ILLINOIS POLLUTION CONTROL BOARD
November 21, 2013

ILLINOIS POWER HOLDINGS, LLC and AMERENENERGY MEDINA VALLEY COGEN, LLC;	)	
Petitioner,	)	
AMEREN ENERGY RESOURCES, LLC,	)	
Co-Petitioner,	)	
v.	)	PCB 14-10
	)	(Variance - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

DISSENTING OPINION (by D. Glosser):

I respectfully dissent from the majority opinion in this case. I would not have granted the variance as I find that Illinois Power Holdings, LLC (IPH), AmerenEnergy Medina Valley Cogen, LLC (Medina Valley), and Co-Petitioner Ameren Energy Resources, LLC (AER) (collectively, petitioners) have not established that an arbitrary or unreasonable hardship exists that warrants a variance.

Section 35(a) of the Environmental Protection Act (Act) provides in pertinent part:

> The Board may grant individual variances beyond the limitations prescribed in this Act, whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship. However, the Board is not required to find that an arbitrary or unreasonable hardship exists exclusively because the regulatory standard is under review and the costs of compliance are substantial and certain. (415 ILCS 5/35(a) (2012)).

Case law has evolved establishing that the Board must weigh any hardship against injury to the public or the environment. Marathon Oil Co. v. EPA, 242 Ill. App. 3d 200, 206, 610 N.E.2d 789, 793 (5th Dist. 1993). However, as the court stated in Marathon,

> We do not mean to indicate by our opinion that the Board should, in effect, give advisory opinions to potential polluters or encourage potential polluters to request variances for the sole purpose of testing the Board to see if the Board can be persuaded to ease its rules. We see nothing wrong in the Board establishing a

> requirement that the petitioner at least make a *prima facie* case that it would suffer an arbitrary and unreasonable hardship by complying with the Board's rule before the Board is required to examine the adverse impact the variance would have on the environment (emphasis added). *Id*. at 794.

Substantial case law also exists indicating that where a hardship is the result of decisions by the petitioner, including business decisions, the hardship is "self-imposed" and a variance is not granted. *See e.g.* Ekco Glaco v. IEPA, PCB 87-41 (Dec. 17, 1987). As the parties and the majority opinion describe this history extensively, I will not repeat it here. However, as discussed below, I find that no hardship exists, so there is no need to examine the issue of whether or not the hardship is "self-imposed".

The threshold question, based on both the statute and the case law, is whether or not the petitioner has established that an "arbitrary or unreasonable" hardship exists. The next question, assuming that some hardship exists, is whether the hardship is a result of the petitioner's own actions, such that the hardship is "self-imposed" and not "arbitrary or unreasonable". The petitioners in this case are IPH, Medina Valley, and AER. The majority, appropriately, does not find that Medina Valley suffers a hardship. Medina Valley is a part of the variance because it takes ownership of closed plants that are still a part of the Multi Pollutant Standard (MPS) group. Because Medina Valley's facilities are closed, and will remain closed, there are no emissions subject to emission limits. Thus, I agree no hardship can be found for Medina Valley.

As to AER, I concede that under the prior variance AER was found to be suffering a hardship. *See* Ameren Energy Resources v. IEPA, PCB 12-126. But, as AER will no longer be an owner of the facilities, subject to the rule of general applicability, AER will have no compliance obligations. At worst, if the variance is not granted and AER retains possession of the facilities, AER will continue under the prior variance. Therefore, I cannot find a hardship for AER in this variance proceeding.

This leaves only the petitioner, IPH, required to at least establish a *prima facie* case that a hardship exists. The majority finds that, "upon acquiring the operating MPS plants, IPH would face a hardship. Even with Medina Valley's continued non-operation of the Meredosia and Hutsonville stations, IPH must complete the Newton Flue Gas Desulfurization project to bring about MPS Group compliance with the MPS." The majority finds that

> The proposed variance would allow IPH to stay the course with that means [*sic*] of ultimate MPS compliance, locking in the benefit of the AER's expenditures and progress on the Newton FGD project pursuant to the variance granted in PCB 12-126. Without a variance, IPH would have to accelerate completion of that project, which, according to petitioners, would still not bring the MPS Group into compliance with the MPS 2015 SO_2 emission rate, requiring plant closures. Illinois Power Holdings LLC *et al* v. IEPA, PCB 14-10, slip op. at 92 (Nov. 21, 2013).

IPH is a limited liability company owned directly by Illinois Power Holdings II, which is a directly and wholly owned subsidiary of Dynegy, Inc. Affidavit of Mario E. Alonso (Pet. Exh.

2) at 2. IPH was formed to assume the equity interest in Ameren's operating merchant generating stations pursuant to a March 14, 2013 transaction agreement between Ameren and IPH. *Id.* Following closing under the transaction agreement, IPH will own all of Ameren's interest in Ameren Energy Generating Company and Ameren Energy Resources Generating Company, and other AER subsidiaries. *Id.* Dynegy's subsidiaries, including IPH, are independent legal entities with separate assets and liabilities. *Id.*

Under the transaction agreement, AER's corporate structure would change. Ameren would "initiate a reorganization of AER," creating "New AER" to accept the active generating facilities in the MPS group, namely, the Coffeen, Duck Creek, E.D. Edwards, Joppa, and Newton plants. Pet. at 4, citing Pet. Exhs. 1, 2. In turn, IPH would acquire New AER and, with it, the five active generating plants. *Id.* Medina Valley would acquire the generating stations that the PCB 12-126 order granting the AER variance requires to remain shuttered for the term of the variance, namely, the Meredosia and Hutsonville stations. *Id*. Thus, the record is clear that IPH was created for the sole purpose of taking over the AER facilities, and IPH has not provided any capital for those facilities.

The majority attempts to explain why the facts of this case are legally distinguishable from those cases where a hardship was found by the Board or courts. *See generally* slip op. at 94-98. I believe the majority completely fails to do so. I find the facts of this request are very like the facts in the Willowbrook Motel Partnership v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985) and IEPA v. Lindgren Foundry, PCB 70-1 (Sept. 25, 1970). Therefore, consistent with those prior decisions, I would deny the variance.

The majority distinguishes this requested variance from Willowbrook in three ways: 1) no claimed financial losses if the variance is not granted; 2) a different "burden of compliance"; and 3) the nature of the environmental impact. *See* slip op. at 96-97. These factual distinctions are without meaning. The facts of Willowbrook are that the petitioner was a partnership established to develop land as well as owning and operating several hotels in the Midwest. Willowbrook Motel Partnership v. IEPA, PCB 81-49, slip op. at 1 (July 14, 1983). The company sought a variance to hook-up to an overloaded sewage treatment plant "on restricted status" to prevent any additional sewage flows. The partnership claimed:

> That denial of variance [*sic*] would result in an arbitrary or unreasonable hardship due to the loss of job opportunities and the concomitant income and taxes to the State, the loss of sales and enhanced property taxes. *Id*. at 3

The Board found that these "hardships" were expected consequences of the restricted status of the sewer system, and the benefits outweighed the adverse environmental impact. *Id*. The Board further found that the partnership's claims of economic loss were simply a delay in an investment opportunity and not an arbitrary or unreasonable hardship. *Id*. at 4. The court affirmed the Board's decision stating that the "hardship here consists of a temporary prohibition against intense development of the property." Willowbrook, 135 Ill. App. 3d 349.

In Lindgren, petitioners were new owners of a foundry that the prior owner had operated "in plain violation" of particulate emission standards, and then closed. Lindgren Foundry, PCB

70-1, slip op. at 1. The new owners sought to reopen the foundry immediately and operate it in violation of emission standards for seven months while they obtained and installed a scrubber to come into compliance. *Id.* at 4. The new owners' hardship claims were that they would not open the facility without the variance, and loss of profits during a shutdown would make the whole venture financially impossible. *Id*. The Board noted that if a variance were granted every time it cost money to comply with the law, "nearly everybody would qualify" and "permission to violate the law while making corrections cannot be granted automatically." *Id*. at 6. The Board went on to state that:

> it is therefore essential in passing upon a variance petition to compare the good effects of compliance with the bad. * * * The words 'unreasonable' and 'arbitrary' plainly suggest that the Board is not to examine in every case whether or not compliance would be a good thing. To do so would completely destroy the force of the regulation and encourage excessive litigation." *Id*.

The new owners claimed that a seven-month delay in resuming operations would make it impossible financially to reopen the foundry, and that they would lose $70,000 in sunk costs. Lindgren Foundry, PCB 70-1, slip op. at 8. The Board was "not greatly impressed" by that loss, which it found was the full extent of the owners' losses, since they could "cut and run if prospects dim." *Id*. "By investing money with reason to know it would be lost absent a favorable decision," the Board added, the owners had "created their own hardship." *Id.* at 8. The Board emphasized that "[a] petitioner may not bootstrap himself into a preferred position by spending money first and then claiming he has been injured." *Id.*

Lindgren and Willowbrook offer clear indications that entities purchasing facilities have no special status when seeking a variance from a regulation of general applicability and must establish a hardship exists. As I indicated above, IPH is an entity created to take control of AER's properties, and IPH argues that not allowing it to operate with a variance is an arbitrary or unreasonable hardship. IPH has made a business decision to assume ownership of AER's facilities, facilities that are not in compliance with the rule of general applicability. Failure of any entity to meet the requirements of a rule of general applicability might result in lost job opportunities; however, such a consequence alone is not an arbitrary or unreasonable hardship under Lindgren. IPH does not currently operate a facility subject to the MPS and thus its only hardship, if the variance were denied, is that it still would not operate a facility subject to an MPS. IPH could delay its business opportunity, while seeking other regulatory relief; therefore, under Willowbrook this is not an arbitrary or unreasonable hardship.

As the variance statute states "the Board is not required to find that an arbitrary or unreasonable hardship exists exclusively because the regulatory standard is under review and the costs of compliance are substantial and certain." 415 ILCS 5/35(a) (2012). The facts in Willowbrook and Lindgren are strikingly similar to the facts here. This long-standing Board precedent establishes that there is no arbitrary and unreasonable hardship where a purchaser of an out-of-compliance company shows only that a variance is needed to make the facilities profitable. Therefore, I believe that the case law and clear statutory language support my position that IPH has not established a *prima facie* case that an arbitrary or unreasonable hardship exists.

The majority also found that granting the variance would result in an environmental benefit and weighed that fact against any perceived hardship for IPH. I am not convinced that an environmental benefit exists and share the concerns raised by the Citizens Groups (*see e.g.* Obj. at 9, PC 2337 at 9). I have reviewed the USEPA's report concerning health effects of increased SO_2 emissions and find that report telling. *See Integrated Science Assessment for Sulfur Oxides-Health Criteria*, EPA-600/R-08/047F (Sept. 2008). I have grave concerns about the impact of even a temporary increase in SO_2 emission near the AER facilities. Even though I am not convinced there is an environmental benefit, I find that the weighing of any such benefit is inappropriate in this case. As made clear in Marathon Oil Co. v. EPA, 242 Ill. App. 3d 200, 206, 610 N.E.2d 789, 793 (5th Dist. 1993), before the Board reaches the consideration of environmental benefit, a *prima facie* case that a hardship exists must be established. As discussed above, none of the petitioners in this proceeding have established the existence of a hardship, and therefore, any perceived environmental benefit is irrelevant.

For all these reasons, I respectfully dissent from the majority opinion.

Deanna Glosser

_____

Deanna Glosser

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on November 21, 2013.

John T. Therriault

_____

John T. Therriault, Clerk
Illinois Pollution Control Board