

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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DEC 13 2006

STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
PROPOSED NEW CAIR SO2, CAIR NOX) R06-26
ANNUAL AND CAIR NOX OZONE) (Rulemaking – Air)
SEASON TRADING PROGRAMS, 35 ILL.)
ADM. CODE 255, CONTROL OF)
EMISSIONS FROM LARGE)
COMBUSTION SOURCES, SUBPARTS)
A, C, D AND E)

NOTICE OF FILING

To: see attached service list

Please take notice that today I filed with the Office of the Clerk of the Pollution Control Board a Response to Motion To Dismiss filed by Dynegy Midwest Generation, Inc., Midwest Generation, Inc. and Southern Illinois Power Cooperative, a copy of which is hereby served upon you.


Keith Harley

Dated: December 13, 2006

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RESPONSE TO MOTION TO DISMISS

Environment Illinois and the Environmental Law and Policy Center (collectively "Environmental Advocates") oppose the Motion to Dismiss filed by Dynegy Midwest Generation, Inc, Midwest Generation, LLC, and Southern Illinois Power Cooperative (collectively "Movants"). The Illinois Environmental Protection Agency ("Agency") will address the substantive jurisdictional arguments raised by the Movants. In this Response, the Environmental Advocates solely address the lack of timeliness of the Motion to Dismiss, which provides an independent basis for the Motion to be denied.

Relevant Facts

The following facts in this case are not in dispute. On May 30, 2006, the Agency submitted to the Illinois Pollution Control Board ("Board") a rulemaking proposal pursuant to Sections 27 and 28 of the Illinois Environmental Protection Act (the "Act") (415 ILCS 5/27 and 28 (2004)) that proposes to add new Subparts C, D and E to Part 225. On June 30, 2006, Kathleen C. Bassi, Stephen J. Bonebrake and Sheldon A. Zabel of the firm Schiff Hardin LLP filed their Appearances on behalf of Dynegy Midwest Generation Inc. ("Dynegy Midwest") and Midwest Generation, LLC ("Midwest Generation"). Also on June 30th, by and through their attorneys, Dynegy Midwest and Midwest Generation

filed a Motion for Leave to File Responses and Responses to several Agency Motions. By and through their attorneys, Dynegy Midwest and Midwest Generation subsequently participated in Board hearings on October 10th, October 11th and October 12th in Springfield, and on November 29th and November 30th in Chicago. On November 30, 2006, Dynegy Midwest and Midwest Generation filed a Motion to Dismiss this rulemaking proceeding. Southern Illinois Power Cooperative ("SIPC") is also listed as Movant. SIPC was not identified on the original Appearances of Ms. Bassi, Mr. Bonebrake or Mr. Zabel.

Discussion

In general, Board regulations allow motions to be filed at any time unless specifically provided by rule. 35 Ill. Adm. Code 101.500. The Movants concede Board rules specifically require that motions to strike, dismiss or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after service of the challenged document. 35 Ill. Adm. Code 101.506. This rule creates no exceptions for motions to dismiss on jurisdictional grounds; therefore, it may be presumed that the present Motion to Dismiss is governed by this 30-day timeline.

The Movants did not adhere to the deadline established in Board rules. In the present case, the Motion to Dismiss was filed on November 30th, 184 days after the Agency's original rulemaking proposal and 153 days after the Dynegy Midwest's and Midwest Generation's attorneys filed their Appearances, initial Motion and extensive Responses to the Agency's rulemaking proposal. Notably, the Motion to Dismiss is based on legal arguments that could have been raised in compliance with the 30-day requirement imposed by Board rule. That is, the Movants' arguments are not based on any evidence

introduced subsequent to the Agency's initial filing. Simply, the Movants could have filed, but chose not to file, their Motion to Dismiss within the period mandated by Board rules. There is no explanation in the Motion for this several month delay.

There are several reasons for the Board to view this course of conduct with suspicion and to enter an Opinion and Order that will discourage it. First, the Movants' failure to act within 30 days materially prejudices every other participant in these proceedings. Since the conclusion of the 30-day period, there have been several days of hearings that have involved significant commitments of time and/or expense for dozens of participants, including witnesses, attorneys, members of the public, Board members, Board staff members and court reporters. By withholding a potentially dispositive Motion, the Movants are elevating their own convenience or desire for tactical effect at the expense of every other participant in this process.

The importance of the issue of prejudice is addressed in the only Illinois Pollution Control Board case cited by the Movants to establish the timeliness of their Motion, *Brazas v. Village of Hampshire*, PCB 06-131. In *Brazas*, the Agency filed a Motion to Dismiss within 30 days of filing the record of a permit determination, within 43 days after a Board Order and Opinion finding much of a permit appeal to be deficient, and more than 30 days prior to the date of the first evidentiary hearing. *Id.* at 2. *Brazas* never responded to the Agency's Motion to Dismiss. *Id.* In granting the Agency's Motion, the Board specifically cited the Agency's argument that material prejudice would result in proceeding to hearing in the absence of Board jurisdiction. *Id.* at 3.

In the present case, the delay in filing the Motion to Dismiss is more than ten times longer than the few days in the *Brazas* case. On the critical issue of avoiding material

prejudice, the cases are also clearly distinguishable. Unlike *Brazas*, where the Agency acted prior to hearing, in the present case the Movant delayed until after the hearings concluded to file their Motion to Dismiss. In *Brazas*, the Agency alleged the material prejudice exception to an ordinarily applicable rule, and the Board in its discretion and under the circumstances presented allowed the Motion to proceed. Material prejudice was not asserted by the Movants in the present case. In *Brazas*, the risk of material prejudice was the introduction of inappropriate evidence at hearing. In the present case, the reality of material prejudice is the unexplained delay in filing a Motion to Dismiss that could have been filed consistently with Board rules, potentially meaning that thousands of hours of cumulative effort by dozens of participants in a Board proceeding, and tens of thousands of dollars, could be wasted.

Second, if this course of conduct is permitted, the Board unwittingly could be encouraging parties to engage in bait-and-switch tactics. In the present case, the Movants demonstrated their ability to engage in motion practice before the Board as early as June 30, 2006 with their initial filing in this matter. A Motion to Dismiss on that date would have been timely. Earlier this year, in PCB R-2006-025, the very same Movants filed a dispositive Motion one day after the Agency submitted its rulemaking proposal. In the present case, the Movants did not file a Motion to Dismiss until the hearings concluded, six months after the Agency rulemaking proposal and five months after the Movants' first Motion. In the meantime, they fully availed themselves of the opportunity to create a record favorable to their interests. Only after creating this record – and having the opportunity to gauge the likelihood of success on the merits of the evidence – did they produce a Motion alleging the proceedings never should have taken place at all. In order

to avoid this, the Board rules prudently establish an orderly process in which potentially dispositive Motions are resolved very early in the rulemaking process. The Board has every reason to issue an Opinion and Order underscoring the necessity of adhering to this process, especially when a dispositive Motion could have been timely filed but was not, without explanation and without any demonstration of material prejudice, by Movants that participated fully in the hearing process.

Third, if the Board denies the Motion for lack of timeliness, the Movants are not without an alternative in this rulemaking process. The period for post-hearing comments will remain open until December 22nd. The Movants are free to make legal arguments in their post-hearing comments. By requiring the Movants to make their arguments in post-hearing comments, the Board will be acting consistently with Board rules and with the Hearing Officer's Orders for the efficient conduct of this proceeding, while also curtailing the possibility of interlocutory appeal, see *Dynegy Midwest Generation, Inc., Kincaid Generation, LLC and Midwest Generation, LLC v. PCB and IEPA*, No. 2006-CH-213, Sangamon County Circuit Court. Of course, the Board could also eliminate the possibility of a last minute interlocutory appeal simply by withholding its decision on the Motion To Dismiss until it issues its final Opinion and Order in this matter, meaning all issues would be addressed in the same proceeding if an appeal is filed.

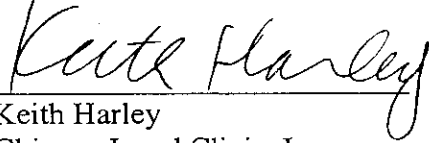
Conclusion

For the reasons described in this Reply, the Environmental Advocates respectfully request the Board to deny the Motion to Dismiss on the basis that it was not filed in a timely manner.

Respectfully Submitted,

Environment Illinois

By



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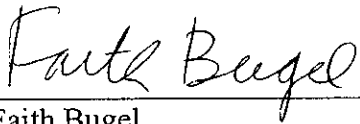
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CERTIFICATE OF SERVICE

I, Keith Harley, an attorney, hereby certify that true copies of the foregoing Appearance were delivered on December 13, 2006 to the following:

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and that true copies of the foregoing Appearance were mailed by First Class Mail, by depositing the same in the U.S. Mail depository located at 227 West Monroe, Chicago, Illinois in an envelope with sufficient postage prepaid, on December 13, 2006, to the following:

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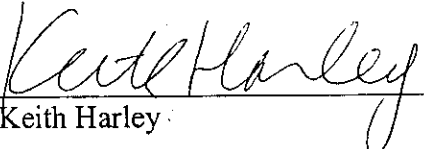
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