

ILLINOIS POLLUTION CONTROL BOARD
August 22, 2013

DYNEGY MIDWEST GENERATION, LLC,)
)
Petitioner,)
)
v.) PCB 12-135
) (Variance - Air)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by J.A. Burke):

On June 8, 2012, Dynegy Midwest Generation, LLC (Dynegy), filed a petition for a variance (Petition) seeking relief until April 1, 2015, from certain provisions of the Illinois Multi-Pollutant Standard (MPS), 35 Ill. Adm. Code 225.233, “applicable to vintage 2013 and 2014 sulfur dioxide (SO₂) allowances allocated by the [United States] Environmental Protection Agency (USEPA) or the Illinois Environmental Protection Agency (Agency) under the Cross-State Air Pollution Rule (CSAPR).” Pet. at 1.

Dynegy requests this variance for its MPS group consisting of electricity generating units at five separate facilities. Pet. at 1. The Dynegy MPS group includes the following five coal-fired electric generating plants: Baldwin Energy Complex (Randolph County), Havana Power Station (Mason County), Hennepin Power Station (Putnam County), Wood River Power Station (Madison County), and Vermilion Power Station (Vermilion County). *Id.*, FN 1. The Agency filed its recommendation on July 23, 2012.

On August 14, 2013, Dynegy filed a motion to stay proceedings and waiver of decision deadline (Motion). For the reasons below, the Board grants the motion and stays this proceeding until February 20, 2014.

DYNEGY’S MOTION FOR EXTENSION OF STAY

Background

Dynegy seeks relief from the provisions of 35 Ill. Adm. Code 225.233(f)(2) that would prohibit Dynegy from trading SO₂ allowances under the CSAPR. Mot. at 1-2. The CSAPR had been adopted by the USEPA at 76 Fed. Reg. 48,208 (Aug. 8, 2011) and then appealed in EME Homer City Generation, L.P. v. EPA, No. 11-1302 (D.C. Cir.). *Id.* at 2.

On August 21, 2012, the appellate court vacated the CSAPR. Mot. at 2. At that point, Dynegy waived the decision deadline in this case in anticipation of a challenge to the appellate court’s ruling. *Id.* Dynegy continued to waive the decision deadline in this case as it determined

whether to continue with this variance proceeding or instead withdraw its petition, dependent on whether or not the CSAPR was reinstated. *Id.*

Dynergy states that rehearing of the appellate court's ruling was sought and denied. Mot. at 3, citing EME Homer City Generation, L.P., 696 F.3d 7, *reh'g denied*, No. 11-1302, 2013 WL 656247 (D.C. Cir. Jan. 24, 2013). However, the United States Supreme Court granted *certiorari* on June 24, 2013. *Id.*, citing EME Homer City Generation, L.P., 696 F.3d 7 (D.C. Cir. 2012), *cert. granted*, 81 USLW 3702, 81 USLW 3567, 81 USLW 3696 (U.S. June 24, 2013) (No. 12-1182). The Supreme Court will hear the EME Homer City Generation, L.P. appeal in its term beginning in October 2013. *Id.* Briefing is expected to be completed by December 2013. *Id.*

Request for Stay

Dynergy states that it has provided a status report (as outlined above), and that it has waived the decision deadline to June 30, 2014, approximately 120 days following the end of the requested stay period, in accordance with the Board's procedural rules for granting a stay. Mot. at 3-4, citing 35 Ill. Adm. Code 101.514(a).

Dynergy states that it filed its petition for variance prior to the implementation of the CSAPR "in order to be able to enter the emissions allowance market as soon as USEPA distributed CSAPR allowances to [Dynergy's] accounts." Mot. at 4. Should the U.S. Supreme Court overturn the lower court's decision, Dynergy anticipates it would need to make only minor changes to its petition for variance "to reflect appropriate beginning and ending dates for the variance." *Id.* Dynergy states that its ability to sell CSAPR allowances as soon as its CSAPR allowance accounts are populated "would be extremely important in the emissions allowances trading market." *Id.* Dynergy is concerned that a withdrawal of the petition followed by a refiling "would consume valuable time, including for preparation and filing of the new petition and related initial procedural matters." *Id.*

Dynergy further contends that the requested stay would conserve resources of the Board, the Agency, and Dynergy. Mot. at 4. Dynergy states that, if the U.S. Supreme Court affirms the appellate court's decision, any resources expended by the Board, the Agency, or Dynergy "would be wasted as the variance petition is dependent on the existence and implementation of the CSAPR." *Id.* at 4-5.

Dynergy acknowledges that February 2014 is likely the earliest that the U.S. Supreme Court would render its decision in EME Homer City Generation, L.P., but would like return of the matter to the Board's active docket at that time, "understanding that it may have to waive the decision deadline again" while awaiting the Supreme Court's decision or possible subsequent appellate court proceedings. *Id.* at 5.

Dynergy concludes by stating that it understands that the Agency does not object to this requested stay. Mot. at 5. Dynergy therefore requests a stay until February 20, 2014, and waives the Board's decision deadline in this case until June 30, 2014. *Id.*

DISCUSSION

Legal Background

Under Section 101.514(a) of the Board's procedural rules, a motion to stay a proceeding must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion. 35 Ill. Adm. Code § 101.514(a).

The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." See People v. State Oil Co., PCB 97-103 (May 15, 2003), *aff'd sub nom State Oil Co. v. PCB*, 822 N.E.2d 876, 291 Ill. Dec. 1 (2nd Dist. 2004).

Board Ruling on Motion to Stay

Dynergy has requested this stay as it awaits the U.S. Supreme Court's decision in EME Homer City Generation, L.P. Mot. at 2. Dynergy anticipates a decision by the U.S. Supreme Court, at the earliest, in February 2014. *Id.* at 5. Dynergy contends that the "variance petition is dependent on the existence and implementation of the CSAPR." *Id.* The Agency does not object to Dynergy's request, and the Board has not received any responsive filings to the request.

The Board grants Dynergy's motion to stay this case. The uncertainty over the impact that the U.S. Supreme Court's decision could have on this case supports a stay. Further, Dynergy has filed a waiver in this case that extends 120 days past the end of the stay, ensuring appropriate time for the Board to decide this case. Under these circumstances, the Board finds that Dynergy has established that a stay is appropriate. The Board therefore grants Dynergy's motion for stay through February 20, 2014.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 22, 2013, by a vote of 4-0.



John Therriault, Clerk
Illinois Pollution Control Board