BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	**)**	
	)	
AMENDMENTS TO	**)**	**R18-20**
35 ILL. ADM. CODE 225.233,	**)**	**(Rulemaking – Air)**
MULTI-POLLUTANT STANDARDS (MPS)	**)**	

NOTICE OF FILING

To: ALL PARTIES ON THE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **DYNEGY'S RESPONSE TO ENVIRONMENTAL ORGANIZATIONS' MOTION TO STAY**, copies of which are herewith served upon you.

/s/ Ryan Granholm
Ryan Granholm

Dated: February 16, 2018

Ryan Granholm
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 7100
Chicago, Illinois 60606
rgranholm@schiffhardin.com
312-258-5500

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DYNEGY'S RESPONSE TO ENVIRONMENTAL ORGANIZATIONS' MOTION TO STAY

NOW COMES Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC and Electric Energy, Inc., collectively "Dynegy," by and through its attorneys Schiff Hardin LLP and pursuant to 35 Ill. Adm. Code § 101.500(d), and respectfully submits this response opposing the motion by the Environmental Defense Fund, the Environmental Law and Policy Center, the Natural Resources Defense Council, the Respiratory Health Association and the Sierra Club (collectively, the "Environmental Organizations") to stay this rulemaking proceeding ("Mot. to Stay").

The Environmental Organizations' motion should be denied, first, because the requested stay would undermine the rulemaking process established by law and practice. As the proponent of the rule change, the Illinois Environmental Protection Agency ("Agency" or "IEPA") is the only party required to participate in the process. All members of the public, including Vistra Energy Corp. ("Vistra"), have been given the opportunity to participate in this rulemaking, and that is all that is required. The involvement of other interested parties is entirely voluntary – the Board's rulemaking process *allows* members of the public to provide input, but does not force them to do so. Granting this stay would set a dangerous and disruptive precedent by which parties could argue that the Board

cannot act until all potentially interested parties are heard. This result is contrary to law and wasteful of Board, Agency, and stakeholder resources.

The requested stay could also undermine the rulemaking process by allowing anyone to seek a stay and delay IEPA's proposed rules and the Board's related action simply by identifying some current or future potential non-participating stakeholder who might have some input to offer. For instance, one might even argue with an equally erroneous voice that any absent environmental organization is a reason to stay a rulemaking proceeding. Members of the public, including Vistra, are free to participate in rulemakings initiated by IEPA if they like, but the Board should not grant a stay that effectively creates precedent for the need to compel anyone with a possible interest to participate.

Moreover, in this case the stay request is even weaker and more dangerous to orderly rulemaking because it is premised on the possibility that ownership of a stakeholder may change at some point in the future and that the new potential owner might have different input. The Board should not grant a stay based upon mere possibilities and speculation. The Board is not responsible for ensuring that every interested party or regulated entity, present or future, is heard during a rulemaking, only that every stakeholder has the *opportunity* to be heard.

Furthermore, the Environmental Organizations' motive for this stay seems disingenuous. Vistra has the right to participate in this rulemaking, but that is Vistra's right to assert. The Environmental Organizations seek to delay the proposed changes to the Multi-Pollutant Standards ("MPS"), and the stay is a procedural tool to cause delay. In turn, any delay would extend Dynegy's economic hardship under the current MPS regime.

Additionally, the deficiencies in the current MPS and economic challenges of today's energy market *will not change* if another company takes ownership or control of the downstate fleet. The Agency's reasons for the MPS amendments are not related to the profitability of particular companies, but rather a systemic problem with the existing MPS regulatory program in current market conditions that would adversely affect any owner or operator of the impacted electric generating units ("EGUs"). The proposal is designed to positively impact the people of Illinois by relieving a regulatory burden while also protecting the environment by reducing the emissions the MPS fleet is allowed to emit.

Finally, a stay would materially prejudice Dynegy because the current MPS framework coupled with depressed energy prices cause Dynegy to operate several EGUs at a financial loss. The longer the delay in adopting the proposed MPS changes, the greater that economic hardship.

For these reasons, which are explained more fully below, Dynegy respectfully requests that the Board deny the stay motion.

Background

IEPA initiated this rulemaking to amend the MPS, which are contained in 35 Ill. Adm. Code § 225, "Control of Emissions from Large Combustion Sources." Dynegy currently owns all of the EGUs subject to the MPS. Dynegy's Response in Support of the Agency's Motion to Expedite ("Resp. in Supp. of Mot. to Exp.") at 4 (Oct. 16, 2017). Because some of those EGUs were owned by a different company when the MPS was adopted, the existing MPS divides EGUs subject to the rule into two separate groups, each subject to a different rate-based emissions limit, despite the two groups' current common ownership through a common parent. *Id.* at 4, 7. This issue, along with a steep decline in

energy prices, has caused Dynegy to bid high-cost, low emission units into the energy market at prices far below cost to ensure that low emission units are selected for use by the system operator, thereby keeping each group's emissions rate below the applicable MPS limits. *See Prefiled Testimony of Dean Ellis* (Dec. 11, 2017) (hereinafter "Ellis Test.").

On October 2, 2017, following discussions with Dynegy, the Agency submitted the proposed rulemaking to the Board pursuant to 35 Ill. Adm. Code § 102.200. The proposed rule would amend the MPS to reduce the amount of emissions Dynegy is allowed to emit in exchange for much needed operational flexibility and more uniform emissions limits. *Id.* at 7-8. This would be accomplished, in part, by replacing two separate NO_X annual, NO_X seasonal, and SO_2 annual emissions rates with a single set of annual tonnage limits. *Id.* at 1-2. This change would bring the MPS in line with other existing federal and state regulations establishing emission caps for NO_X and SO_2, such as the federal Cross State Air Pollution Rule ("CSAPR"). *Id.* at 2. Additionally, this change would increase certainty for regulated entities and promote Board efficiency, as the revised rule would be far less likely to require future actions by the Board, such as variances, adjusted standards, and/or other revisions. *Id.*

The Agency also filed a motion with the Board seeking expedited review of its proposal. Resp. in Supp. of Mot. to Exp. At 1. On October 16, 2017, Dynegy filed a response in support of the Agency's motion pursuant to 35 Ill. Adm. Code § 101.500(d), explaining that expedited review was critical, in part because postponement of the MPS amendment would delay the proposal's anticipated regulatory and environmental benefits and would require Dynegy to continue to operate under the economically inefficient and unnecessarily complicated existing MPS program. *Id.* at 1-2. While the Board denied the

Agency's motion for expedited review, the Board found that evidence submitted by the Agency "[did] support avoiding unnecessary delays in initiating the statutorily prescribed notice and comment process. In particular, any prejudice that will arguably start to accrue once the amendments' proposed effective date passes can be mitigated by the Board proceeding to non-substantive first-notice publication of the Agency's proposal and promptly scheduling hearings." Bd. Order at 6 (Oct. 19, 2017).

On February 2, 2018, in an apparent effort to delay promulgation of the new MPS amendments, the Environmental Organizations filed a motion to stay these proceedings on the grounds that the MPS amendments were "proposed under very different circumstances than exist today," and that the rulemaking should not go forward until Dynegy merges with Vistra, an event that may occur at the end of the second quarter of 2018, so that Vistra can "express its opinion on the rule change." Mot. to Stay at 1 (Feb. 2, 2018).

To date, the Agency has met all requirements for proposing a rule of general applicability under 35 Ill. Adm. Code § 102.202 and, in cooperation with Dynegy, has provided supporting information for the Board to consider when deciding whether to amend the MPS. All members of the public, including Vistra, have been given the opportunity to provide input on the proposed rule. Further, the Agency has provided the Board with specific reasons why delay of this rulemaking would be detrimental to the regulatory and environmental goals of the Agency, Dynegy and the general public. Resp. in Supp. of Mot. to Exp. at 7 (Oct. 16, 2017).

I. The Board Should Not Grant this Stay Because All Interested Parties Have Had the Opportunity to Participate

The Agency has followed all proper procedures for a general rulemaking under 35 Ill. Adm. Code § 102.202, and as the proponent of the rule change, it is the only party that

is required to participate in the rulemaking proceedings. The Board has, however, provided opportunity for other members of the public to offer input, as required by 35 Ill. Adm. Code § 102.108 and § 102.416. Thus, while Vistra *may* offer its views on the proposed amendments to the MPS if it so chooses, it cannot be forced to do so. The Illinois Environmental Protection Act allows any person to participate in the rulemaking process: "[n]o substantive regulation shall be adopted, amended, or repealed until after a public hearing within the area of the State concerned . . . the Board shall give notice of such hearing by public advertisement in a newspaper of general circulation in the area of the state concerned of the date, time, place and purpose of such hearing; give written notice to any person in the area concerned who has in writing requested notice of public hearings; and make available to any person upon request copies of the proposed regulations, together with summaries of the reasons supporting their adoption."
415 ILCS 5/28(a).

The only party that is required to submit evidence in connection with a rulemaking is the proponent, which in this case is IEPA. *See* 45 ILCS 5/27(a) ("Any person filing with the Board a written proposal for the adoption, amendment, or repeal of regulations shall provide information supporting the requested change[.]"). The Board is charged with reviewing the proposal and initiating the first notice period, during which the Board accepts written comments from any person about the proposed regulation. 35 Ill. Adm. Code § 102.604. After that, the Board gives second notice of the proposed regulation, and accepts any response or directive from the Joint Committee on Administrative Rules. 35 Ill. Adm. Code § 102.606. During this process, the Board may revise the proposed regulation "upon its own motion or in response to suggestions made at hearings and in written comments

made prior to second notice." 35 Ill. Adm. Code § 102.600. If the Board determines that there is insufficient evidence to support the rule, the Board can deny the rule. The burden is upon the proponent to present sufficient evidence to support the rule, not on a stakeholder or other interested party.

The Environmental Organizations have misconstrued the purpose of this rulemaking before the Board and erroneously construct from a participation opportunity a requirement for potentially interested parties to participate. The law creates that opportunity, but it does not impose that requirement. First, the Environmental Organizations mistakenly assert that this rulemaking was "premised on accommodating the needs of Dynegy," (Mot. to Stay at 5) and that a stay should be granted because Vistra's needs might be different than Dynegy's. However, the Agency – not Dynegy or Vistra – is the proponent of this *generally applicable rule* affecting all EGUs covered by the MPS. Therefore, the Agency is the only party required to participate in these proceedings and participation by other members of the public is optional, though encouraged by 35 Ill. Adm. Code § 101.110 ("[t]he Board encourages public participation in all of its proceedings."). There is simply no requirement that Vistra participate in order for this rulemaking to proceed.

The Environmental Organizations request a stay of these proceedings until "[Vistra] can express its views" on the premises that Vistra will in fact merge with Dynegy, that Vistra has thus far "played no role in these proceedings" and has been unable to do so, and that without Vistra's participation, no "meaningful" or "adequate" record can be developed. (Mot. to Stay at 4, 6 (Feb. 2, 2018)). This argument confuses a legal obligation with mere permission. Vistra may *choose* to participate in a Board rulemaking, but is not

required by law to do so. Only the Agency's input is required. *See* 45 ILCS 5/27(a) (requiring only that the proponent of a rule change provide supporting information to the Board). Vistra's, Dynegy's, the Illinois Attorney General's, and the Environmental Organizations' input is not required. A "meaningful" and "adequate" record can be developed without the input of every member of the public, otherwise every rulemaking process would be frustrated if any potentially interested party chose not to participate. Even identifying all potentially interested parties could prove a difficult if not impossible task in some rulemakings.

Additionally, while the Environmental Organizations speculate that Vistra *might* have different views about the proposed MPS changes, it is nothing more than speculation. Vistra's right to choose to participate in this rulemaking process belongs to Vistra alone, and it is not appropriate for the Environmental Organizations to assert that right on Vistra's behalf and to speculate about what Vistra may or may not believe. Thus, a stay should not be granted on the grounds that one person or company has not participated in the process.

Furthermore, allowing a stay based on a prospective possible event like a merger would create precedent by which rulemakings could be stayed based on an uncertain future event. Indeed, it is still possible that the merger might not occur, or it could be delayed, causing an indeterminate delay of this proceeding if the stay motion is granted. Any future owner of the EGUs at issue will be subject to the same applicable laws of the State of Illinois, it may operate assets as it sees fit and request relief if necessary. The possibility of future proposed rule changes should not influence how the Board handles the present rulemaking: the Board need only ensure that every interested party has the *opportunity* to participate in *this* rulemaking. This requirement has been met.

Lastly, the Board should not grant a stay because the Environmental Organizations' reasoning is flawed and there is no support for its request in the Board decisions they cite. In each Board decision cited, the *proponent* of the proposed rule – not some other interested party in the rulemaking – requested a stay in order to obtain more information for the record or reassess its objectives, *not* to force other parties into the rulemaking process. *E.g., In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives* (35 Ill. Adm. Code 742), R09-9 slip. op. at 2 (Nov. 5, 2009) (proponent IEPA asked for and received a partial stay for the R09-9 TACO rulemaking to give itself time to evaluate serious concerns raised by USEPA over IEPA's proposed vapor intrusion rules). Moreover, in each case the Board granted a stay in part because no other participant objected to the stay. *See In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives* (35 Ill. Adm. Code 742), R09-9 slip. op. at 2 (Nov. 5, 2009). Here, IEPA has not requested a stay.

The authority cited in the motion shows that the Board will grant a stay of a rulemaking when the rule proponent makes the request. The proponent here is IEPA, not the Environmental Organizations. Further, stays are typically requested by rule proponents to allow the proponent to develop an adequate record, not to force a stakeholder to participate in the rulemaking process. The Board has given all interested persons the opportunity to participate, and nothing more is required or appropriate. The stay motion should be denied.

II. A Stay Would Waste Board Resources and Set Bad Precedent

Unnecessary delay of these proceedings will not only create bad precedent by which future rulemakings can be postponed, but also works against the interest of

conserving Board resources. The Environmental Organizations raise the issue of the Board's "limited resources" when arguing that this rulemaking should be stayed. The Environmental Organizations speculate that Vistra *might* want to initiate a separate rulemaking sometime in the future. But future impacts on the Board's resources as a result of potential future rulemakings are conjecture and pale in comparison to the negative impacts on the Board's resources should the Board grant a stay and the merger does not occur or it is delayed. The Board's rulemaking process is now four months along, two days of hearings have been held, and hundreds of public comments have been submitted. There is no valid reason to prolong this rulemaking with a stay. Worse still, the Board's resources would be wasted by allowing parties to do exactly what the Environmental Organizations have attempted to do here, which is to invoke Vistra's interests as a guise for pursuing the Environmental Organizations' true goal of delaying MPS amendments, which would cause Dynegy additional economic hardship.

III. The Problems with the Current MPS Are the Same Regardless of Who Owns and Operates EGUs in the Downstate Fleet

A merger between Dynegy and Vistra will not change the regulatory and economic problems with the current MPS or the potential for environmental benefit that led IEPA to propose the MPS revision and Dynegy to support the proposal. The Environmental Organizations' focus on the potential merger and financial condition of Vistra ignores the concerns at the heart of this rulemaking: The current MPS is inefficient, it fails to account for changes in the power markets and it does not promote regulatory consistency or clarity. These concerns were made particularly clear in the administrative record through the Prefiled Testimony of Dynegy's Executive Vice President for Regulatory and Government Affairs, Dean Ellis and in Dynegy's previous motion to the Board. *See* Ellis Test. at 11 ("in

order for Dynegy to operate [under the current MPS] it must bid into MISO higher-cost, lower emitting units along with the lower-cost, higher emitting units. This situation results in Dynegy's fleet operating on a negative cash flow basis."); *see also* Resp. in Supp. of Mot. to Exp. (Oct. 16, 2017).

Through written submissions and hearing testimony Dynegy has outlined several problems that make compliance with the existing MPS economically difficult and irrational. Since adoption of the MPS, electricity prices in the energy market controlled by the Midcontinent Independent System Operator ("MISO"), the electric grid operator, have become volatile and too low to support the operation of generation necessary to comply with the MPS's existing SO_2 emissions limits. Ellis Test. at 6-7. As Mr. Ellis testified, to ensure compliance with the MPS, Dynegy is forced to bid units at the Coffeen and Duck Creek Power Stations into MISO as "must run." Ellis Test. at 11. In these instances, Dynegy is often forced to bid these units into the market at a price that does not allow for cost recovery. *See id.* at 10-11.

The economics of each generating unit is independent of the overall economic condition of the parent company, whether it be Dynegy or Vistra. The cost to produce electricity at each generating unit is a function of a number of variables, including fuel costs and other costs like emissions controls. *Id.* at 8. While these costs can change, generally speaking they are relatively fixed. Jan. 18 Hr'g Test. at 185. Fuel contracts often extend over a period of years and the costs to run pollution controls remains fairly constant. The price each unit is paid to generate the electricity sold into MISO is ultimately set by MISO, given that MISO selects the generators that will provide the needed amount of

supply. Ellis Test. at 7-8. Neither Dynegy's nor Vistra's economic condition determines the cost to produce electricity from any given unit, nor the price MISO pays for electricity.

The assertion that Vistra "may have a very different view" on overall economic issues is irrelevant for the purpose of determining, based on evidence that has been submitted to the Board, whether MPS amendments are needed to address the economic conditions in the MPS fleet.

IV. A Stay Would Materially Prejudice Dynegy

Lastly, granting a stay would materially prejudice Dynegy, contrary to the Environmental Organizations' assertion. Mot. to Stay at 9 (Feb. 2, 2018). If the stay is granted, the MPS amendments would be delayed, causing Dynegy to suffer additional high costs and severe economic constraints. Resp. to Mot. to Exp. at 2. Dynegy's economic situation has already been seriously eroded by multiple plant retirements, events and economic trends in the energy and capacity markets, as well as the archaic and flawed MPS system that simply did not contemplate current market economics or two fleets with common ownership but nonetheless subject to two separate MPS group requirements. Delaying the MPS revision will postpone achievement of several benefits that are needed now, including regulatory consistency, operational flexibility, and reduction of the emissions the fleet is allowed to emit.

The Environmental Organizations' reliance on Dynegy's statement that it "is able to demonstrate compliance in accordance with the MPS," (Mot. to Stay at 9; Jan. 17-18 Hr'g Ex. 18 at 3) as evidence that a stay will not harm Dynegy is disingenuous and ignores the evidence in the record. Dynegy's current ability to comply with the MPS does not mean it is not severely burdensome for Dynegy to do so. In fact, Dynegy's compliance requires

the company to regularly operate certain units at a loss, which is one reason Dynegy approached the Agency about a rule change. Ellis Test. at 11-12.

Conclusion

The Board should deny the motion to stay because the proponent of the rule has not sought a stay and all interested persons, including Vistra, have the opportunity to participate in the rulemaking process. The Board should not set precedent by which parties are *required* to provide input to the Board for a rulemaking to proceed, as such precedent would unnecessarily hinder administrative rulemaking and waste Board resources. The current MPS framework must be changed regardless of who owns and operates the downstate fleet, but Dynegy will suffer continued economic harm if this rulemaking is postponed. The Environmental Organizations' main aim seems to be delaying the MPS amendments, which would only perpetuate that harm. The Board should not allow the Environmental Organizations to misuse a procedural tool, like a stay, to accomplish that goal.

WHEREFORE, Dynegy respectfully requests that the Board, consistent with the law governing Board rulemaking procedures and in the interest of avoiding the establishment of negative precedent, deny the Environmental Organizations' motion to stay.

Respectfully Submitted,

/s/ Joshua More

Joshua More
Joshua.More@schiffhardin.com
Amy Antoniolli
Amy.Antoniolli@schiffhardin.com
Ryan Granholm
Ryan.Granholm@schiffhardin.com
Caitlin Ajax
Caitlin.Ajax@schiffhardin.com

Schiff Hardin LLP
233 South Wacker Drive
Suite 7100
Chicago, Illinois 60606
312-258-550

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 16th day of February, 2018, I have electronically served the attached **DYNEGY'S RESPONSE TO ENVIRONMENTAL ORGANIZATIONS' MOTION TO STAY**, upon all parties on the attached service list.

My e-mail address is rgranholm@schiffhardin.com;

The number of pages in the e-mail transmission is 17.

The e-mail transmission took place before 5:00 p.m.

/s/ Ryan Granholm
Ryan Granholm

Joshua More
Amy Antoniolli
Ryan Granholm
Caitlin Ajax
SCHIFF HARDIN LLP
233 South Wacker
Drive Suite 7100
Chicago, Illinois 60606
312-258-5500

SERVICE LIST	
Don Brown, Assistant Clerk Don.brown@illinois.gov Mark Powell, Hearing Officer Mark.Powell@illinois.gov Marie Tipsord, Hearing Officer Marie.Tipsord@illinois.gov Illinois Pollution Control Board James R. Thompson Center Suite 11-500 100 West Randolph Chicago, Illinois 60601	Dana Vetterhoffer Dana.vetterhoffer@illinois.gov Gina Roccaforte Gina.roccaforte@illinois.gov Division of Legal Counsel Illinois Environmental Protection Agency 1021 North Grand Avenue, East P.O. Box 19276 Springfield, Illinois 62794-9276
Eric Lohrenz Eric.lohrenz@illinois.gov Office of General Counsel Illinois Department of Natural Resources One Natural Resources Way Springfield IL 62702-1271	Andrew Armstrong aarmstrong@atg.state.il.us Office of the Attorney General 500 South Second Street Springfield, IL 62706
James Gignac jgignac@atg.state.il.us Stephen Sylvester, Assistant Attorney General ssylvester@atg.state.il.us Matthew Dunn mdunn@atg.state.il.us 69 West Washington Street, Suite 1800 Chicago, IL 60602 enviro@atg.state.il.us	Katy Khayat Katy.Khayyat@illinois.gov Department of Commerce and Economic Opportunity Small Business Office 500 East Monroe Street Springfield, IL 62701
Jean-Luc Kreitner jkreitner@elpc.com 35 East Wacker Drive, Suite 1600 Chicago, IL 60601	Greg Wannier, Staff Attorney Greg.wannier@sierraclub.org Sierra Club Environmental Law Program 2101 Webster Street, Suite 3100 Oakland, CA 94612
Faith Bugel fbugel@gmail.com Interested Party 1004 Mohawk Wilmette, IL 60091	Katherine D. Hodge HeplerBroom LLC khodge@heplerbroom.com 4340 Acer Grove Drive Springfield, IL 62711