to determine whether it should continue with this variance proceeding because the CSAPR was reinstated or, instead, that it should withdraw its Petition because the appellate court’s invalidation of the CSAPR was sustained on further appeal.



4. Rehearing of the appellate court's ruling was sought and denied. *EME Homer City Generation L.P.*, 696 F.3d 7, *reh'g denied*, No. 11-1302, 2013 WL 656247 (D.C. Cir. Jan 24, 2013). On June 24, 2013, however, the U.S. Supreme Court granted certiorari. *EME Homer City Generation, L.P.*, 696 F.3d 7 (D.C. Cir. 2012), *cert. granted*, 81 USLW 3702, 81 USLW 3567, 81 USLW 3696 (U.S. June 24, 2013) (No. 12-1182). The Supreme Court will hear the *EME Homer City* appeal in its Term beginning in October 2013. By Order of the Court, petitioners' brief in the *EME Homer City* appeal is due by September 4, 2013, and respondents' brief is due by October 31, 2013. *EPA v. EME Homer City Generation*, U.S. No. 12-1182, Order (July 16, 2013). Under the Court's rules, petitioners would have 30 days to file reply briefs, Sup. Ct. R. 25(3), such that briefing in the *EME Homer City* appeal is anticipated to be completed by December 2013. The Court has not yet scheduled oral argument in the *EME Homer City* appeal. During the July 11, 2013, status call in this matter among the Hearing Officer, the Agency, and DMG, DMG agreed to consider filing this Motion to Stay Proceedings.

#### **REQUEST FOR STAY OF PROCEEDINGS**

5. The Board's rules grant the Board flexibility in granting stays of proceedings.

The applicable rule states as follows:

- a) Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion. (See also Section 101.308 of this Part.)

35 Ill. Adm. Code § 101.514(a). DMG has provided above a status report related to this proceeding. The Hearing Officer has scheduled another status call for August 22, 2013, at which

time DMG will report that it has filed this Motion. DMG has waived the decision deadline to June 30, 2014, herein, approximately 120 days following the end of the requested stay period. Therefore, two of the elements necessary for the Board to grant a stay of the proceedings have been addressed. The third element is detailed below.

6. DMG filed its Petition for Variance prior to the implementation of the CSAPR in order to be able to enter the emissions allowance market as soon as USEPA distributed CSAPR allowances to DMG's accounts, assuming that the CSAPR was sustained on appeal. DMG has continued to waive the decision deadline in order to be positioned to proceed with the variance as soon as possible should the CSAPR be reinstated. DMG anticipates that, should the U.S. Supreme Court overturn the lower court's decision, it would need to make only minor changes to its Petition for Variance to reflect appropriate beginning and ending dates for the variance. Assuming that the CSAPR is reinstated, DMG's ability to sell CSAPR allowances as soon as its CSAPR allowance accounts are populated would be extremely important in the emissions allowances trading market, thus its decision to seek this Stay of Proceedings rather than to withdraw the Petition and have to restart the process. DMG is concerned that a withdrawal of the Petition for Variance and then a re-filing would consume valuable time, including for preparation and filing of the new petition and related initial procedural matters.

7. The requested limited stay in these proceedings pending the U.S. Supreme Court's decision on the CSAPR is also needed to conserve resources of the Board, the Agency, and DMG. In the event the Supreme Court were to affirm the appellate court's decision vacating the CSAPR, any resources and effort expended in these proceedings by the Board, the Agency,

and DMG prior to the Court's decision would be wasted as the variance petition is dependent on the existence and implementation of the CSAPR.

8. DMG recognizes that February 2014 is likely the earliest that the Supreme Court would render a decision in the *Homer City* appeal. Nevertheless, the decision would likely be rendered within a few months following February 2014, and DMG would like to return the matter to the Board's active docket in February 2014, understanding that it may have to waive the decision deadline again while awaiting the Supreme Court's decision or possible subsequent supplemental proceedings before the appellate court in the event the Supreme Court were to reverse the appellate court's decision in whole or in part.

9. DMG understands that the Agency does not object to this requested Stay of Proceedings.

WHEREFORE, for the reasons set forth above, Petitioner Dynegy Midwest Generation, LLC requests that the Board stay these proceedings until February 20, 2014, and, consistent with that request, DMG waives the Board's decision deadline in this matter until June 30, 2014.

Respectfully submitted,

DYNEGY MIDWEST GENERATION, LLC

by:

  
One of Its Attorneys



Dated: August 14, 2013

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 14th day of August, 2013, I have served electronically the attached **MOTION TO STAY PROCEEDINGS AND WAIVER OF DECISION DEADLINE**, upon the following persons:

John T. Therriault, Assistant Clerk  
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