BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS POWER HOLDINGS, LLC and AMERENENERGY MEDINA VALLEY COGEN, LLC;	)	
Petitioners,	)	
AMEREN ENERGY RESOURCES, LLC	)	
Co-Petitioner,	)	PCB No. 14-10 (Variance – Air)
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING

To: ALL PARTIES ON THE ATTACHED SERVICE LIST

Please take notice that today we have electronically filed with the Office of the Clerk of the Illinois Pollution Control Board a **PETITIONERS' and CO-PETITIONER'S POST-HEARING BRIEF**, copies of which are herewith served upon you.

/s/ Claire A. Manning
Claire A. Manning

Dated: October 7, 2013

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PETITIONERS' AND CO-PETITIONER'S POST-HEARING BRIEF

On July 22, 2013, Petitioners, Illinois Power Holdings, LLC ("IPH") and AmerenEnergy Medina Valley Cogen, LLC ("Medina Valley"), and Co-Petitioner, Ameren Energy Resources, LLC ("AER") filed with the Illinois Pollution Control Board ("Board") a request for variance relief from the 2015 and 2017 sulfur dioxide ("SO_2") emission rate provisions of the Illinois Multi-Pollutant Standard ("MPS"), 35 Ill. Adm. Code § 225.233(c)(3)(C)(ii) and (iv), respectively.[1] The MPS applies to a fleet of seven coal-fired power plants (the "MPS Group") located throughout central and southern Illinois: Coffeen Energy Center (Montgomery County); Duck Creek Energy Center (Fulton County); E.D. Edwards Energy Center (Peoria County); Newton Energy Center (Jasper County); Joppa Energy Center (Massac County); Hutsonville Energy Center (Crawford County); and Meredosia Energy Center (Morgan County).

[1] Hereinafter, citations to the Board's regulations will be by section number only.

Pursuant to an executed transaction agreement,[2] Petitioners intend to own these facilities upon a grant of variance in this proceeding. Both Petitioners will be signatories to the Board's Certification of Acceptance of the requested variance. A proposed Certification of Acceptance has been presented to the Board in Petitioners' and Co-Petitioner's Response to Illinois Pollution Control Board's Questions Set Forth In Hearing Officer Order of September 12, 2013, filed on September 16, 2013 ("September 16 Responses to Board").

I. RELIEF REQUESTED

The proposed variance involves the same facilities, the same regulations, and the same requested relief as granted to Co-Petitioner AER on September 20, 2012, for this very MPS Group, in a prior Board variance proceeding. *AER v. IEPA*, PCB 12-126 ("AER Variance"). This proceeding is necessitated by market realities which led Co-Petitioner AER's parent company, Ameren Corporation, among other reasons, to exit the merchant generation business. Pet. at 4, Pet. Ex. 1, *Lyons Affidavit*, ¶6. Subsequent to that decision, Petitioner IPH entered the transaction agreement with Ameren Corporation, where IPH would acquire the equity interest in the five operating energy centers, and Petitioner Medina Valley would acquire the two shuttered facilities (Hutsonville and Meredosia). The conveyance to IPH is conditioned upon IPH receiving a Board-ordered variance materially the same as the AER variance.

On May 2, 2013, AER, along with IPH and Medina Valley, moved the Board to reopen the PCB 12-126 docket and substitute IPH as the grantee of the variance relief upon closing of the transaction. In denying the motion, the Board stated that IPH must file a petition and demonstrate that IPH's compliance with a rule or regulation, requirement or order of the Board

[2] The transaction agreement was put into evidence in PCB 12-126, as Exhibit B to the Motion to Substitute Parties, filed on May 2, 2013. The Petition requests that the Board take administrative notice of the docket in that proceeding.

would impose an arbitrary or unreasonable hardship. *AER v. IEPA*, PCB 12-126, slip op. at 10 (June 6, 2013). Consistent with the Illinois Environmental Protection Act ("Act"), the Board's rules, and that order, the Parties filed the Petition.

As described more fully in the Petition and at hearing, and reiterated herein, the same hardship factors that the Board analyzed in PCB 12-126 are present here, as to IPH and as to the employees and communities where the relevant energy centers are located. Uncontroverted evidence in this proceeding has established that, without the variance, plant closures of one or more of the remaining operational MPS Group energy centers are inevitable and would have to occur by January 1, 2015. Tr. p. 28, lns. 13-23; Pet. at. 24, 31-34; Pet. Ex. 2, *Alonso Affidavit*, ¶8.

A public hearing was held in this matter on September 17, 2013. In addition to testimony presented by IPH,[3] 107 persons appeared at the hearing to provide public comment in support of the requested variance. Those persons included: state legislators representing six legislative districts and from both political parties; the President of the Illinois AFL-CIO; the Energy Council Executive Director of the Illinois Chamber of Commerce; the President of the Illinois Energy Association; the Chief Operating Officer of the Illinois Manufacturers' Association; various representatives of state and local unions, including International Brotherhood of Boilermakers Locals 60 & 363, International Brotherhood of Electrical Workers Locals 702 & 816, International Union of Operating Engineers Local 148, Steamfitters Local 353, United

[3] At that hearing, IPH provided testimony of Dan Thompson, Vice President and General Manager of Dynegy Midwest Generation, LLC ("DMG") and IPH (Tr. pp. 17-31; Pet. Ex. 8) and expert witnesses, George Bilicic, from Lazard Freres, an independent financial advisory and asset management firm (Tr. pp. 32-43; Pet. Ex. 9), and Lisa JN Bradley, Ph.D., DABT, and Vice President and senior toxicologist with AECOM Technical Services. (Tr. pp. 71-81; Pet. Ex. 12). Additionally, the following persons, each of whom also filed Affidavits with the Petition, were present and made available for questioning to the Board and the IEPA: Mario Alonso, Vice President of Dynegy and IPH (Pet. Ex. 2) and Rick Diericx, Senior Director of Environmental Compliance for Dynegy Operating Company (Pet. Ex. 11).

Association of Pipe Trades District Council 34, Southwestern Illinois Building & Construction Trades Council, and IL AFL-CIO; various local government officials, including the Mayors of Robinson and Newton, the Chairman of the Jasper County Board, the Executive Director of Crawford County Development, and the Superintendent of Jasper County Unit 1 School District; and over 75 employees (both management and union) from the operating power plants relevant in this proceeding, as well as those from existing Dynegy power plants: Baldwin Energy Complex (Randolph County), Wood River Power Station (Madison County), Havana Power Station (Mason County) and Hennepin Power Station (Putnam County). A list of all those persons who provided public comment at hearing urging the Board to grant the variance, and a summary of those comments, are attached to this Post-Hearing Brief as Exhibit 1.

The requested variance would do two things: (1) improve upon the environmental *status quo* under the AER Variance; and (2) avoid the economic hardships arising from inevitable plant closures if the variance is not granted. The Board is fully authorized to grant the requested relief to Petitioners. On September 5, 2013, the Illinois Environmental Protection Agency ("IEPA") filed a Recommendation in this proceeding ("IEPA Recommendation"), as required by Section 37(a) of the Act. 415 ILCS 5/37(a).

Importantly, the IEPA Recommendation concludes:

> The Illinois EPA agrees with Petitioners that there will be a continued net environmental benefit if the Board were to grant the requested relief subject to the terms and conditions contained in the Petition. The Illinois EPA also does not believe that any environmental harm would result there from. (at ¶79)

Equally important in the context of this proceeding, the IEPA Recommendation also concludes:

> The Illinois EPA also recognizes that the economic viability of the Energy Centers is essential to the citizens of the local communities, school districts, and units of local government and acknowledges the adverse impact that plant closures would have upon the local communities, the local economies, and the State's economy. (at ¶80)

A. The Requested Variance Will Continue to Provide a Net Environmental Benefit.

Specifically, as in PCB 12-126, the proposed variance would allow the Petitioners until January 1, 2020 to achieve the SO_2 emission rate set forth in § 225.233(c)(3)(C)(iii) and (iv)[4] which, without the variance, would be applicable to this seven plant MPS Group on January 1, 2015 and January 1, 2017, respectively. IPH and Medina Valley agree to accept all conditions of the variance deemed appropriate by the Board in PCB 12-126 and, as explained below, IPH has agreed to accept further conditions during the course of the underlying proceeding – thus assuring that, although not required by the Act in a variance proceeding, an environmental benefit is achieved.

First, Petitioner IPH agrees to immediately operate the plants to achieve the same system-wide rate deemed appropriate in the AER Variance (0.35 lb/mmBtu). As that rate is lower than what is required under the MPS from 2013 – 2015, the SO_2 emissions released into the atmosphere by the MPS Group in calendar years 2013 – 2020 *will actually be less* than those allowed under the MPS. In response to a question from the Board and in order to ensure a net environmental benefit is achieved during the expected duration of IPH's ownership, IPH proposes to accept a system-wide cap on SO_2 emissions of 327,996 tons through 2020, *reflecting a 7,778 reduction* in SO_2 emissions beyond what is allowed under the AER variance during this same timeframe. September 16 Responses to Board. *See* Proposed Variance Order, Conditions 1 and 6.

Second, Petitioners agree that the electrical generating units at the Meredosia and Hutsonville Power Stations will not be operated until after December 31, 2020. (The FutureGen

[4] Section 225.223(c)(3)(C)(iii) requires the seven-plant MPS Group to achieve a system-wide SO_2 annual emission rate of 0.25 pound per million British thermal units ("lb/mmBtu") for calendar years 2015 and 2016 and Section 225.223(c)(3)(C)(iv) requires a system-wide SO_2 annual emission rate of 0.23 lb/mmBtu for calendar year 2017 and each calendar year thereafter.

project at the Meredosia Energy Center is exempt from this restriction.) As the Board reasoned in its September 20, 2012 Order in PCB 12-126, "there is no current regulatory requirement that these facilities must remain closed so granting the variance with such a condition would ensure that these two stations remain closed during the term of the variance." AER Variance Order, p. 57; *See* Proposed Variance Order, Condition 2.

Third, during the course of this proceeding the IEPA proposed three additional conditions during the term of the variance to "ensure and enhance" the net benefit it agreed that the proposed variance provided. *See* IEPA Recommendation ¶79. IPH has agreed to accept all three conditions: (1) the burning of low sulfur coal (0.55 lb /mmBtu) at the E.D. Edwards, Joppa and Newton Energy Centers; (2) the operation of the existing FGD systems at the Duck Creek and Coffeen Energy Centers to achieve a combined SO_2 emission rate of at least 98 percent efficiency; and (3) the permanent retirement of E.D. Edwards Unit 1 as soon as allowed by the Midcontinent Independent Transmission System Operator, Inc. ("MISO"). Language, acceptable to the IEPA based upon post-hearing discussions, is proposed. *See* Proposed Variance Order, Conditions 3, 4 and 5.

Fourth, on September 4, 2013, IEPA and IPH entered into a Memorandum of Agreement ("MOA"). It includes the above-referenced commitment to retire E.D. Edwards Unit 1 and also includes additional environmental and energy efficiency benefits not a direct subject of this variance, such as implementation of advanced gas path technology at the Kendall Power Station and the permanent retirement of the air permits at the Stallings and Oglesby Combustion Turbine Facilities. As the MOA states, these environmental enhancements reflect "Dynegy's ongoing commitment to help improve air quality in the State of Illinois." *See* IEPA Recommendation, Exhibit 2.

B. Completing the Newton FGD Project By the End of the Variance Period Will Ensure a Continued Environmental Benefit.

The requested variance will require Petitioners to continue with the compliance plan set forth in the AER variance, which set forth a construction schedule of flue gas desulfurization ("FGD") equipment at the Newton Energy Center ("Newton FGD Project"). As determined in the AER variance proceeding, the Newton FGD Project will allow the owners of the MPS Group to meet the MPS rate at the end of the variance term. Here, IPH is poised to assume the compliance plan AER committed to last year and, despite arguments by the Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club (collectively, the "ELPC") to the contrary, is well positioned to make this variance work. As IPH's Dan Thompson explained at hearing:

> I lead the due diligence efforts on the operations-related issues for this transaction. I can tell you that Dynegy approached this transaction with the intention that it succeed, that the conditions of the variance would be met, and that at the end of the variance period, compliance with the MPS would be achieved. IPH has been structured to succeed based upon informed views of the market and our understanding of the power generation market in Illinois and the adjacent markets.
>
> Dynegy's existing power generation fleet in Illinois provides us with a unique advantage, being able to operate the combined fleets more cost effectively than any other owner. ***Given Ameren's intent to exit the merchant generation business, IPH's proposed acquisition of AER's five plants provides the best and most certain future for these facilities, the employees, and the local communities.***
>
> Among the most compelling reasons for the Board to grant this variance is the fact that IPH can actually finish construction of the Newton scrubber system. This project duct has already cost [AER] over $254 million. IPH has budgeted another $263 million for its completion. In establishing Newton as the key to compliance with the MPS at the end of the variance term, the Board set this MPS Group on a path toward compliance it should not now reverse.

Tr. pp. 25-27 (emphasis added).

II. RELIEF REQUESTED BY PETITIONERS IS APPROPRIATE AND TIMELY

The Petitioners are proper parties to whom the Board may grant variances as established by Board precedent, Board rules, and the regulatory paradigm that forms the basis of the underlying MPS, as applicable to all seven power plants that constitute the MPS Group.

A. The Petition is Procedurally Appropriate and Timely, as the Petitioners are Persons to Whom the MPS, Without the Variance, Would Otherwise Be Applicable.

The Board's regulations, at Section 104.202(a), provide that a variance may be sought by "[a]ny person seeking a variance from any rule or regulation, requirement or order of the Board *that would otherwise be applicable to that person*." (emphasis added). Here, the Petitioners have demonstrated that without a variance materially similar to the variance the Board granted in PCB 12-126, this MPS Group will not be able to meet the 2015 and 2017 SO_2 rates without the closure of a combination of the energy centers by January 1, 2015.

These facts make this Petition both appropriate and timely. Further, in the Board's denial of the Petitioners' and Co-Petitioner's request to substitute parties responsible for the AER variance and its respective conditions on June 6, 2013, the Board invited IPH back before it stating:

> IPH may file a variance petition consistent with Section 104.202(a) of the Board's regulations, or make any other appropriate filing concerning the facilities consistent with this order. PCB 12-126 (June 6, 2013).

This Petition is an appropriate and timely response to that order, and is necessitated by the very same factors the Board found appropriate one short year ago.

Board precedent interpreting and applying the Act and Board procedural rules provide the authority for the variances to be granted in this proceeding. In the past, the Board has provided the regulated community with the certainty it needs, and appropriate relief where justified and

allowed pursuant to the Act, in circumstances similar to the relief Petitioners seek here. *See Allied Chem. Corp. & Inverness Mining Co. v. IEPA,* Ill. PCB 80-92 Order (May 1, 1980); Opinion and Order (June 12, 1980).[5] The Board should soundly reject the comments of the ELPC, that this Petition is not timely as IPH and Medina Valley are not the current owners of the plants. Nothing in the Act or the Board's rules requires or connotes such finding;[6] in fact, any such finding would ignore the appropriate administrative posture here presented. Both entities to whom the MPS "would otherwise be applicable" are Petitioners in this proceeding – as required by the very language of Section 104.202(a). Granting the variances is authorized by law and will provide an overall benefit to the Illinois public. Respectfully, if the Board had found the petition requested relief it is not empowered to grant, it could have dismissed the petition outright. 35 Ill. Adm. Code 104.230 ("Dismissal of Petition"). It did not.

Further, Illinois case law and Board precedent support the conclusion that an entity may receive variance relief before it legally owns the facilities subject to regulation. Contrary to the ELPC's repeated assertions, *Ensign-Bickford* does not stand for the proposition that only the owner of a facility may seek relief from an otherwise applicable rule, regulation, requirement or order. PC# 2337, p. 21. The critical procedural problem in *Ensign-Bickford* was that the purchasing entity there (Dyno Nobel, Inc.) was not a party to the motion so the Board had no assurance that it would assume the obligations and liabilities of any variance. *Ensign-Bickford Co. v. IEPA*, PCB 02-159 (Apr. 3, 2003). No such problem exists here. Moreover, the Board has

[5] In *Allied Chemical*, Inverness sought a variance the Board had granted to Allied, who was at the time of the variance petition in the process of selling two mines in southern Illinois to Inverness. The Board found that Inverness would suffer substantially the same arbitrary and unreasonable hardship if similar variances were not granted to Inverness and it incorporated the Allied variance proceeding by reference.

[6] The MPS will be applicable to IPH and Medina Valley once the two entities own the energy centers that comprise the Ameren MPS Group. Unlike in other environmental regulatory contexts, Title IX of the Act does not use the terms "owner" or "operator". Rather, under Section 37, "any person" to whom a rule would "otherwise apply" may seek a variance.

previously granted variance relief to petitioners which did not own the facilities in question. *Ill. Petroleum Marketers Ass'n* v. *IEPA*, PCB 95-3 (May 4, 1995) (variance relief granted to Petitioner IPMA on behalf of 157 facilities); *Lamplighter Realty & Dev. Co. v. IEPA*, PCB 83-157 (Jun. 5, 1986) (Board held the variance relief was transferable to a prospective purchaser who had entered into an agreement with the petition to purchase the subject property).

Further, no hypothetical situation is present here and no advisory determination is sought. Rather, the Petitioners here present have responsibly executed a very real transaction agreement which requires a Board determination that the arbitrary and unreasonable hardship found by the Board in PCB 12-126 is just as relevant to these energy centers and their employees and the communities they support, and to IPH, as they were in PCB 12-126. There is no reason to presume, as the ELPC urges the Board to do, that in approaching this transaction the parties would have (or should have) thought that the Board would reverse the course toward compliance it set for this very MPS Group last year – given the very real hardship such decision would represent. This is especially true since the transaction needed to consider the very real costs (and obligations) associated with required completion of the Newton FGD Project as the method of achieving compliance. As explained in the Petition and at hearing, no other buyer could be expected to achieve compliance with the MPS without the closure of one or more of the operational plants.

The ELPC is simply wrong to assert that the Petitioners here seek an advisory determination from the Board – or that the Board should dismiss this matter on that basis. First, its citation to language from a Board procedural rule revision docket to stand for such proposition is misplaced. *See In the Matter of: Revision of the Board's Procedural Rules: 35 Ill.*

Adm. Code 101-130, PCB 97-8 (Oct. 3, 1996).[7] Second, no bad precedent will be established here. Granting the requested variance will apply only to the Petitioners and the seven coal-fired energy centers at issue. The Board grants variance relief in its quasi-judicial capacity based on specific findings of fact on a case-by-case basis.[8] As for these Petitioners, the unique set of facts demonstrates that this variance request is in no way hypothetical or advisory and is in every sense a true case or controversy. The Petitioners are not asking the Board to answer the question of whether it would grant the requested variances ***if*** the transaction occurs, they are respectfully asking the Board to grant relief that will become effective only ***when*** the transaction closes and an executed certificate of acceptance is filed with the Board. *See* Objection, p. 4. In a variance context, it is the Board's Certificate of Acceptance that represents finality as to variance petitioners.

Moreover, the fact that Federal Energy Regulatory Commission ("FERC") approval is required prior to ownership transfer should be no impediment to a Board decision on this variance, as the Board has previously conditioned variance orders on required federal approvals. *See City of W. Chicago v. IEPA,* PCB 85-2 (Sept. 5, 1985) (Board variance order contingent on either the amendment of a consent decree or a USEPA approval of a permit modification). Further, no prejudice has been alleged, or can in good faith be asserted here, by the granting of any conditional relief.

Petitioners here respectfully request that the Board not be swayed by the unwarranted and imprudent procedural roadblocks the ELPC attempts to throw at the very important issues

[7] In that matter the Board considered (and ultimately rejected) a rule that would allow for a type of advisory or declaratory ruling process.

[8] For example, in *Lamplighter Realty v. IEPA*, the Board made no general finding about whether variance relief could be transferred, but rather clarified that any transferability issue should be addressed in future proceedings "to allow the Board to make and articulate proper case-by-case findings." *Lamplighter Realty,* slip op. at 2.

brought, in good faith. Contrary to the ELPC's assertions that allowing this variance would be a "terrible precedent," such assertions misconstrue and ignore prior Board case law and the Board's acute sensibility of carefully tailoring each variance order and conditions to the record facts. Illinois courts recognize that in performing its specific duties, the Board has wide latitude to accomplish its responsibilities. *See Freedom Oil v. Ill. Pollution Control Bd.*, 275 Ill. App. 3d 508 (4th Dist. 1995) (*citing Lake Cnty. Bd. of Review v. Property Tax Appeal Bd. of State of Ill.*, 119 Ill. 2d 419 (1988)).

B. All Seven Energy Centers in the MPS Group Must Be Part of Any MPS Variance Analysis.

The Board's analysis of this variance request must consider the electrical generating units ("EGUs") at all seven energy centers in the Ameren MPS Group, not just those that IPH will acquire. The Petitioners fully analyzed the context and background of the MPS in their Petition, at Section I.A. Without citation to any legal authority or regulatory argument, Mr. Gignac objects to the inclusion of Medina Valley as a Petitioner, suggesting such to be a fiction. PC# 2336, p. 2. Mr. Gignac also suggests, wrongly, that the Petitioners and Co-Petitioner ignored the "instructions" of the Board found in its June 6, 2012 Order; rather each asserts that they have respectfully followed that order, in the context of the regulatory paradigm which is the MPS. The numeric emission rates that are the core structure of the MPS were calculated based on emissions from the group of seven plants, *on a system-wide basis*, to achieve the progressively declining MPS emission rates.[9]

[9] In adopting the 2015 and 2017 rates for the Ameren MPS Group, the Board described the "affected sources" as the "seven coal-fired power stations as the Coffeen Power Station in Montgomery County, the Duck Creek Power Station in Fulton County, the E.D. Edward Power Station in Peoria County, the Joppa Power Station in Massac County, the Hutsonville Power Station in Crawford County, the Meredosia Power Station in Morgan County, and the Newton Power Station in Jasper County." In the Matter of: Amendments to 35 Ill. Adm. Code 225: Control of Emissions from Large Combustion Sources (Mercury Monitoring), R09-10, slip op. at 14-15 (Apr. 16, 2009).

Mr. Gignac's comments simply ignore the regulatory development and construct of the MPS and its "system-wide" applicability. The Petition is appropriate based upon the regulatory structure and legal interpretation put forth by one of the key architects of the MPS, Illinois EPA.[10] There is no question that the MPS is a unique regulatory structure. As explained in AER's Brief in Response to Comments (referred to herein as "AER Response") also filed today, the MPS was first developed by AER with IEPA's technical guidance and expertise. Most importantly, the emission rates found within the MPS were calculated based on emissions from the group of seven plants, on a system-wide basis, to achieve the progressively declining MPS emission rates.

Further, Illinois EPA has made clear that compliance with the MPS emission rates will be the responsibility of both IPH and Medina Valley in what has been termed as a "joint and several" approach. Thus, both Mr. Gignac's comments ("there is nothing Medina Valley would need to do to comply with the MPS and therefore no reason for it to be before the Board"), PC #2336, p. 3, and Ms. Bugel's comments (that they are "simply are not a factor in the MPS"), PC # 2337, p. 18, are flatly wrong and, obviously, are not arrived at from any discussions with the regulating entity, the IEPA. Not only is this contrary to the Agency's solid and clear interpretation, but it also flies in the face of the pervasive "once in always in" approach found in air pollution regulations, both federally and in Illinois.

The objectors' approach also fails to recognize or accept that both Hutsonville and Meredosia have valid operating permits and would need to be part of any variance relief offered for the MPS Group. As they remain subject to enforcement as part of that MPS Group, they are

[10] The Illinois EPA obviously agrees with the approach taken by Petitioners and Co-Petitioner here and notes in its recommendation that the composition of the MPS Group will not change if the variance request is granted. IEPA Recommendation, ¶ 9 The IEPA also uses the terminology "*system-wide* SO_2 annual emission rate" in describing the MPS (emphasis added). *Id.*, ¶2

a valid and necessary consideration in any proceeding that seeks relief from the system-wide MPS rate. The MPS rates are based on the data and emission profile of the seven plants that opted in to the MPS in December 2006. Clearly, the Petition is appropriately designed so that the MPS Group as a whole is able to take credit for units that have been shuttered but still possess the ability and permits to operate.

In its September 20, 2012 Variance Opinion and Order in PCB 12-126, the Board appropriately recognized the *system-wide* applicability of this rate-based rule, and concomitantly the appropriateness of allowing credit for reductions on a *system-wide* basis. The Board hit this issue head on and found:

> [I]t appropriate to account for emission reductions achieved through not operating the Meredosia and Hutsonville stations in determining the effect of the variance on SO2 emissions. The AER MPS Group includes seven facilities, including Meredosia and Hutsonville, and the overall SO2 annual emission rates in the MPS apply to all the facilities in the AER MPS Group. It is significant to note the MPS does not restrict the AER MPS Group from employing any specific methods to reach the required emission rates. ***Furthermore, there is no current regulatory requirement that these facilities must remain closed so granting this variance with such a condition would ensure that these two stations remain closed during the term of the variance.*** [emphasis added]. PCB 12-126, at 56.

The point here is that the above analysis does not change with a change in ownership as the MPS and the IEPA are blind to ownership, and there is no valid regulatory rationale for doing so. The key consideration is that, so long as Hudsonville and Meredosia remain in this MPS Group, those facilities remain part of the equation to which the MPS rate applies. Thus, a reduction of emissions from one or more of the plants in the MPS Group must appropriately be considered on a system-wide basis, regardless of ownership. In the context of a variance proceeding, as opposed to a regulatory proceeding seeking to revise the rule, the inclusion of all owners of the MPS plants is not only appropriate, it is necessary.

III. THE PETITIONERS HAVE ESTABLISHED AN ARBITRARY AND UNREASONABLE HARDSHIP AND ARE ENTITLED TO RELIEF

Section 35(a) of the Act provides that, "[t]o the extent consistent with applicable provisions of the * * * Clean Air Act," the Board may grant individual variances where it is shown that "compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." The petitioner bears the burden of proof. 415 ILCS 5/37(a)(2010).

A. The Board's Hardship Analysis Must Consider Not Only Hardships to the Petitioners but Also Hardships to the Relevant Area and Economic Impacts.

When deciding whether to grant or deny a variance request, the Board is required to balance the hardship of continued compliance against the adverse impact the variance will have on the environment. *Marathon Oil Co. v. Ill. Envtl. Protection Agency*, 242 Ill. App. 3d 200, 206 (5th Dist. 1993). The party requesting the variance has the burden of establishing that the hardship resulting from a denial of the variance outweighs any injury to the public or the environment from a grant of the variance. *Id*. *See also* 35 Ill. Adm. Code 104.238(a); *Ekco Glaco Corp. v. Ill. Envtl. Protection Agency*, 186 Ill. App. 3d 141, 147 (1st Dist. 1989). If the hardship outweighs the environmental injury, the evidence rises to the level of an arbitrary or unreasonable hardship. *Marathon Oil Co.*, 242 Ill. App. 3d at 206.

The Illinois Supreme Court has held that the Board's decision to grant or deny a variance is essentially quasi-judicial and, as such, is subject to a manifest weight of the evidence standard on review. *Monsanto Co. v. Pollution Control Bd.*, 67 Ill. 2d 276, 289 (1977). *See also Ekco Glaco Corp.*, 186 Ill. App. 3d at 147. A decision is against the manifest weight of the evidence if opposite conclusions are "clearly evident." *Ekco Glaco Corp.*, 186 Ill. App. 3d at 147.

In a case with facts quite similar to those present here, the Illinois Appellate Court for the Third District reversed the Board's denial of Caterpillar Tractor Co.'s ("Caterpillar") petition for variance, where the Board found Caterpillar failed to show that immediate compliance would constitute an arbitrary or unreasonable hardship. *Caterpillar Tractor Co. v. Ill. Pollution Control Bd.*, 48 Ill. App. 3d 655, 658 (3d Dist. 1977). As here, there was no evidence that persons living nearby suffered any injuries from the plant that would constitute sufficient evidence to outweigh the significant economic consequences of a plant shutdown. The Third District gave little weight to arguments related to air quality violations at monitoring stations located five to ten miles from the Caterpillar foundry, as there was no evidence that Caterpillar caused or contributed to those air quality violations. *Id*. Importantly, the Third District stated that "there is uncontradicted evidence that the only alternatives presently available to Caterpillar are to obtain a variance, to operate the furnaces without a permit in violation of law, or to shut down the furnaces." As such, the Third District held that Caterpillar established an arbitrary or unreasonable hardship and reversed the Board.

The Board was also reversed, and a variance proceeding remanded, when it summarily dismissed a variance petition "on the theory that no arbitrary or unreasonable hardship [had] been 'shown.'" *See Material Serv. Corp. v. Pollution Control Bd.*, 41 Ill. App. 3d 192 (3d Dist. 1976). The court stated:

> [T]he petition for variance shows in paragraphs 18, 19 and 20 that an unnecessary and unreasonable hardship would be imposed if the variance is not granted. In paragraph 18, the petitioner recites that 'the proposed variance would pose no threat or health hazard to the area. The plant is in a rural setting with farmland bordering west, north and east sides of the plant'. In paragraph 19, it is alleged: 'The plant is the Sole lightweight aggregate manufacturer in the State of Illinois and serves over 200 companies in a 6 State area with a highly specialized aggregate product.' In paragraph 20 it is stated: 'The granting of a variance would spare the Ottawa-Marseilles area, an economically depressed area, the loss of one of its basic industries. The Plant employs 110 employees drawn from the

> Ottawa-Marseilles area and, in addition, generates employment from an additional 100 support industries which include trucking, barge traffic and rail operations in the above area.
>
> While paragraph 20 does not use terminology such as the Board recites, the clear import of what is alleged is that, in the event the variance is not granted, the plant would be required to be closed down. The petition states: 'The granting of the variance would spare (the area) the loss of one of its basic industries.' It is also shown in paragraph 18 that the effects of granting the variance would not be harmful to the public, and in paragraph 19 it alleges the economic importance of the industry to the surrounding area. It is thus apparent that hardship is alleged (the possible closing of the plant), and that the hardship to both petitioner and the public would be arbitrary and unreasonable in light of the lack of harm done by granting the variance and the importance of the industry to the economic welfare of the surrounding area. ***We do not interpret the 'hardship' referred to as being exclusively restricted to the hardship occasioned to the petitioner, but that it also includes hardship to the area and consideration of economic effects of termination of production there.***

Material Serv. Corp., 41 Ill. App. 3d at 192 (emphasis added).

Thus, it is clear that in evaluating arbitrary and unreasonable hardship, the courts will require that the Board evaluate the hardships alleged to the community, the employees, and the area economy – and balance those hardships against environmental injury or harm. The demonstrated hardships here come in many shapes and sizes – and they are very real and quantifiable. These hardships most certainly outweigh any alleged environmental impacts, especially when the Petitioners are poised to assume the very same variance the Board found appropriate last year – with less emissions than allowed pursuant to that variance.

B. Significant Existing Hardships Warrant the Requested Relief.

In large part, the Board already recognized the market hardships that underlie this proceeding: the adverse impact deregulation has had on Illinois generators; the continued low power prices; the substantial capital expenditures required for compliance. PCB 12-126, Sept. 20, 2012 Opinion and Order, pp. 60-64. Those factors are again reflected below and, as the Petition explains, they have not changed for the positive in the last year. Moreover, the same

financial considerations the Board addressed in PCB 12-126 as it relates to hardship continue to be relevant here. *Id*.

First, the nearly $254 million investment in the Newton FGD Project may well be lost, as the nearly equal capital expenditure to finalize the project cannot be realized under the current state of affairs – without (a) the transaction and (b) the variance. Due to AER's limited financial resources caused by depressed power prices and poor economic conditions over the past several years and its inability to obtain external financing, IPH will not be able to fund completion of the Newton FGDs in time to comply with either the 2015 or 2017 MPS SO_2 annual emission rates. Pet. Ex. 2, *Alonso Affidavit*, ¶24. Second, there are no better alternatives to MPS compliance as demonstrated in the Petition (at Section VI) and here, at Section IV. These considerations lead to the inevitable and uncontroverted conclusion that, without the variance, plant closures are inevitable by January 1, 2015. Pet. at. pp. 24, 31-34, Pet. Ex. 2, *Alonso Affidavit*, ¶8.

1. IPH and the MPS Group face significant financial hardships.

The variance sought in this matter is for the same facilities and pursuant to the identical regulatory provisions applicable when the Board granted a variance to the current owner under similar macro-economic conditions just one year ago.

IPH entered into this transaction having conducted a complete due diligence review. Circumstances wholly outside of IPH's control necessitate the variance. These circumstances include current market conditions creating depressed power prices, difficult economic conditions, the inability to install upgrades in accordance with the 2015 and 2017 requirements, all of the similar hardships in place when the original variance was granted and, as well, the fact that the 12-126 Variance Order has set this MPS Group on the course of meeting the MPS through the Newton FGD Project. IPH has independently substantiated the request for relief

before closing the transaction instead of appearing before the Board after-the-fact. The hardship faced by IPH and the plants in the MPS Group is detailed in the Petition, and is further detailed below. Pet. §V, pp. 25-47.

i. IPH's structure is standard in the utility industry and many other business sectors.

The transaction structure is one in which IPH, an entity legally separate from Dynegy, would acquire Ameren's equity interest in what is referred to as New AER. As is normal and customary in corporate transactions, Dynegy structured the acquisition such that New AER would be independent, self-sustaining, self-funding and economically viable on its own. *Affidavit of George W. Bilicic* ¶*5 (Bilicic Affidavit)*, set forth as Exhibit 2. This is typically done to separate the risks and benefits of an acquired business from the buyer's other businesses, and so that the benefits of the transaction can be separately evaluated. *Id.* Requiring businesses to "stand on their own" is common practice in the power and utility industry and many other industries, including banking, finance and insurance, as a way to manage the credit risk of the acquiring parent company and its existing subsidiaries from the risks of the acquired entity. *Id.* ¶6. Recent notable examples of transactions with non-recourse structures include Energy Capital Partners' acquisition of a portfolio of power plants from Dominion Resources and GenOn Energy's combination with NRG Energy. *Id.* In fact, the former Dominion Resources portfolio includes coal-fired and natural gas generation facilities in Illinois.

The proposed transaction structure is common in corporate practice and effectively changes very little for AER. *Id.* ¶10.

ii. IPH capitalization will sustain the new operations and provide a significant financial and environmental improvement from the status quo under the AER variance.

The capitalization secured by IPH is sufficient to provide liquidity that will meet operating obligations. IPH has committed to sustaining the previously initiated schedule for completing the Newton scrubber and possesses the capital necessary to support ongoing operations. The capital available will provide the ability to (a) continue construction of the Newton FGDs in accordance with the requested Compliance Plan; (b) maximize the existing FGD systems at Duck Creek and Coffeen; and (c) utilize low sulfur coal at Newton, Edwards and Joppa.

The capitalization will be sufficient to support the activities necessary for operations of the power generation facilities, with over $220 million in cash and $160 million in working capital available at closing. *Id.* ¶12. Also, due to the transaction, AER's financial standing will improve, as there will be a benefit of approximately $75 million in annual operational synergies that Dynegy expects to realize, most of which will be realized by IPH. *Id.* The capital presently available is sufficient to continue operations of the plants provided the variance is granted. The variance is necessary to allow for the recovery of power prices, and for IPH to accumulate the financial resources necessary for compliance while preserving hundreds of Illinois jobs.

In the public comment submitted by Mr. David Johnson of ACM Partners (the "ACM Report"), Mr. Johnson posits that the post-transaction economic prospects for IPH are weak. Accordingly, Mr. Johnson opines, Dynegy is not providing financial support to IPH. This erroneous conclusion constitutes an unreasonably pessimistic and cynical perspective on a transaction that presents a significant improvement from the *status quo* under AER on both financial and environmental fronts for the MPS Group.

The ACM report claims that Dynegy has the "financial resources necessary to properly capitalize IPH in connection with its acquisition of the Coal Plants if it chooses to." Mr. Johnson concludes, therefore, that Dynegy's decision not to financially support IPH is based on its realization "that the economic prospects for IPH post-acquisition are not good." While ACM alludes to Dynegy's "financial strength" (by pointing out, for example, that Dynegy is "coming off an impressively profitable year in which it managed to show superior profitability despite a decline in revenue"), Dynegy actually generated negative net income in 2012, a year in which it emerged from bankruptcy, and continues to face meaningful near-term financial challenges, in light of the depressed commodity price environment. *Bilicic Affidavit*, ¶16. For example, in its most recent quarterly filing, Dynegy lowered its 2013 Coal Segment Adjusted EBITDA guidance by $70 million (from $60 – $85 million to $(10) – $15 million), citing lower realized power pricing and lower capacity revenues, among other factors. *Id.* ¶16.

While accurately highlighting Dynegy's "strengthened balance sheet" following its recent refinancing, Mr. Johnson ignores that the currently challenging commodity price environment requires Dynegy to maintain strong credit metrics to support its current credit rating and preserve its access to affordable capital. *Id. ¶17.* The structure of the transaction is based on Dynegy's own need for liquidity at a time of critical recovery and is carefully structured to well position IPH for ultimate recovery. *Id.*

Contrary to ACM's assertions that the post-transaction economic outlook of IPH is weak, it is Dynegy's considered judgment that as energy markets stabilize, IPH will be able to accumulate the financial resources necessary to obtain compliance. Dynegy is not pessimistic regarding the post-transaction economic outlook for the acquired assets. In addition to the expert opinions of George Bilicic of Lazard Frères & Co., which support IPH's positive economic outlook for the MPS Group into the future, Fitch Ratings recently maintained its "Watch

Positive" on Genco which was issued following the announcement of the transaction between Ameren and Dynegy.

In fact, IPH would be a stronger, more viable business relative to AER under Ameren. *Bilicic Affidavit*, ¶14. Among the most glaring deficiencies in the ACM Report is Mr. Johnson's inexplicable argument for preservation of the *status quo*. Specifically, the practical result of Mr. Johnson's suggestion that the Board deny IPH's requested relief is the continued effect of the variance granted to AER. Mr. Johnson would have the Board refuse IPH the same relief afforded AER merely one year ago affecting the same MPS Group under the same regulations. The only material difference is that IPH will be a better capitalized company which offers a greater net benefit to the environment than the *status quo* under the AER variance and secures hundreds of Illinois jobs in an uncertain economy.

2. Plant Closures Will Devastate the Illinois Economy, Especially in Southern and Central Illinois.

The MPS Group supplies crucial economic support to the State of Illinois, its workforce and affected communities throughout central and southern Illinois. IPH retained Development Strategies to evaluate the direct and indirect economic impacts that each of the five energy centers has on the Illinois and local economies, attached to the Petition as Exhibit 7. *See* Pet. Group Ex. 7. Direct impacts include money spent on capital expenditures, operating costs, and salaries. Pet. at 18. Indirect impacts include the multiplier effect of dollars spent on goods and services in the affected communities. *Id*. The Development Strategies report shows that each plant has a dramatic impact on state and local communities.[11] The following table, which

[11] For example, AER makes the following direct expenditures in the primary economic impact region around the energy center: $160.5 million per year at Coffeen Energy Center, $97.8 million per year at the Duck Creek Energy Center, $37.5 million per year at the E.D. Edwards Energy Center, $67.4 million per year at the Joppa Energy Center, and $90.3 million per year at the Newton Energy Center. *See* Pet. Ex. 7.

summarizes data from the Development Strategies reports, illustrates the economic importance of these plants to the State of Illinois:

	Coffeen	***Duck Creek***	***Newton***	***E.D. Edwards***	***Joppa***	***TOTAL ECONOMIC IMPACT***
Output (Total Economic Activity)	*$534,944,000*	*$307,429,000*	*$288,339,000*	*$108,118,000*	*$193,530,000*	*$1,432,360,000*
Earnings	*$123,228,000*	*$66,590,000*	*$288,339,000*	*$29,941,000*	*$46,007,000*	*$554,105,000*
Direct Jobs at the Energy Center[12]	*161*	*65*	*142*	*111*	*125*	*604*
Total Direct and Indirect Jobs	*2,481*	*1,325*	*1,292*	*471*	*725*	*6,294*

In fact, the estimated total economic impact exceeds $1.4 billion annually and over 6,200 total jobs. The breadth and scope of such impacts on the livelihood of so many Illinoisans, and the severity of the hardship inevitably arising from plant closures without the variance, cannot be understated.

One direct impact, job loss, is easy to quantify and that is why a key combination of labor and industry leaders from across Illinois were at the September 17 hearing to speak to the Board in favor of granting this variance. As Mr. Mike Carrigan from Illinois AFL-CIO explained: the "plants support 6,294 Illinois jobs …. Collectively [the plants] have a total annual economic impact of $1.4 billion on the State of Illinois. The facilities all in generate more than 338 million in annual household earnings for Illinois residents." Tr. p. 97.

Indirect impacts will also be felt. The adverse impact of any plant shutdown extends far beyond the obvious loss of power generation ability, loss of direct jobs, and loss of property tax

[12] Table A only reflects employees who reside in Illinois. Some of the Energy Centers employ personnel from neighboring states. The total direct jobs at the Energy Centers are as follows: Coffeen 162 employees; Duck Creek 66 employees; E.D. Edwards 111 employees; Joppa 176 employees; Newton 143 employees. Pet. Ex. 7, *Group Exhibit.*

revenue.[13] As Mark Bolander, Mayor of Newton explained: "[o]ur local restaurants, gas stations, car dealerships, retail establishments and building contractors are heavily dependent on the business revenue generated by the employees and families of the Newton Energy Center who reside here." Tr. p. 60. Joe Luckett, a 31-year employee of the Coffeen Power Station whose father and grandfather also worked in southern Illinois coal-fired generation plants, relayed how important the variance is to his community:

> We really need it for the central and southern Illinois small towns. All you have to do is drive through there and where the buildings are empty, if they're still standing -- often times, my daughter refers to them as missing teeth. The downtown districts are just really getting very depressed, and we really need this.

Tr. p. 129. Also, if families are forced to leave the communities where the plants are located to find other employment, the communities will also lose the value that the spouses of employees provide to the community. For instance, the wife of Rob Faglia, an employee at the Joppa plant, works at Southern Illinois University in Carbondale as the "only neurological psychologist in the southern region of Illinois." Tr. p. 256. When discussing the impact of a potential job loss, Mr. Faglia stated that his wife will move with him to another region to find employment:

> She brings in millions of dollars of grant money for that university, and the region relies on her helpful expertise. People come for 200 miles around to bring the kids to see her and get studies done, and she's going to go with me. I mean, if I lose my job, that's another impact.

Tr. p. 256. These indirect impacts reach far into the community as well. As a 10-year employee of the Joppa plant explained, the plants and employees provide much needed assistance for charitable organizations, such as United Way. Tr. p. 287.

[13] For example, Development Strategies estimates the total economic impact of each of AER's energy centers on the primary economic impact region around the energy center as follows: $388.5 million per year for the Coffeen Energy Center, $190.2 million per year for the Duck Creek Energy Center, $84.1 million per year for the E.D. Edwards Energy Center, $137.5 million per year for the Joppa Energy Center, and $211.2 million for the Newton Energy Center. *See* Pet. Ex. 7.

Further, public comment at hearing expressed the very real impact any plant closures would represent to Illinois, and to the communities and economies the MPS Group supports. The geographic territory affected by this variance request is a significant portion of central and southern Illinois.

3. Continued Operation of the Plants Provides Necessary Tax Dollars to Local Governments and Schools.

Local governments will suffer significant hardships as a result of any plant closures. Units of local government rely on these property tax revenues to provide all the necessary components of a safe community, like streets, police protection and utility services. Fire protection districts, library districts and community colleges also rely on the property tax revenue.

The plants generate a significant amount of property tax revenue. Newton Mayor Mark Bolander explained that in Newton alone, the economic impact on local property taxes would equate a loss of $7,384,000 in local property taxes. Tr. p. 61; Pet. Ex. 8. The economic consequences are not just numbers on a page. Those numbers reflect real impact, as Ronnie Douglas, a 25-year employee of the Joppa plant, explained, "[t]he loss on the Joppa plant would result in a huge negative effect on the local economy both through the direct loss of jobs and payroll taxes and the trickledown effect on local businesses and vendors." Tr. p. 266.

Ed Mitchell, Chairman of the Jasper County Board, stated in his testimony that for Jasper County, the impact of not granting this variance would be devastating and destabilizing to the entire community. It's been calculated that there's about $55 million generated through this plant, and we just feel that the employees that are working there, the families, the whole community will be devastated if this variance isn't allowed." Tr. pp. 63-64. Many legislators and employees that testified utilized the same terminology as Chairman Mitchell to explain the

impact to their districts and communities should any of the MPS Group plants close: "devastating." Tr. pp. 64, 66, 116, 158, 224, 237, 239, 243, 289, and 292.

Further, the loss of property taxes generated by the plants would be devastating for the school districts within the impacted communities. Mr. Dan Cox, Superintendent of Schools for Jasper County Unit #1, provides the Board with direct insight into the importance of the Newton Power Station which represents over half of the school district's tax base, approximately $4 million. Tr. p. 66. Mr. Cox's testimony further exemplifies the uniqueness of this particular area of Illinois, its distinction from the more urban areas in the northeast region, and the costs required for such necessary functions as public education. The district has 1,400 students in pre-K through 12th grade. It is the largest geographic school district in Illinois, consisting of 462 square miles with buses traveling 3,435 miles per day, which is 1,200 miles farther than the drive from New York to San Diego, "and we do that each day." Tr. p. 65. Without the continued viability of the Newton Energy Center, it will be much harder for the school district to run those buses, and keep teachers in the classroom. *Id*.

C. The Petitioners' Hardship is Not Self-Imposed.

The Board's key considerations in granting a variance have always been focused on the nature of the hardship balanced against any adverse impact to the environment. *Monsanto Co. v. Pollution Control Bd.*, 67 Ill. 2d 276 (1977). The determination of whether a hardship is self-imposed turns on the facts and circumstances of each case. *Ill. Power Co. (Wood River) v. IEPA*, PCB 73-483 (March 7, 1974) ("A hardship is self-imposed if a reasonable, prudent man in the same or similar circumstances would not have acted the same way."). Unfortunately, the ELPC simply refuses to see beyond the proposed business transaction and fail to put the variance request in its proper context. In reality, there are many more factors that contributed to AER's

showing that it would suffer an arbitrary or unreasonable hardship if not granted the variance. These factors still exist for AER and will also exist for IPH and Medina Valley upon acquiring the energy centers. The financial implications of not closing under the transaction agreement are but one component. Other components included the unforeseen combination of regulatory uncertainty, declining power market prices resulting from the lingering recession, the fact that increased compliance costs cannot be recovered through rate charges, and historically low natural gas prices. *AER v. IEPA*, PCB 12-126, slip op. at 60-63. None of these factors are specific to either AER or IPH and Medina Valley, and each of these factors will remain the same for any new owner of these energy centers. Just like AER, IPH is a merchant generator that will operate the energy centers in a deregulated power market subject to the same unforeseen market circumstances that have created a financial hardship for AER.

The ELPC's misinterpretation of case law case further illustrates its failure to see the larger context in this proceeding and fundamental misunderstanding of the self-imposed hardship concept as a whole. PC# 2337, p. 6 (*citing Willowbrook Motel P'ship v. IEPA*, PCB 81-149 (Jul. 14, 1983), *aff'd by Willowbrook Motel P'ship v. IPCB ("Willowbrook")*, 135 Ill. App. 3d 343, 345 (1985)); *IEPA v. Lindgren Foundry Co. ("Lindgren Foundry")*, PCB 70-1 (Sept. 25, 1970). The ELPC argues that the hardship born by IPH and Medina Valley would be self-imposed if they voluntarily purchase the seven operating energy centers and cite to the *Willowbrook* and *Lindgren Foundry* cases in support. In fact, the hardship facing AER and then IPH upon closing under the transaction agreement is not self-imposed and is of a very different nature than the hardships found to be self-imposed in these cases. In *Lindgren* the former owner of a foundry operated it "in plain violation of the standards for particulate air contaminant emissions until financial difficulties forced its closing . . . ." *Id*. The Air Pollution Control Board (which pre-

dated the IEPA) issued a formal complaint against the former owner due to its failure to submit an acceptable program for reducing emissions. *Id*. New owners (Lindgren) subsequently purchased the company and then (after purchase) filed a petition for variance, requesting that they be allowed to emit particulates in excess of the applicable regulation limits while installing control equipment. *Id*. In balancing the hardship against the environmental harm, the Board minimized the petitioners' claimed loss, noting that no employees would lose wages. This was because the foundry had already closed. Moreover, the environmental harm from re-opening the foundry was well-documented.

IPH is not seeking to reopen a closed business that is not in compliance with current standards. The ELPC would prefer that the Parties first complete the transaction before IPH and Medina Valley seek variance relief. Ironically, it is this sequence of events that the Board has found constitutes self-imposed hardship in *Lindgren Foundry* and other variance proceedings. *DMI, Inc. v. IEPA*, PCB 90-227 (Dec. 19, 1991). In *IEPA v. Lindgren Foundry*, the Board warned "[a] petitioner may not bootstrap himself into a preferred position by spending money first and then claiming he has been injured." *Lindgren Foundry*, PCB 70-1, slip op. at 8. Instead, based upon the same considerations that led the Board to grant the variance as to this MPS Group in the first instance, it seeks to implement the variance the Board granted – in order to allow for the completion of the construction of the Newton FGD Project that has been determined to be the key to compliance. The ELPC's argument that the present situation is the *exact* situation that the self-imposed hardship standard is designed to protect against is simply without merit.

Three months after its decision in *Lindgren*, the Board revisited the concept of self-imposed hardship and, in granting a variance to a fluorspar processing plant in Rosiclare, Illinois,

distinguished it on the basis of facts much closer to those present here. While the plant was operating in excess of the relevant regulatory limit, the Board allowed it time install pollution control equipment to bring the operation into compliance. *Ozark-Mahoning Co. v. Envtl. Protection Agency*, Ill. PCB 1970-019 (Dec. 22, 1970). Noting that emissions from the Lindgren plant had been wholly uncontrolled and nearly seven times those allowed, the Board found that Ozark-Mahoning, as here, was already in substantial compliance due to existing pollution control equipment and just needed time to implement further equipment. The Board also noted that any hardship suffered in *Lindgren* was thought to be self-inflicted because the new owners had purchased the business and invested time and money with reason to know the closed foundry had been operating in violation of the applicable law. *Id*.

Also important here, the Board stated that the degree of hardship was greater in *Ozark-Mahoning* because it presented the question of closing down an existing business. *Id*. Although stating that it "will not hesitate to do this if it becomes necessary," the Board recognized that the hardship of throwing 181 persons out of work is considerably more significant than the hardship in Lindgren, where the plant had been closed for some months and the issue was reemployment of an undetermined number of former employees. *Id*. Here, policy and factual considerations overwhelmingly support a grant of this variance.

Similarly, the Board granted a variance in *Rexam Medical Packaging, Inc. v. Illinois Environmental Protection Agency* on facts like those here, declining to find a self-imposed hardship. Ill. PCB 95-99 (Oct. 19, 1995). In *Rexam Medical Packaging*, the petitioner requested a variance from certain control requirements applicable to emissions of volatile organic material from its flexographic printing presses. *Rexam Med. Packaging Inc.*, Ill PCB 95-99, at 1. The petitioner argued that the denial of a variance would create an economic hardship leading to loss

of sales totaling approximately $11 million plus the loss of 75 jobs. *Id*. at 6. Additionally, its customers would have problems gaining alternative supplies due to product shortages and product shifting. *Id*. The Board found that the environmental impact would be negligible and, when compared to the hardship petitioner would suffer, the petitioner presented adequate proof that immediate compliance with the regulations would result in an arbitrary and unreasonable hardship. *Id*. at 6-7. As in *Rexam Medical Packaging*, the Petitioners in this proceeding did not create the economic hardship at issue. Rather, the market dictates the economics of the industry. Here, the Petitioners are seeking to adapt to that market in order to achieve the environmental controls deemed appropriate in PCB 12-126 to achieve compliance with the MPS.

While the Board has previously found that a hardship is self-imposed if it is the result of the petitioner's poor decision making, none of those cases are applicable here. *See Ekco Glaco Corp. v. Ill. Envtl. Protection Agency*, Ill. PCB 87-41 (Dec. 17, 1987); *Marathon Oil Co. v. Ill. Envtl. Protection Agency*, Ill. PCB 94-27 (May 16, 1996); *Willowbrook Motel P'ship v. Ill. Envtl. Protection Agency*, Ill. PCB 81-149 (July 14, 1983). A thorough review of these cases, cited by the ELPC, reveals glaring differences between the poor business decisions made in those cases and the proactive business decisions made by the Petitioners in this proceeding to ensure compliance with applicable law.

In *Ekco Glaco Corp.*, the petitioner, Ekco Glaco, requested a variance extension for its used pan reconditioning line and new pan manufacturing line. *Ekco Glaco Corp.*, Ill. PCB 87-41, at 1. The IEPA argued that any hardship which existed was self-imposed because Ekco Glaco's difficulties did not result from difficulties in compliance with the emission limits but, rather, were a consequence of prior business decisions and delay caused by failed commitments. *Id*. at 4.

By contrast, the hardship here results from the extraneous market and economic circumstances identified in the Petition and the MPS Group's consequent inability to comply with the 2015 and 2017 emission limits. Pet. §5, pp. 25-45. It does not result from any petitioner delay in becoming compliant. Indeed, uncontroverted evidence demonstrates that AER has spent $1 billion in environmental control equipment for this MPS Group, with over $254 million on Newton FGD Project. Tr. pp. 19, 27. Further, the MPS Group is currently in compliance with all relevant federal and state standards, and is taking proactive measures to ensure that it will be compliance with the MPS 2015 and 2017 by requesting the variance found appropriate in PCB 12-126, so that it can assume AER's compliance plan. IPH undertook diligent planning of the purchase from Ameren because it is aware of the underlying hardship issues and the impossibility of being in compliance with the regulatory standards without the variance requested.

Despite the ELPC's assertions to the contrary, it is also no "stretch" to distinguish *Marathon Oil Co. v. Illinois Environmental Protection Agency* from the variance request here. There, Marathon did not petition the Board for variance relief until eight months after it discovered its fluid catalytic cracking unit was out of compliance. *Id*. The Board found that Marathon did not diligently seek timely relief or make sufficient efforts to quickly comply. *Id*. The Board concluded that Marathon's indecision for eight months as to how to correct the noncompliance was a hardship Marathon brought on itself. *Id*. Unlike the petitioner in *Marathon Oil Co.*, Petitioners here are diligently seeking timely relief because they know and understand the hardship faced by the MPS Group in becoming compliant with existing standards.

Finally, the ELPC's reliance on *Willowbrook Motel Partnership v. Pollution Control Board,* 135 Ill. App. 3d 343 (1st Dist. 1985), is also misplaced. In *Willowbrook*, the Board

declined to grant a sewer ban variance to a developer of a future motel on the subject property to a sewage system that was on restricted status. The petitioner in *Willowbrook* alleged only that a hardship would exist due to the financial loss and associated consequences of a single development project if the Board did not grant relief. The Board denied the variance, noting the environmental impact would be significant and that the petitioner failed to show that the loss of an investment opportunity outweighed that impact. *Id*. In upholding the Board on appeal, the First District noted that the hardship was merely a temporary prohibition against intense development of the property and that the petitioner would lose only expected profits and incidental expenses. *Id*. at 349. Contrary to what the ELPC argues, the First District did not find the insufficient showing merely because the transaction was conditioned on the variance being granted; rather, the petitioners failed to demonstrate that any arbitrary or unreasonable hardship outweighed the public interest in allowing development where improper sewage capacity exists. The ELPC simply fails to understand that IPH and Medina Valley are not arguing the hardship is purely financial or merely limited to the impacts of the transaction agreement. Rather, the hardship is an unforeseen and complex convergence of circumstances that is both arbitrary and unreasonable. It is due to this hardship that any owner of the Ameren MPS Group must seek more time to comply with the MPS. Of course, if the transaction does not close, the implications will exacerbate existing economic conditions. However, the Petitioners assert that the arbitrary or unreasonable hardship that exists for AER prior to the transaction will be transferred to Petitioners along with the transfer of the facilities.

On a broader note, in its arguments related to self-imposed hardship, the ELPC improperly focuses exclusively on the Petitioners and ignores the reality of the hardship to the

public at large brought on by a challenging economic environment. This is exactly what the Third District appellate court in the *Material Services Corporation* case warned against:

> We do not interpret the 'hardship' referred to as being exclusively restricted to the hardship occasioned to the petitioner, but that it also includes hardship to the area and consideration of economic effects of termination of production there.

Material Serv. Corp., 41 Ill. App. 3d at 192. In sum, no Board cases find that a structured good faith transaction such as that evident here represents a self-imposed hardship. IPH is acutely aware of the applicable regulatory construct and, accordingly, undertook diligent planning of the purchase from Ameren to obtain the variance relief necessary to take ownership, complete the Newton FGD Project and offer the best and most feasible path forward for the plants in the MPS Group, together with the local economies they support. That is not a self- imposed hardship.

IV. THE PARTIES' REVISED COMPLIANCE PLAN PROVIDES THE GREATEST ENVIRONMENTAL BENEFIT UNDER THE MPS TO DATE.

Petitioners have performed an independent and exhaustive analysis of compliance alternatives, consistent with the Board's procedural rule at Section 104.204(e). *See* Pet. at 51-54. Additionally, Petitioners have examined the "proposal" set forth by Mr. Mike Beyer, President and CEO of Foresight Energy, LLC ("Foresight") in public comment at hearing (Tr. pp. 161-164) and filed before the Board (PC # 2000). Co-Petitioner AER also provides comment regarding this proposal, from its perspective, in its Post-Hearing Comments.

A. No Other Compliance Alternative is Economically Reasonable and Technically Feasible.

The range of alternative compliance options and the consideration afforded them in PCB 12-126 are equally relevant to PCB 14-10. Pet. Ex. 8, *Thompson Affidavit*, ¶12. They have been reassessed by IPH in the context of this petition. As they have been sufficiently detailed in the Petition, at § VI, pp. 48-54, and were not the subject of substantial public comment or Board

questioning, we provide only the following summary in this Post-Hearing Brief. First, Petitioners have analyzed whether curtailing plant operations would accomplish compliance with the MPS 2015 SO_2 emission rate without the variance. However, this would require IPH to shut down a combination of the Newton, Joppa and E.D. Edwards Energy Centers. Pet. Ex. 8, *Thompson Affidavit,* ¶12. Here, since the fixed costs would be the same while the revenues were less, IPH could not garner the necessary financial resources to complete the Newton FGD Project and meet the strict emission standards required at the end of the variance period. *Id*. The Board found this argument persuasive in PCB 12-126 and the same considerations are relevant here. Where IPH is able to curtail operations, it has committed to do so (e.g., retirement of Edwards Unit 1). Pet. at 48-50; Petitioners' Responses to Board Questions filed Sept. 5, 2013. Second, Petitioners' analysis here concluded that any different alternative control technologies than the Newton FGD are infeasible because they would cost more than the Newton FGD Project. Pet. at 50-51, Pet. Ex. 8, *Thompson Affidavit*, ¶16. The Board concurred with this finding in PCB 12-126 and the economic infeasibility of a change of course toward alternative control technologies is now even more pronounced in light of the past and future capital investments already committed to the Newton FGD Project. Pet. at 50-51. Third, IPH also considered firing natural gas as an alternative means of compliance. For the detailed reasons set forth in the Petition, a conversion to natural gas would be economically infeasible. Pet. at 51-54.

B. Foresight Energy LLC's Proposal is Not an Option that Would Achieve Compliance with the MPS.

Foresight proposes, with limited details, to fund the completion of the Newton scrubber project and recoup the investment with an embedded cost in a long-term coal supply agreement with Foresight for Illinois basin high-sulfur coal (3.5 percent sulfur content) at the Newton, Coffeen and Duck Creek energy centers. PC# 2000, p. 2. Foresight presents its proposal as

"win-win" for the State of Illinois, the Illinois coal industry and the MPS Group. Notwithstanding its facial appeal, the Foresight proposal is not a viable compliance alternative for operational, commercial, and financial reasons.

Most importantly, the MPS Group would not be able to achieve compliance with the MPS SO_2 rate limit if high-sulfur Illinois basin coal were burned at the scrubbed Newton, Coffeen and Duck Creek plants. *Affidavit of Daniel J. Thompson ("Thompson Affidavit"),* set forth as Exhibit 3. Without considering delays needed to redesign the Newton scrubber system to use high-sulfur coal, it will take approximately two years to complete construction of the Newton scrubbers once construction activities ramp up. *Id*. ¶15. As a result, under Foresight's proposal, the MPS Group would not be able to comply with the 2015 MPS SO_2 limit: all units at the Edwards and Joppa energy centers would need to be mothballed/shutdown for all, or at least a significant part, of 2015, and likely longer, until the Newton scrubbers are operating. *Id*. In addition, in IPH's analysis, in order to meet the applicable MPS SO_2 emission rate, several units at the Edwards and/or Joppa Energy Centers would need to be shut down or significantly curtailed once the Newton, Coffeen, and Duck Creek plants are burning high-sulfur Illinois basin coal. *Id*.

From an operational perspective, the Foresight proposal is not viable. The configuration of the Newton scrubber does not contemplate the use of high-sulfur Illinois coal. *Id*. ¶¶6, 7. To date, more than $250 million has been spent on the construction of the Newton scrubber and engineering is approximately 90 percent complete. As currently configured, the Newton wet scrubber systems are designed for coal with sulfur content of up to approximately 1.3 pounds lbs/mmBtu and are guaranteed for 98 percent SO_2 removal using such design coal. *Id*. ¶6. In stark contrast, Foresight's high-sulfur Illinois coal has a sulfur content of approximately 6.3 lbs

SO_2/mmBtu (i.e., at an assumed heat content of 10,800 Btu/lb, 3.5 percent sulfur content would be 6.3 lbs SO_2/mmBtu). *Id*.

As a result, burning Foresight's high-sulfur Illinois coal would produce nearly five times the amount of SO_2 the Newton scrubbers are configured to treat. *Id*. In fact, the Newton scrubbers, as configured, would achieve approximately only a 20 percent SO_2 removal efficiency on high-sulfur Illinois coal, instead of the 98 percent removal rate the Newton scrubbers would be able to achieve with low sulfur PRB coal. *Id*. In order to achieve the 98 percent removal design value with high sulfur Illinois coal, the configuration of the Newton scrubber system would have to be modified significantly to include an additional absorber tower for each generating unit. *Id*. ¶7. A preliminary cost estimate for constructing two additional absorber towers at Newton is $150 million, not including the material additional costs associated with adding and operating the two additional absorber towers (e.g., limestone storage systems, gypsum handling and disposal). *Id*. In addition, modifying configuration of the scrubbers at this time materially would escalate the engineering and construction costs to complete the Newton FGD Project and likely extend the time needed to achieve commercial operation startup of the scrubbers. *Id*.

Although these boilers were originally designed to operate on bituminous coal, both Coffeen boilers have received changes in equipment and controls since last burning exclusively high sulfur coal and, thus, would require lengthy outages and significant upfront capital investment in order to operate on only high sulfur coal. *Id*. In addition, the Newton and Duck Creek boilers have undergone changes, more extensive than those at Coffeen, to burn low sulfur coal. *Id*. ¶9. These boilers would also require lengthy outages and very large capital investments before they could operate burning only high sulfur coal. *Id.* The much higher sulfur content of

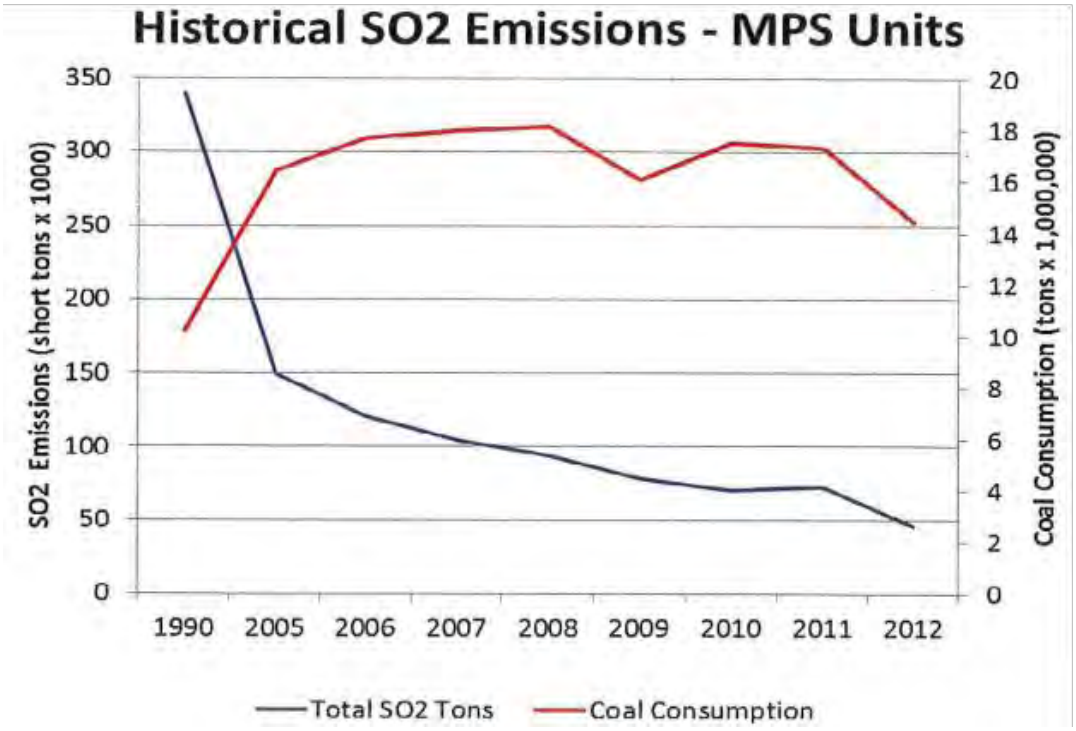
Illinois coal also generates significantly greater levels of corrosive products than lower sulfur PRB coal, which creates short-term and long-term damage to boiler and gas path systems. *Id*.

From a commercial perspective, the proposal from Foresight is not a viable alternative. Under current market conditions, delivered PRB coal is cheaper on a dollar per mmBtu basis than is high sulfur Illinois basin coal, notwithstanding the additional transportation and delivery costs. *Id*. ¶14. The increase in costs would be approximately $4.13 per megawatt hour (*i.e.*, approximately a 20 percent increase in cost). *Id*. In addition to those extra costs and the additional significant additional capital investment that would be needed to burn Illinois coal, the use of high-sulfur Illinois coal would increase annual O&M expenses associated with the Newton, Coffeen and Duck Creek scrubbers because much larger quantities of limestone to remove the higher quantities of SO_2 in the coal would be needed. *Id*. ¶11.

Foresight's proposal also ignores the fact that AER committed to burn ultra-low sulfur PRB coal as part of the compliance plan in the existing variance. *Id*. ¶10. If the Foresight proposal were accepted, several low sulfur PRB coal supply contracts for 2014 would need to be terminated, thereby incurring financial penalties. *Id*. In addition, Newton, Coffeen and Duck Creek each have existing long-term multi-year rail agreements to transport coal that are destination specific. *Id*. These agreements cannot be terminated without significant financial penalties. *Id*. In addition, the Foresight proposal would essentially lend money to GENCO for completion of the scrubber project at Newton. *Id*. ¶13. The embedded cost of the investment would be charged back to Newton through above market coal prices. *Id*. Debt covenants at GENCO prohibit additional borrowing. *Id*. Foresight's proposal is essentially a borrowing activity, which would violate the covenants and put GENCO into default. *Id*.

V. THE REQUESTED VARIANCE WILL ENSURE THE CONTINUED ENVIRONMENTAL BENEFIT AND COMMITMENT TO ENVIRONMENTAL PROGRESS OF THIS MPS GROUP; CLAIMS OF ADVERSE ENVIRONMENTAL CONSEQUENCE ARE UNSUBSTANTIATED AND MISPLACED

The ELPC's argument that the variance would "confer a benefit to a handful of corporations, at an unacceptably high cost to the general public" ignores the achievements of the Illinois Mercury Rule and the MPS to date and the progressively stringent standards to which the MPS Group adheres. This MPS Group has made drastic reductions in SO_2, nitrogen oxides ("NOx"), and mercury emissions over the past decade. Tr. p. 74. With respect to SO_2, since 1990 the MPS Group has achieved a steady and significant decline in SO_2 emissions across the fleet -- 87% since 1990 and 51% over just the last five years, and similar reductions have been achieved with respect to NOx. *Id*. *See* table below:



A. Environmental Achievements of this MPS Group Will Continue With the Requested Variance

These reductions have been accomplished even while utilizing greater quantities of coal. This decrease correlates specifically to the increased use of low sulfur coal and the various pollution control equipment that has been installed on these plants. At hearing, Mr. Dan Thompson presented a chart identifying all of the pollution control equipment that has been installed on the MPS Group to meet the Illinois Mercury Rule and the MPS, attached hereto as Exhibit 4. The total cost of these controls has exceeded $1 billion dollars. Pet. § VI, p. 57; Tr. p. 19. Similarly, Mr. Thompson discussed the pollution control equipment that has been installed at the Dynegy MPS Group of plants, also exceeding $1 billion dollars – and achieving a 90% drop in emission levels since 1998. *See* Exhibit 5; Pet. § VI, p. 57; Tr. p. 20).

At hearing, employees from both Ameren and Dynegy attested to the environmental commitments and achievements they have witnessed from their respective companies and vantage points. As Prentice Carter (AER) stated:

> I started my career in 1987 at Central Illinois Light Company in the Environmental Department and, through a number of mergers, I have become part of Ameren. I've worked in engineering and operations positions through the years, and I've been personally involved in the installation, startup, and operation of pollution control equipment including low NOx burners, over fire air, selective catalytic reduction, scrubbers, so I've been there through the years where we've made these improvements to our plants, and in recent years, I've had the opportunity to actually work at all of our facilities in Illinois and meet the people there, and I just want to assure you that everybody I've worked with is dedicated to the work, to the environment, and the communities in which we live, and I respectfully request that the Board grant approval of the petition. Tr. pp. 109-110.

Similarly, John Baker, a 30-year Dynegy employee stated:

> I've also been on the team of the check out and the commissioning of the scrubbers and also work with the guys on the daily operation of that. We're proud of that, not because we had to do that but because we wanted to do that. Dynegy is a very responsible corporate citizen in the state, and I'm proud to be a part of that, and I'm proud to tell you all that. …… I remember 30 years ago what the

> stacks looked like, and I'm proud to see the change. Dynegy is going to move forward in a positive aspect to make these, and we're asking for a variance. We're asking for a little time to do that to get things engineered, designed properly, and move forward with that. Tr. pp. 200-201.

In keeping with the above corporate commitments, IPH has committed to finish construction of the Newton scrubber system. IPH has committed to achieve completion of the Newton FGD Project in accordance with the construction schedule the Board set forth in the AER variance. As Dan Thompson stated at the hearing: "given our expertise in retrofitting our Illinois plants particularly at Baldwin and Havana with emission controls, we expect a seamless continuation of that schedule under IPH ownership." Tr. p. 27.

IPH will maintain a continuous program of construction at the Newton Energy Center, on the schedule set forth in the proposed Board Order, so as to be in a position to have the Newton FGD Project completed and operational to meet compliance obligations. Pet. at Sec. IV(A). All major equipment components required to complete the Newton FGD Project have been procured. Engineering design will continue through 2014. *Id.* Field construction work will be staged so as to facilitate future construction sequencing as set out in the existing variance order schedule. IPH's commitments will result in compliance with the Ameren MPS Rule's final overall SO_2 annual emission rate (0.23 lb/mmBtu) beginning in 2020, with installation and operation of the Newton FGDs. *Id.* IPH has diligently undertaken the necessary planning to complete the Newton FGD Project with the requested variance relief. IPH's financial and operational commitment to complete the project on the current construction schedule unquestionably advances the long-term interests of the public and the environment.

Beyond the significant reductions in SO_2 emission levels already achieved in the MPS Group and within the rest of the Dynegy fleet in Illinois, IPH also has committed to additional reductions and limitations that should be considered in this variance proceeding. As Mr.

Thompson testified (Tr. pp. 21-22), IPH committed to the additional variance conditions proposed in the IEPA Recommendation: operation of the FGD systems at Duck Creek and Coffeen at 98% SO_2 removal efficiency; burn only low sulfur coal (0.55 lb sulfur/mmBtu or less) at Edwards, Joppa and Newton; and permanently retire E.D. Edwards Unit 1 as soon as allowed by MISO. The Edwards Unit 1 retirement is also part of the MOA between IPH (and other Dynegy affiliates) and IEPA executed on September 4, 2013 (*see* IEPA Recommendation, Exhibit 2), which additionally provides IEPA other environmental improvements that will assist in its air quality planning for the entire state, including installation of advanced gas path technology at the Kendall Power Station and permanent retirement of the air permits for Stallings and Oglesby Combustion Turbine facilities.

Mr. Gignac's comments filed on behalf of the Attorney General's Office acknowledge the proposed additional variance conditions but also suggest, without technical analysis, that the Board make annual mass emission caps a condition of a variance, if granted. PC# 2336 at 7. The Board also asked Petitioners about an annual emissions cap in its questions presented in a Hearing Officer order dated August 14, 2013. *See* Petitioners' Responses, filed on September 5, 2013. As Petitioners discussed therein, the concept of annual mass emission caps runs directly contrary to the regulatory structure that is the MPS. *See* Ex. 3, *Thompson Affidavit*, ¶20. The MPS SO_2 system rate approach allows affected units to operate more or less in any given year in response to market demand and other forces (e.g., weather, unit availability), so long as the MPS SO_2 emissions rate limit is achieved at the end of the calendar year. *Id*. In the context of this requested variance, this flexibility is important. Imposing annual mass emission caps would eliminate the operating flexibility intrinsic in the rate-based MPS regulatory structure. *Id*. As such, an annual mass emission cap could significantly curtail plant and or unit operations and,

thereby, restrict the ability of IPH to generate sufficient revenues to fund timely completion of the Newton FGD Project. *Id*. IPH recognizes that annual mass emission caps were part of Midwest Generation's compliance plan in PCB 13-24. *Id*. ¶21. However, Midwest Generation proposed such as its particular approach to compliance with its own structured multi-pollutant regulation (the Combined Pollutant Standard or "CPS") and, accordingly, could plan its operations and relief accordingly. *Id*. Nonetheless, IPH has agreed, as requested by the Board, to accept as a condition of its proposed variance order a requirement to report the annual SO_2 mass emissions for the five operating power plants and continue to confirm the shuttered state of the other two MPS Group plants. *Id*. ¶22.

Instead of an annual emissions cap, and in order to maintain the flexibility necessary to meet its obligations, IPH here proposes instead a tonnage cap on SO_2 emissions of 327,996 tons from the fourth quarter of 2013 through December 31, 2020. This would ensure a positive net environmental benefit of 7,778 tons through December 31, 2020. *See* Exhibit 5. The IEPA agrees that annual mass emission caps are not needed. IEPA's Response to Board's Question filed September 16, 2013.

Mr. Gignac's comments also broadly suggest that the Board should reexamine a range of emission scenarios. PC# 2336 at 5-6. As regards Petitioners' emission tables, the ELPC also challenges the baseline heat input values used in them, even though those heat input values have been used continuously as they relate to this MPS Group – and were the very tables used by the Board in PCB 12-126, as developed in consultation with IEPA in that proceeding.

Indeed, Petitioners' emissions tables were developed in this proceeding in consultation with the IEPA, once again, and the Agency believes the tables are appropriate. IEPA Recommendation, ¶79. Despite this, the ELPC suggests that the only appropriate heat inputs are

the four most recent years, and cites to the recent Board variance granted to Midwest Generation. PC #2337 at 17 – 18. That case, however, does not provide a regulatory basis or precedent for this case. Rather, here the appropriate baseline years are the ones that were previously used for this MPS Group as developed in consultation with the IEPA. Transposing different baseline period from different MPS Groups, such as Midwest Generation, is simply not appropriate in this proceeding. Respectfully, Petitioners also suggest that the ELPC misreads the Board's decision in *Midwest Generation, LLC v. IEPA*, PCB 13-24 (Apr. 4, 2013), at p. 65, where Midwest Generation itself, as the petitioner, proposed to use the four most recent years as its baseline for its own purposes. Here, the more comparative example is, of course, PCB 12-126, where the Board approved the use of these very tables. Moreover, the four most recent years of heat input for the Ameren MPS Group are not representative of the MPS Group's operations because recent years reflect depressed market conditions in which the units did not achieve typical levels of operations.

In sum, the IEPA Recommendation concluded that if the variance relief is granted at the requested system-wide SO_2 emission rate of 0.35 lb/mmBtu heat input, with continued cessation of operations at Meredosia and Hutsonville, there would be a net environmental benefit. *Id*. This conclusion was reached even before factoring in the additional benefits that would be created by the additional variance conditions, the MOA reductions and the tonnage cap proposed by IPH. Reexamining of the emission scenarios as suggested by Mr. Gignac is neither necessary nor appropriate.

B. The ELPC's Technical Analyses are Flawed and Misplaced.

Mr. Andrew Armstrong of the ELPC, claims that the variance would have a negative environmental impact by allowing local exceedances of the 1-hour SO_2 NAAQS. PC# 2337, p. 11. In support of such claim, Mr. Armstrong relies on air modeling impact analyses of the

Edwards, Newton and Joppa Energy Centers as prepared on the ELPC's behalf by Mr. Steven Klafka of Wingra Engineering. The ELPC contends that the Klafka analysis predicts exceedances of the 1-hour SO_2 NAAQS throughout each of the three plant's respective regions. Mr. Gignac similarly believes the Klafka analysis supports the view that the variance would cause unsafe exposure to unsafe levels of air pollution longer for longer than would otherwise if compliance with the MPS were required. PC# 2336, p. 7. The claims are both misplaced and premised on technically flawed analyses.

Petitioners retained AECOM to conduct a technical review of the public comments related to environmental impact. This includes post-hearing comments of Lisa J. Bradley, Ph.D., DABT. *See* Exhibit 6. This exhibit includes, as Attachment A, a technical review of the Klafka analyses. AECOM's review, *Technical Critique of Recent Air Quality Modeling Analyses of the Edwards, Joppa and Newton Plants* (Sept. 30, 2013), was prepared by Robert J. Paine, C.P.P.N., Q.E.P., Associate Vice-President of AECOM. *See* Exhibit 6, Attachment A. Mr. Paine is a noted air pollution and modeling expert. His resume appears at the end of Exhibit 6, Attachment A.

AECOM's critique found that the approach to modeling employed by Mr. Klafka "grossly overstates actual emissions from the three energy centers, as well as their impact on air quality" and that "the Klafka modeling represents a very conservative analysis that does not present credible results." Ex. 6, Attachment A at 1. More specifically, the AECOM technical review identifies several key flaws in the modeling analyses performed by Mr. Klafka resulting in an over prediction of emissions from all three plants.[14] For example, AECOM's technical

[14] Notably, USEPA has not yet finalized technical guidelines for proper use of air quality modeling for purposes of assessing attainment and nonattainment areas with the 1-hour SO_2 NAAQS. As explained in the AECOM technical review, USEPA most recently released a draft document for comment on May 21, 2013 after numerous concerns were raised by USEPA's initial efforts to implement the 1-hour SO_2 standard using air quality modeling, in contrast

review found that the Klafka modeling did not use actual hourly emissions monitoring data, but rather used maximum allowable emission rates and peak actual emission rates. *Id*., Attachment A at 6. This unrealistic methodology also was used in the Newton and Joppa modeling analyses and similarly over predicted emissions for those two Energy Centers. *Id.*, Attachment A at 10, 12. Importantly, the AECOM technical review found that by making appropriate technical adjustments, the modeling results show that 1-hour SO_2 levels are below the NAAQS at each of the three Energy Centers. *Id.*. Attachment A at 6, 10, 12. Thus, the AECOM technical review concludes that the Klafka analysis does not provide credible results. *Id.*, Attachment A at 13. Accordingly, contrary to assertions of the ELPC, the Klafka analyses does not demonstrate the requested variance will result in continuing localized NAAQS exceedances at Newton, Joppa and Edwards.

Moreover, Mr. Armstrong's and Mr. Gignac's contention that requiring compliance with the MPS rule would address the 1-hour SO_2 NAAQS is nothing more than a red herring. The Klafka analyses fails to demonstrate how changes to the MPS system-wide SO_2 annual rate limits would affect 1-hour SO_2 concentrations at a specific station. Indeed, the environmental harm contention of the Mr. Armstrong and Mr. Gignac ignores the fact that MPS SO_2 emission limits are not intended to address short-term ambient air quality levels. Within the calendar year compliance period established in the MPS SO_2 rule, the MPS allows units to alter their SO_2 emission rates as long as the MPS Group meets the MPS SO_2 rate limit at the end of the year. Thus, any single unit in the MPS Group can increase or decrease the amount of SO_2 that it emits in response to changes in unit availability, coal quality, pollution controls, and market demand. The amount of SO_2 any MPS unit may emit over a short-term period is regulated by other

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to actual ambient monitoring data. Ex. 6, Attachment A at 1-3. One of the key issues to be addressed in the modeling guidance is use of actual emissions data as modeling inputs.

emission limits designed to address short-term SO_2 concentrations, not the MPS system-wide annual SO_2 limit. The contention also ignores the fundamental reality of the existing variance. Simply put, as recognized by the IEPA, the requested variance will not cause any increase in SO_2 emissions over what is currently allowed. IEPA Response to Board Question, filed September 16, 2013.

Nor is the requested variance inconsistent with federal law. Short-term SO_2 emission limits needed to achieve the 1-hour SO_2 NAAQS will be promulgated and implemented via a separate rulemaking process in accordance with a schedule established by USEPA. As stated in the Petition, IPH understands that the variance would not affect any emission reductions obligations imposed through the separate rulemaking processes addressing the 1-hour SO_2 NAAQS. Pet. § VIII, pp. 65-67. Importantly, the IEPA agrees: "The IEPA believes the granting of this variance will not jeopardize the State's obligations to attain and maintain the 1-hour SO_2 NAAQS. This variance deals only with the requirement in question at the current time. Any new rule mandating reductions in SO_2 will be addressed in a separate rulemaking proceeding before the Board. Variances for existing requirements do not affect any future rules." IEPA Response to Board Questions filed September 5, 2013, at 2.

C. The Proposed Variance Does Not Threaten Public Health.

The Petitioners presented Dr. Lisa Bradley, Senior toxicologist at AECOM, as its expert witness to provide (a) a Memorandum to accompany the Petition (Pet. Ex. 12), (b) testimony at hearing, as needed (Tr. pp. 72-82); and (c) a follow-up report attached to this Post-Hearing Brief, addressing comments at hearing related to alleged public health impacts. *See* Ex. 6. Dr. Bradley is a nationally recognized toxicologist who holds a Ph.D. in toxicology from the Massachusetts Institute of Technology. She has 25 years of experience in risk assessment and toxicology, and

is certified by the American Board of Toxicology. Her 11-page résumé appears at the end of the AECOM Memorandum that was included with the Petition. *See* Pet. Ex. 12.

Dr. Bradley specifically addresses the comments made by Ms. Bugel on behalf of the ELPC. First, Ms. Bugel argues that the variance "will allow a negative environmental impact" which she explains would be "local exceedances of the 2010 NAAQS for SO_2." PC# 2337 at 11. As Dr. Bradley explains, the approach used by the ELPC to reach this conclusion is fatally flawed, as it utilizes an approach not condoned by most recent U.S. EPA guidance. A detailed evaluation of the ELPC's air modeling is attached to Dr. Bradley's comments, as Attachment A, and is discussed in detail above. The modeling presented by the ELPC quite simply is "not evidence of an air quality violation" and "should not…be relied upon for decision-making." Ex. 6 at, p. 2. Moreover, Dr. Bradley points to the more appropriate emission estimates, contained in Attachment A which will, she explains, "result in modeled compliance at all three of the plants" referred to by Ms. Bugel. *See* Ex. 6, p. 2.

Further, Dr. Bradley explains that, in any event, the NAAQS themselves do not represent a threshold for adverse health effects, as appears to be the suggestion of Ms. Bugel in her comments. Dr. Bradley explains that the comments on this point reflect "a fundamental lack of understanding…of the concept of the concentration-response relationship and the difference between a regulatory standard and a biological threshold for adverse effects." *See* Ex. 6, p.2. To demonstrate why Ms. Bugel's thesis is incorrect, Dr. Bradley reviews the following: the concentration-response relationship for SO_2 in the sensitive subpopulation of interest, asthmatics; the basis of the NAAQS for SO_2; and the recent data on 1-hour SO_2 concentrations in Illinois. *See* Ex. 6, pp. 2 – 4.

Finally, Dr. Bradley also responds directly to Ms. Bugel's point, at PC# 2337, p. 9, that excess SO_2 emissions would transform into fine particulate matter PM2.5, thereby cause degradation of air quality. First, this comment fails to recognize that there will be *no excess SO_2 emissions* over the variance period and, in fact, the compliance plan proposed with additional conditions will provide further assurance that there will be even less SO_2 emissions over the variance period. Second, Dr. Bradley refers to the analysis performed on this point as included in the AECOM Memorandum in the Petition, Pet. Ex.12, as well as an expanded analysis which is included in her Post-Hearing Comments. Ex. 6, Attachment B.

In conclusion, based upon her evaluations of this variance, Dr. Bradley expresses the expert opinion that the proposed variance is protective of human health, and will not result in adverse health effects, even in our most sensitive populations.

VI. THE REQUESTED VARIANCE IS CONSISTENT WITH FEDERAL LAW

The Petition properly concluded that the requested variance may be granted consistent with federal law. A discussion of the consistency was laid out in some detail regarding consistency with the federal Best Available Retrofit Technology ("BART") requirements, Cross State Air Pollution Rule ("CSAPR") (if it ever becomes effective), Mercury and Air Toxics Standards ("MATS") and the NAAQS. Pet. at 64-67. The IEPA has no disagreement on any of these issues, and as with the AER variance in PCB 12-126, the IEPA will submit this variance, if granted, to the USEPA for approval as an Illinois State Implementation Plan ("SIP") revision. *See* Pet., Section X.

The ELPC claims that the operation of three of the plants (Edwards, Joppa and Newton) already causes exceedences of the 1-hour SO_2 NAAQS. The claimed support for this is air modeling performed by Mr. Steven Klafka on behalf of the ELPC. However, this is simply

inaccurate, and not relevant to this variance request, for a variety of reasons as set forth above. Thus, consistency with the SO_2 NAAQS will also be had if this variance is granted. *See also* IEPA Response to Board Question, filed September 16, 2013 (IEPA concludes: "[T]here is no increase in SO_2 emissions from the requested variance over what is currently allowed in the variance previously granted to Ameren. Therefore, the Illinois EPA does not need to rely upon any annual mass emissions cap associated with the requested variance for approval of a SIP revision."). Moreover, in its evaluation of the variance, as required by section 37(a) of the Act and Section 104.216 of the Board's rules, the IEPA did not indicate that the variance would be inconsistent with federal law but instead indicated an intention to submit the variance, if granted by the Board, "for approval as a SIP revision." *See* Section VII, ¶¶63-70. The Petitioners fully intend to show compliance with the 1-hour SO_2 NAAQS under a separate analysis, where relevant and as required outside the scope of this variance.

VII. CONCLUSION

The requested variance represents the best path forward for the continued operation of the MPS Group in a manner that achieves environmental protection and allows time for completion of the Newton FGD Project that was the subject of the compliance plan in PCB 12-126. The requested variance is in the best interest of not only the petitioning companies, but also the State of Illinois, the communities where the MPS Group energy centers are located, and the employees who work there. Further, this Petition for Variance represents the Petitioners' and Co-Petitioner's good faith response to the Board's June 6, 2013 Order in PCB 12-126, in which the Board required the requested variance to be filed as a separate matter and justified independently in its own docket. Petitioners and Co-Petitioner believe they have done that, in its appropriate regulatory context: a variance from the 2015 and 2017 system-wide emission rates for one

pollutant, SO_2. Further, all relevant parties are present here – and have presented record evidence in the Petition, and at hearing, and in this Post-Hearing Brief that provides clear justification for the granting of their request, in accordance with the Act, the Board's regulations and prior Board and court case law.

While Petitioners and Co-Petitioner have justified the hardships that will occur absent a grant of this variance, as they must, Petitioners and Co-Petitioner also very much respect the role of the Board and wish to state unequivocally that this matter does not require the Board to choose between jobs and the environment. This petition seeks relief at no demonstrated detriment to the environment and, in fact, results in an overall improved environment – as evident from the enhanced compliance conditions proposed by Petitioner IPH and the fact that IPH represents the best path forward for ensuring the compliance initiative set in motion in PCB 12-126: completion of the Newton FGD Project while maintaining economic, employment and operational stability.

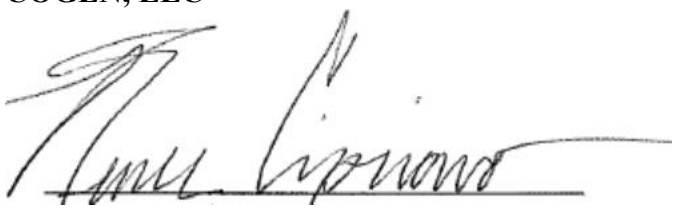
WHEREFORE, for the reasons set forth above, Petitioners ILLINOIS POWER HOLDINGS, LLC, and AMERENENERGY MEDINA VALLEY COGEN, LLC, and Co-Petitioner AMEREN ENERGY RESOURCES, LLC, respectfully request that the Board grant the requested variance from the requirement that the seven affected MPS Group facilities comply with a system-wide SO_2 annual emission rate of 0.25 lb/mmBtu for the period from January 1, 2015, through December 31, 2019, and from the requirement that they comply with a system-wide SO_2 annual emission rate of 0.23 lb/mmBtu for the period from January 1, 2017 through December 31, 2019. Specifically, Petitioners ILLINOIS POWER HOLDINGS, LLC, and AMERENENERGY MEDINA VALLEY COGEN, LLC propose the following VARIANCE ORDER (*see* Attachment A).

Respectfully submitted,

ILLINOIS POWER HOLDINGS, LLC

By: One of Its Attorneys

AMEREN ENERGY RESOURCES, LLC and AMERENENERGY MEDINA VALLEY COGEN, LLC



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ATTACHMENT A

The Board grants Petitioners, ILLINOIS POWER HOLDINGS, LLC and AMERENENERGY MEDINA VALLEY COGEN, LLC, combined dual variances for the electrical generating units in the Ameren multi-pollutant standard (MPS) Group from the applicable requirements of 35 Ill. Adm. Code 225.233(e)(3)(C)(iii) for a period beginning January 1, 2015 through December 31, 2019 and 35 Ill. Adm. Code 255.233(e)(3)(C)(iv) for a period beginning January 1, 2017 through December 31, 2019, subject to the following conditions:

1. Illinois Power Holdings, LLC (IPH) must assure compliance with paragraph 2 and must comply with an overall SO_2 annual emission rate of 0.35 lb/mmBtu through December 31, 2019, and beginning January 1, 2020, must comply with an overall SO_2 annual emission rate of 0.23 lb/mmBtu.

2. AmerenEnergy Medina Valley Cogen, LLC shall not operate the electrical generating units at the Meredosia and Hutsonville Power Stations until after December 31, 2020. The FutureGen project at the Meredosia Energy Center is exempt from this restriction.

3. Through December 31, 2019, IPH shall continue to burn low sulfur coal at the E.D. Edwards, Joppa and Newton Energy Centers. The combined annual average stack SO_2 emissions of these three stations shall not exceed 0.55 lb /mmBtu on a calendar year annual average basis.

4. Through December 31, 2019, IPH shall operate the existing Flue Gas Desulfurization systems at the Duck Creek and Coffeen Energy Centers to achieve a combined SO_2 removal rate of at least 98 percent on a calendar year annual average basis.

5 IPH shall permanently retire the E.D. Edwards Unit 1 as soon as allowed by the Midcontinent Independent Transmission System Operator, Inc.

6. IPH shall limit the MPS Group system-wide mass emissions of SO_2 to no more than 327,996 tons, through December 31, 2020.

7. For each year through 2020, IPH shall report to the Agency the mass SO_2 emissions with its Annual Emissions Reports. For the purposes of this condition, the mass SO_2 emissions would be the combined tons of SO_2 emitted by the five

operating power stations in the MPS Group: Coffeen, Duck Creek, E.D. Edwards, Joppa and Newton Energy Centers.

8. Regarding the Flue Gas Desulfurization project at the Newton Power Station (I.D. No. 079808AAA) (Newton FGD project):

   a. On or before July 1, 2015, IPH must complete engineering work on the Newton FGD project.

   b. On or before December 31, 2017, IPH must obtain a new or extended construction permit, if needed, for the installation of the FGD equipment at the Newton Power Station.

   c. On or before December 31, 2018, IPH must complete construction of the absorber building on the Newton FGD project.

   d. On or before July 1, 2019, IPH must complete steel fabrication of ductwork and insulation activities on the Newton FGD project.

   e. On or before July 1, 2019, IPH must complete installation of electrical systems and piping on the Newton FGD project.

   f. On or before September 1, 2019, IPH must set major equipment components into final position on the Newton FGD project.

   g. Beginning with calendar year 2013 and continuing through 2019, annual progress reports must be filed with the Agency as to the status of construction activities relating to the Newton FGD project by the end of each calendar year. These annual progress reports must include an itemization of activities completed during the year, activities planned to be completed in the forthcoming year, progress of the Newton FGD project to comply with the timelines specified in this variance, and the estimated in-service date.

9. Annual reports as required above must be submitted to:

Illinois Environmental Protection Agency
Attn: Ray Pilapil, Manager
Bureau of Air-Compliance Section
1021 N. Grand Ave. East
P.O. Box 19276
Springfield, IL 62794-9276

Illinois Environmental Protection Agency
Attn: Gina Roccaforte, Assistant Counsel
Division of Legal Counsel-Air Regulatory Unit
1021 N. Grand Ave. East
P.O. Box 19276
Springfield, IL 62734-9276

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 7th day of October, 2013, I have served electronically the attached **PETITIONERS' and CO-PETITIONER'S POST-HEARING BRIEF**, upon the following persons:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

and by first class mail, postage affixed upon:

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinis 62794-9276

Gina Roccaforte
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Faith E. Bugel
Andrew Armstrong
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/s/ Claire A. Manning
Claire A. Manning

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