

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROPOSED NEW 35 ILL.ADM.CODE PART 225) PCB R06-25
CONTROL OF EMISSIONS FROM) Rulemaking - Air
LARGE COMBUSTION SOURCES)

NOTICE OF FILING

To:

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

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Persons included on the
ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board PARTICIPANTS DYNEGY AND MIDWEST GENERATION'S RESPONSE TO THE AGENCY'S MOTION CONCERNING GUIDELINES AND FORMAT OF FIRST HEARING, copies of which are herewith served upon you.

/s/ Kathleen C. Bassi

Kathleen C. Bassi

Dated: April 17, 2006

SCHIFF HARDIN LLP

Attorneys for Dynegy Midwest Generation, Inc, Midwest Generation, LLC, and Southern
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**PARTICIPANTS DYNEGY AND MIDWEST GENERATION'S RESPONSE
TO THE AGENCY'S MOTION CONCERNING
GUIDELINES AND FORMAT OF FIRST HEARING**

NOW COME Participants DYNEGY MIDWEST GENERATION, INC., and MIDWEST GENERATION, LLC, (collectively "Participants"), by and through their attorneys, SCHIFF HARDIN LLP, pursuant to 35 Ill.Adm.Code §§ 101.500(d) and 101.502, and respond to the Illinois Environmental Protection Agency's ("Agency") Motion Concerning Guidelines and Format of First Hearing on the Agency's Proposed New 35 Ill.Adm.Code 225: Control of Emissions from Large Combustion Sources (the "Mercury Proposal"). Participants have no objection to the order in which the Agency calls its witnesses; however, Participants do object to the proposed schedule and constraint on the availability of the Agency's witnesses for cross-examination. More specifically, Participants state as follows:

1. On April 3, 2006, the Agency filed its Motion Concerning Guidelines and Format of First Hearing with the Board, in which the Agency moved that the Board allow it to present its witnesses in a certain order, that the witnesses be cross-examined immediately following the presentation of their testimony, that questioning be restricted to the topics as listed, that the testimony for the topics identified and the cross-examination of the corresponding witnesses occur on specific days, that cross-examination of a particular witness not completed on its given

day be carried over to first thing the next day, and that witnesses be allowed to respond to cross-examination in writing if the witness is unable to be present for his or her cross-examination.

2. Participants have no objection to the Agency's order of calling its witnesses. Indeed, the order of calling witnesses should be left to the discretion of the party calling the witness, consistent with the Board's management of a hearing.

3. Participants do object, however, to the Agency's proposed schedule. Specifically, the Agency requests that its witnesses be cross-examined only at the time that they present their testimony and that, thereby, any cross-examination of a specified topic be completed at that time before proceeding to the next identified topic. The Agency's Motion represents that direct testimony and cross-examination will be completed in four days.

4. This four-day schedule for the hearing is unrealistic. The issues that are to be addressed in the testimony are complex and controversial. Participants and other interested parties are entitled to a full airing of those issues. To the extent that the Agency does not present all of the salient discussion in its direct testimony, the issues will need to be developed through cross-examination. Further, Participants and other interested parties should be provided adequate opportunity to cross-examine witnesses concerning their qualifications and the bases for and meaning of their direct testimony. To arbitrarily restrict Participants and other interested parties to only portions¹ of four days for examination of the Agency's support for its Mercury Proposal denies Participants and other interested parties their right to a full hearing in this matter. Imposing such an arbitrary schedule at this time, without having a full opportunity to consider

¹ Participants do not know how much time the Agency will take on each of the four days to conduct direct or redirect examinations of its witnesses. Redirect examination could consume a significant portion of some or all of those days.

the nature of the testimony presented, unnecessarily limits the ability of the Board, Participants, and other interested parties to bring important facts and opinions to light.

5. The Agency's proposal also improperly constrains the availability of its witnesses for cross-examination by denying oral cross-examination when a witness who provides direct testimony is not available for cross-examination or, implicitly, once a witness' topic is addressed even if a later witness raises issues relevant to that topic. Witnesses should be asked to remain available until all of the Board's, Participants', and other interested parties' questions have been addressed, subject to the Hearing Officer's right to limit redundant and irrelevant questions. Allowing witnesses to respond to questions in writing is not acceptable, and Participants object to this form of cross-examination. Participants and other interested parties should be able to follow up not only their own questions but the questions of other cross-examiners. This can be accomplished only in an iterative session where the questions and answers are heard instantaneously. A witness on the stand may give incomplete, non-responsive, or even evasive answers that can only be clarified if the cross-examiner has the opportunity to follow up on the original question. Live hearings allow interested parties the opportunity to hear the testimony and test the witness' knowledge, expertise, and opinions through cross-examination.

6. Participants recognize and understand the demands on expert witnesses and will make every effort to complete cross-examination of Dr. Barbara Rice, the Agency's expert on health effects, on the first day of hearing as the Agency has requested. Participants, however, have not yet seen Dr. Rice's direct testimony, and they do not know at this point how much time would be available for cross-examination of Dr. Rice on the first day of hearing after the Agency conducts its direct examination on the various topics it has proposed to address on the first day

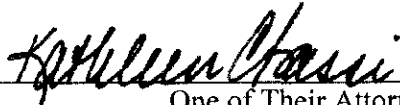
and any cross-examination of other witnesses called on that day is completed.² The Board must recognize that the complexity of the issues involved in this rulemaking and the fact that many of the topics proposed by the Agency overlap may require the availability of an Agency witness for a longer period than anticipated by the Agency or the recall of a witness to fully examine that witness and to compile an adequate record.

WHEREFORE, for the reasons set forth above, Participants DYNEGY MIDWEST GENERATION, INC., and MIDWEST GENERATION, LLC, do not object to the Agency's Motion Concerning Guidelines and Format of First Hearing with respect to the order in which it presents its witnesses and that cross-examination of those witnesses should occur as they give their testimony but do object and request that the Board deny the Agency's Motion with respect to the time available for cross-examination and the presence of witnesses to answer, in person, questions posed.

Respectfully submitted,

DYNEGY MIDWEST GENERATION, INC., and
MIDWEST GENERATION, LLC

by:



One of Their Attorneys

² Participants are willing to work with the Agency to address any scheduling issues that might arise with respect to testimony by the Agency's witnesses and are hopeful that the parties can resolve any such issues. Participants expect that the Agency would accord similar consideration to Participants' witnesses.

Dated: April 17, 2006

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 17th day of April, 2006, I have served electronically the attached PARTICIPANTS DYNEGY AND MIDWEST GENERATION'S RESPONSE TO THE AGENCY'S MOTION CONCERNING GUIDELINES AND FORMAT OF FIRST HEARING, upon the following persons:

Dorothy Gunn, Clerk
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James R. Thompson Center
Suite 11-500
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and by first-class mail with postage thereon fully prepaid and affixed to the following persons:

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to the participants listed on the
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/s/ **Kathleen C. Bassi**

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