

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON) SS
)
)

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state that I have served by electronically mailing the attached MOTION TO FILE INSTANTER AND RESPONSE TO POST-HEARING COMMENT of the Illinois Environmental Protection Agency upon the following persons:

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ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

/s/ _____
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Dated: August 25, 2009

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
SECTION 27 PROPOSED RULES FOR)	
NITROGEN OXIDE (NO_x) EMISSIONS)	R07-19
FROM STATIONARY RECIPROCATING)	(Rulemaking – Air)
INTERNAL COMBUSTION ENGINES AND)	
TURBINES: AMENDMENTS TO 35 ILL.)	
ADM. CODE PARTS 211 AND 217)	

**MOTION TO FILE INSTANTER AND
RESPONSE TO POST-HEARING COMMENT**

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by its attorneys, and hereby submits its response to a comment submitted by Southern Illinois Power Cooperative (“SIPCo”) on August 20, 2009, and a Motion to File Instanter in the above rulemaking proceeding. Comments were due on August 21, 2009, however counsel was on vacation and counsel’s technical support was not available to review the response when the comment was submitted – and it should be noted that the Agency received the comment on the last day of the comment period, thus allowing essentially no time for a response within the period even if staff had been available. Therefore, the Illinois EPA respectfully requests that it receive an additional two days to provide comments in response. The Illinois EPA moves the Illinois Pollution Control Board (“Board”) to grant its request for leave to file a response to the comment instanter.

SIPCo is requesting that Board address the distribution of NO_x Budget allowances remaining in the Illinois EPA’s account. SIPCo raises the specter that if the allowances are not distributed pursuant to this rulemaking they will be retired under 35 Ill. Adm. Code Section 225.545(i) or 225.575(b)(4). This is false because the transfer of the NO_x SIP Call allowances from the Illinois EPA’s NO_x budget account to its Clean Air Interstate Rule (“CAIR”) NO_x Ozone Season account by the United States Environmental Protection Agency (“USEPA”) does

not confer any additional authority on the Illinois EPA to distribute or retire these allowances beyond the authority originally given by the Board under Subpart W.

In addition, the Board has not given the Illinois EPA the authority under either Section 225.545(i) or 225.575(b)(4) to retire NO_x SIP Call allowances. Section 225.545(i) applies to allowances from the CAIR New Unit Set-Aside (“NUSA”). As the NO_x SIP Call allowances are not part of the CAIR NO_x Ozone Season Budget as set forth in Section 225.525, these allowances are not part of the portion of the budget that has been set-aside for new-units in 2009, hence, these allowances are not subject to the retirement provisions of subsection (i) of Section 225.545(i). Similarly, Section 225.575(b)(4) refers to allowances that have been portioned from the CAIR NO_x Ozone Season Budget for the Clean Air-Set Aside (“CASA”). As the NO_x SIP Call allowances are not part of the CAIR budget, they cannot be distributed under the CASA provisions and are not subject to the provisions of that Section. Just because the allowances in question were New Source Set-Aside allowances under the NO_x SIP Call does not make them allowances in the NUSA under Illinois’ CAIR program. There is no provision for such allowances to be transferred into the NUSA category, because there is no provision for how these allowances will be treated under the CAIR program.

SIPCo also indicates that if the allowances that were not allocated under the NO_x SIP Call trading program are not addressed in this docket, a separate rulemaking will need to be undertaken. This is also not true, as the Illinois EPA will be reopening Part 225 after USEPA addresses the vacatur and remand of the CAIR rule under the *North Carolina v. EPA*, No. 05-1244 (D.C. Cir. 2008) decision.

SIPCo tries to circumvent the regulatory process by arguing that as the issue was raised in outreach and at hearing, it would still be appropriate for the Board to adopt an amendment distributing these allowances. The Illinois EPA strongly disagrees with the appropriateness of SIPCo’s attempt, as SIPCo’s argument fails to acknowledge that the Illinois EPA repeatedly

indicated that the issue was outside the scope of its proposal. SIPCo while raising the issue has never put forth technical support for its amendment nor proffered regulatory language until its post-hearing comment. Further, it has not provided any indication that the affected entities, environmental groups, or other members of the public who would be affected by this amendment have any knowledge or had an opportunity to provide comment. The proposal has already gone to first notice on June 26, 2009 (33 *Ill. Reg.* 8880), as the Illinois EPA in its proposal and before the Board has repeatedly requested that this issue not be addressed in this proceeding. Any member of the public that had an interest would not have been apprised that this issue was to be addressed; hence, to add this language would necessitate a new first notice delaying the timely adoption of this proposal. In addition, SIPCo has never put forward any indication that it is prejudiced by the Illinois EPA delaying a proposal on this issue. SIPCo has never put forth any emission data or other evidence that it needs these allowances for 2009 compliance.

Further, it should be noted that SIPCo's proposed amendment that provides, "All allowances remaining in the Agency's accounts shall be distributed pursuant to the provisions of Section 217.764(b)(4)(A) and (B)," does not address the issue as it applies only to the fourth year of the program (2007) which has passed. Hence, the adoption of such amendment would result in no distributions whatsoever as the fourth year of the program has come and gone.

The Illinois EPA believes that no changes to the proposal are necessary at this time and that no prejudice will result from bundling an amendment to distribute these allowances (should such an amendment be deemed appropriate at that time) with its future amendments to Part 225. The Illinois EPA also believes that the amendment as proposed by SIPCo falls beyond the scope of the current rulemaking which was proposed to address substantive and duplicative requirements that face both the Illinois EPA and affected Electric Generating Units.

The Illinois EPA respectfully submits this Motion For Leave to File Instanter and Response to Comment.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Rachel L. Doctors
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DATED: August 25, 2009

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