

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)
)
STANDARDS FOR THE DISPOSAL OF COAL) R 2020-019
COMBUSTION RESIDUALS IN SURFACE) (Rulemaking – Land)
IMPOUNDMENTS: PROPOSED NEW 35 ILL.)
CODE 845)

NOTICE OF FILING

To: Service List

PLEASE TAKE NOTICE that I have today electronically filed, with the Office of the Clerk of the Pollution Control Board, AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company, d/b/a Ameren Missouri's Motion to Strike, copies of which are herewith served upon you.

Dated: April 2, 2021

Respectfully submitted,
**AmerenEnergy Medina Valley Cogen,
LLC and Union Electric Company, d/b/a
Ameren Missouri.**

By /s/Claire A. Manning
BROWN, HAY & STEPHENS, LLP
Claire A. Manning
Registration No. 3124724
Anthony D. Schuering
Registration No. 6333319
205 S. Fifth Street, Suite 1000
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491
cmanning@bhslaw.com
aschuering@bhslaw.com

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, AmerenEnergy and Union Electric Company, d/b/a Ameren Missouri's Motion to Strike, were electronically filed on April 2, 2021 with the following:

Don Brown, Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, IL 60601
Don.Brown@illinois.gov

and that copies were sent via email on April 2, 2021, to the parties on the service list.

Respectfully submitted,
**AmerenEnergy Medina Valley Cogen,
LLC and Union Electric Company, d/b/a
Ameren Missouri.**

By /s/Claire A. Manning
BROWN, HAY & STEPHENS, LLP
Claire A. Manning
Registration No. 3124724
Anthony D. Schuering
Registration No. 6333319
205 S. Fifth Street, Suite 1000
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491
cmanning@bhslaw.com
aschuering@bhslaw.com

SERVICE LIST

<p>Don Brown, Clerk of the Board Don.brown@illinois.gov Vanessa Horton, Hearing Officer Vanessa.Horton@illinois.gov Illinois Pollution Control Board James R. Thompson Center Suite 11-500 100 West Randolph Chicago, Illinois 60601</p>	<p>Stefanie N. Diers – Assistant Counsel Stefanie.diers@illinois.gov Christine M. Zeivel – Assistant Counsel Christine.zeivel@illinois.gov Clayton J. Ankney - Assistant Counsel Clayton.Ankney@illinois.gov Illinois Environmental Protection Agency 1021 N. Grand Ave., East, P.O. Box 19276 Springfield, Illinois 62794-9276</p>
<p>Virginia I. Yang - Deputy Counsel virginia.yang@illinois.gov Nick San Diego - Staff Attorney nick.sandiego@illinois.gov Robert G. Mool bob.mool@illinois.gov Paul Mauer - Senior Dam Safety Eng. Paul.Mauer@illinois.gov Renee Snow - General Counsel renee.snow@illinois.gov Illinois Department of Natural Resources One Natural Resources Way Springfield, IL 62702-1271</p>	<p>Matthew J. Dunn, Chief mdunn@atg.state.il.us Stephen Sylvester Sr. Asst. Attorney General ssylvester@atg.state.il.us Andrew Armstrong, Chief aarmstrong@atg.state.il.us Kathryn A. Pamenter KPamenter@atg.state.il.us Office of the Illinois Attorney General 69 West Washington Street, Suite 1800 Chicago, IL 60602</p>
<p>Michael L. Raiff mraiff@gibsondunn.com Gibson Dunn and Crutcher, LLP 2001 Ross Avenue, Suite 2100 Dallas, TX 75201</p>	<p>Alisha Anker - V.P. Reg. & Market Affairs aanker@ppi.coop Prairie Power 3130 Pleasant Run Springfield, IL 62711</p>
<p>Michael Smallwood Msmallwood@ameren.com Ameren 1901 Choteau Ave. St. Louis, MO 63103</p>	<p>Cynthia Skrukud Cynthia.Skrukud@sierraclub.org Jack Darin Jack.Darin@sierraclub.org Christine Nannicelli christine.nannicelli@sierraclub.org Sierra Club 70 E. Lake Street, Ste. 1500 Chicago, IL 60601-7447</p>
<p>Jeffrey Hammons Jhammons@elpc.org Environmental Law & Policy Center 1440 G Street NW Washington, DC 20005</p>	<p>Chris Newman newman.christopherm@epa.gov Jessica Schumacher - Physical Scientist Schumacher.Jessica@epa.gov USEPA Region 5 77 West Jackson Blvd. Chicago, IL 60604</p>

<p>Melissa Legge mlegge@earthjustice.org Earthjustice 48 Wall Street, 15th Floor New York City, NY 10005</p>	<p>Mark A. Bilut mbilut@mwe.com McDermott, Will & Emery, LLP 227 West Monroe Street Chicago, IL 60606-5096</p>
<p>Kim Knowles kknowles@prairierivers.org Andrew Rehn arehn@prairierivers.org Prairie Rivers Network 1902 Fox Drive, Suite 6 Champaign, IL 61820</p>	<p>Abel Russ – Attorney aruss@environmentalintegrity.org Environmental Integrity Project 1000 Vermont Avenue NW, Suite 1100 Washington, DC 20005</p>
<p>Kiana Courtney KCourtney@elpc.org Environmental Law and Policy Center 35 E. Wacker Drive, Suite 1600 Chicago, IL 60601</p>	<p>Jennifer Cassel jcassel@earthjustice.org Thomas Cmar tcmar@earthjustice.org Earthjustice 311 South Wacker Drive, Suite 1400 Chicago, IL 60606</p>
<p>Keith I. Harley kharley@kentlaw.edu Daryl Grable dgrable@clclaw.org Chicago Legal Clinic, Inc. 211 West Wacker Drive, Suite 750 Chicago, IL 60606</p>	<p>Mychal Ozaeta mozaeta@earthjustice.org Earthjustice 707 Wilshire Blvd., Suite 4300 Los Angeles, CA 90017</p>
<p>Deborah Williams Regulatory Affairs Director deborah.williams@cwlp.com City of Springfield Office of Public Utilities 800 East Monroe, 4th Floor Municipal Bldg. East Springfield, IL 62757-0001</p>	<p>Alec M Davis - Executive Director adavis@ierg.org Jennifer M. Martin jmartin@heplerbroom.com Kelly Thompson kthompson@ierg.org IERG 215 E. Adams St. Springfield, IL 62701</p>
<p>Stephen J. Bonebrake sbonebrake@schiffhardin.com Joshua R. More jmore@schiffhardin.com Schiff Hardin, LLP 233 South Wacker Drive Suite 6600 Chicago, IL 60606-6473</p>	<p>Susan M. Franzetti sf@nijmanfranzetti.com Kristen Laughridge Gale kg@nijmanfranzetti.com Vincent R. Angermeier va@nijmanfranzetti.com Nijman Franzetti, LLP 10 South LaSalle Street, Suite 3600 Chicago, IL 60603</p>

<p>Faith Bugel fbugel@gmail.com 1004 Mohawk Wilmette, IL 60091</p>	<p>Walter Stone - Vice President Walter.Stone@nrg.com NRG Energy, Inc. 8301 Professional Place, Suite 230 Landover, MD 20785</p>
<p>Melissa S. Brown melissa.brown@heplerbroom.com Jennifer M. Martin Jennifer.Martin@heplerbroom.com HeplerBroom, LLC 4340 Acer Grove Drive Springfield, IL 62711</p>	

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)
)
STANDARDS FOR THE DISPOSAL OF COAL) R 2020-019
COMBUSTION RESIDUALS IN SURFACE) (Rulemaking – Water)
IMPOUNDMENTS: PROPOSED NEW 35 ILL.)
CODE 845)

AMEREN’S MOTION TO STRIKE

NOW COMES AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company, d/b/a Ameren Missouri (collectively, “Ameren”), by their attorneys Claire A. Manning and Anthony D. Schuering of BROWN, HAY & STEPHENS, LLP, and pursuant to 35 Ill. Adm. Code § 102.108(d), asks that the Board strike and/or disregard the March 30, 2021 filing designated as Public Comment No. 152. In support thereof, Ameren states as follows:

1. On November 6, 2020, the record in the above-captioned rulemaking was closed. *See Opinion and Order of the Board*, No. R20-19, slip op. at 8 (Ill. Pol. Control Bd. Feb. 4, 2021) (noting that the Attorney General’s January 14, 2021 public comment regarding dismissal of an unrelated circuit court case was “untimely as this rulemaking’s record closed on November 6, 2020”, and irrelevant because it involved the “discussion of specific, ongoing legal actions between and amongst the participants” to the rulemaking).

2. On February 4, 2021, the Board submitted proposed rules, which were the subject of this rulemaking, to the Joint Committee on Administrative Rules (“JCAR”). *See Opinion and Order of the Board*, No. R20-19, slip op. at 2 (Ill. Pol. Control Bd. Feb. 4, 2021).

3. Under the Illinois Administrative Procedures Act (the “IAPA”), JCAR is responsible for promoting adequate and proper rules by agencies and fostering public understanding with respect to those rules. *See* 5 ILCS 100/5-100(a). In many scenarios, that role

is advisory. *See Id.* (identifying two statutory sections, which are inapplicable to this proceeding, as scenarios where JCAR's role is not advisory). To meet its mandate, JCAR is required to review the statutory authority upon which any administrative rule is based, 5 ILCS 100/5-105(b), to examine the proposed rule and assess, in relevant part, whether the proposed rule has an adequate basis in law and whether the agency has considered alternatives to the rule which are consistent with the stated objectives of the enabling legislation. 5 ILCS 100/5-110(a).

4. On March 18, 2021, the Board issued an Order explaining that JCAR asked for additional time to “examine the proposed rules and, specifically, the Board’s reliance on the October 19, 2015 effective date of the corresponding federal rules in delineating the universe of CCR surface impoundments subject to Part 845.” *See Opinion and Order of the Board*, No. R20-19, slip op. at 1 (Ill. Pol. Control Bd. Mar. 18, 2021).

5. On March 26, 2021, JCAR—as part of its legislative mandate to examine the rules which this Board submitted to it for review—called a meeting between its staff, representatives for Ameren, employees of the IEPA, and participants in this rulemaking, including representatives of the Attorney General’s Office, to discuss the issues Ameren has raised regarding the retroactivity of the Board’s proposed rules given the use of a 2015 effective date.

6. On March 30, 2021, the IEPA submitted for inclusion into the public record of this rulemaking a memorandum which purports to summarize a “potential *ex parte* communication” related to this rulemaking. *See P.C. # 152*. This memorandum claims to “summarize[] a meeting between representatives of [JCAR] and several interested parties” related to this rulemaking. *Id.* at p. 1. For multiple reasons, this memorandum is improper and should not be a part of the rulemaking’s public comment.

7. First, even assuming the memorandum accurately portrayed the content of the meeting it purports to summarize, the meeting does not constitute an *ex parte* communication. Under the IAPA, an *ex parte* communication is one that, in relevant part, “makes a material argument regarding potential action concerning an agency’s . . . rulemaking under this Act and that is communicated to that agency, the head of that agency, or any other employee of that agency.” 5 ILCS 100/1–165(b). The IEPA’s own memorandum concedes it is not the “agency” for purposes of this provision—the Board would be. *See* P.C. # 152, p. 1. Moreover, there was no material argument regarding potential action—it was a meeting to address JCAR’s questions so that it can fulfill its obligations under the IAPA. There was no indication that any action has even been contemplated, let alone that the potential for such action exists.

8. Second, this is yet another untimely public comment filed by the State in opposition to Ameren’s legal arguments. As the Board noted in its February 4, 2021 Order, the record on this rulemaking closed on November 6, 2020, and any subsequent public comments are untimely. *See Opinion and Order of the Board*, No. R20-19, slip op. at 8 (Ill. Pol. Control Bd. Feb. 4, 2021) (noting that the Attorney General’s January 14, 2021 public comment regarding dismissal of an unrelated circuit court case was “untimely as this rulemaking’s record closed on November 6, 2020”). While Ameren concedes that a requirement exists under Section 5–165(c) of the IAPA to file notice of an *ex parte* communication in the record of any rulemaking, *See* 5 ILCS 100/5–165(c), this requirement is inapplicable here because the meeting does not qualify as an *ex parte* communication.

9. Under 35 Ill. Adm. Code § 102.108(d), untimely comments “will not be considered, except as allowed by the hearing officer or Board to prevent material prejudice.” In this case, neither the Board nor the Hearing Officer have entered an order allowing P.C. # 152 to be made

