BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS POWER HOLDINGS, LLC and AMEREN ENERGY MEDINA VALLEY COGEN, LLC,	)	
Petitioners,	)	
AMEREN ENERGY RESOURCES, LLC,	)	PCB 2014-010
v.	)	(Variance – Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board the Comments of the Illinois Attorney General's Office, a copy of which is hereby served upon you.

Dated: September 24, 2013

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney
General of the State of Illinois

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COMMENTS OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE

Pursuant to 415 ILCS 5/32 and 35 Ill. Adm. Code § 104.224(d), the Illinois Attorney General's Office, on behalf of the People of the State of Illinois (the "People"), hereby submits the following comments to the Illinois Pollution Control Board (the "Board") for its consideration in the above-referenced matter.

INTRODUCTION

The People strongly support the Board's decision in PCB 12-126 to require Dynegy's subsidiary, Illinois Power Holdings, LLC ("IPH"), to make its own independent showing of need for a variance and to require that IPH file its request in a new docket to undergo the public process requirements set forth in 35 Ill. Adm. Code 104, Subpart B. The wisdom of this decision is evidenced by the large numbers of public comment (written and oral) received by the Board in the current docket, as well as through the exchange of questions and recommendations by and between the Board, the Illinois Environmental Protection Agency ("IEPA"), and the petitioners.

One issue, however, that the Board did not appear to squarely address in PCB 12-126 is the procedural question of whether it is appropriate for the Board to consider requests for

variances from entities, such as IPH, who are not yet actually subject to the regulations from which they seek relief. Assuming, though, that the Board finds this type of request to be allowable, the People provide the following suggestions to aid the Board's analysis of the substantive merits of IPH's petition.

DISCUSSION

I. Evaluation of Emissions

Petitioners go to great lengths to attempt to claim that the requested variance will not result in higher pollution amounts than if they were required to comply with the MPS. For the reasons set forth below, the Board should reject IPH's attempt to claim credit for not operating plants that it will not acquire. Also, because IPH is requesting prospective variance relief to begin on an uncertain date, the Board should examine a range of emission scenarios and consider the use of adjustable emission caps based on the actual date of the closing before determining that a variance is warranted.

A. Medina Valley is an Unnecessary Party.

In denying the motion to substitute parties in PCB 12-126, the Board pointed out that IPH was proposing to acquire only five out of the seven plants that the Board had analyzed in granting the variance to AER. Order of the Board (June 6, 2013) at 11. The Board stated that it "would therefore be required to undertake a new analysis specifically related to the five facilities in [IPH's] requested variance." *Id*. (emphasis added). But instead of following the Board's instructions and presenting a new analysis, IPH decided to join with another entity (Medina Valley Cogen, LLC) and repackage the same set of pollution calculations involved in PCB 12-126. As discussed below, the Medina Valley subsidiary is irrelevant to IPH's variance request and should be excluded from the Board's analysis in this docket.

Upon acquiring the two shut-down facilities (Hutsonville and Meredosia), 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 requesting variance relief. Nowhere does Medina Valley state any intent of resuming coal-fired power generation at either Hutsonville or Meredosia. It appears that the FutureGen 2.0 project, if it is built at the Meredosia plant, would operate at an emission rate of .044 lb/mmBtu[1] and have very little impact one way or the other on the overall MPS group compliance due to its relatively small size. To the extent FutureGen would affect anything, it would only assist IPH with MPS compliance obligations. The simplest and most straightforward way to address FutureGen would be for IPH, as part of the proposed transaction, to agree to indemnify Medina Valley in the event Medina Valley is claimed to be in violation of the MPS by operating the FutureGen boiler during the term of a variance.

Accordingly, the Board should deny Medina Valley's variance request, focus its analysis on the five plants that IPH proposes to acquire, and should follow-through with a new evaluation that it determined to be necessary in denying the substitution of IPH for AER in PCB 12-126. The Hutsonville and Meredosia plants should be excluded from the revised analysis because they have zero impact on the fleet-wide emission rate (no heat input, no sulfur dioxide ("SO_2") emissions) and are, therefore, irrelevant to IPH's compliance with the MPS. IPH's insistence on continuing to claim credit for the closures of Hutsonville and Meredosia—plants that it never owned and will never own—only serves to obscure the question of harm to public health and the environment and represents a fiction that should be rejected by the Board.

[1] According to the draft air permitting documents, the FutureGen boiler would be limited to a heat input of 14,500,000 mmBtu/year and an SO_2 emission limit of 322.4 tons/year ((322.4x2000)/14500000=0.044). http://www.epa.state.il.us/public-notices/2013/ameren-futuregen-meredosia/draft-permit-12020013.pdf.

B. Uncertain Closing Date

In addition to confining its analysis to the actual plants that IPH proposes to acquire, the Board should also reject IPH's attempt to take credit for emission reductions that occur prior to it taking ownership of those plants. In PCB 12-126, the Board found that the beginning of AER's commitment under the proposed variance conditions was the appropriate starting point for analyzing the environmental impact of the variance. Opinion and Order (Sep. 20, 2012) at 56 ("[T]he Board finds that 2012 is the appropriate start point because the variance will be granted in 2012 and commits AER to complying with a more stringent overall [sulfur dioxide ("SO_2")] annual emission rate starting in 2012 . . . as a prerequisite to the dual variance periods themselves.").

Here, when IPH's commitment will begin is unclear because of the contingent nature of the proposed transaction. One of the major contingencies is the Federal Energy Regulatory Commission ("FERC") approval the transaction under Section 203 of the Federal Power Act (16 U.S.C. § 824b). Dynegy and Ameren filed their application for FERC approval on April 16, 2013. *See* Joint Application, FERC Docket EC13-93.[2] The FERC must act on a completed Section 203 application within 180 days of the filing. 18 C.F.R. § 33.11. Thus, if the Ameren-Dynegy application had been deemed complete, the FERC would have had a decision deadline of mid-October. But the application was not complete. In a letter dated July 26, FERC staff directed the applicants to amend the application and provide additional information to allow FERC to analyze the filing.[3] Ameren and Dynegy submitted the additional information on

[2] http://elibrary.ferc.gov/idmws/docket_search.asp

[3] Office of Energy Market Regulation, Letter order directing Ameren Energy Generating Company et al. to provide an amendment to the 4/16/13 application for authorization of a disposition of jurisdictional assets and merger under EC13-93 (July 26, 2013).

August 5th, which FERC had stated in its letter would be considered an amendment to the application and would involve assigning a new date to the filing. Thus, FERC approval may not by achieved by mid-October and may in fact still be pending into 2014.

The possibility that FERC approval could be delayed appears to have been anticipated by Ameren and Dynegy. Through the asset purchase agreement, the parties gave themselves until March 14, 2014 to complete the closing before unilateral termination rights accrue. *See* Exhibit B at 26, Motion to Reopen Docket (May 2, 2013), PCB 12-126. They also allowed the option to extend this date by an additional thirty days if "governmental consents" (*e.g.*, FERC approval) had not been secured. *Id*.

As the requestor of the variance, IPH carries the burden of proof. *Marathon Oil Co. v. EPA*, 242 Ill.App.3d 200, 206 (5th Dist. 1993) (citing *Monsanto Co. v. PCB*, 67 Ill.2d 276, 293 (1977)) ("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."). As of today, IPH is unable to prove when it will assume ownership of the plants and can only speak to its expectations or what it anticipates or hopes will occur. Under the asset purchase agreement, it is conceivable that IPH would not assume ownership and would not become subject to the variance until as late as April 14, 2014.

If in fact the closing date is delayed into 2014, the calculation of differences between mass SO_2 emissions under the MPS and under the requested variance would need to be adjusted. Thus, the Board should examine a range of emission scenarios ranging from what it has already requested (Fourth Quarter 2013 through 2020) up to and including April 2014 through 2020. Also, as discussed below, the People support the inclusion of mass emission caps as a condition to any IPH variance that may be granted to ensure that actual emissions do not exceed the

amounts that the Board finds appropriate. To address the uncertainty of the actual closing date in this case, the Board could consider including, as an additional condition to the variance, that IPH provide a re-calculation of the emission cap(s) needed based on the date of closing and submit it to the Board as part of its certification of acceptance.

II. Consideration of 1-Hour SO_2 Modeling Analysis

The Citizen Groups have submitted air modeling analyses of the unscrubbed plants proposed to be acquired by IPH (Edwards, Joppa, and Newton). PC #113. According to the results, all three of the plants are estimated to be causing violations of the 1-hour SO_2 national ambient air quality standard. *Id*. For the reasons set forth below, the People believe that it is appropriate for the Board to include the analyses in its evaluation of the potential for harm to public health as a result of the variance.

In order to comply with the MPS, some action would need to be taken by IPH at one or more of the Edwards, Joppa, and Newton plants to reduce SO_2 emissions starting in 2015. Depending on the specific action to be taken, the reduction in SO_2 emissions would help to eliminate or reduce exceedances of the 1-hour SO_2 standard at one or more of the plants. Instead, under the variance, IPH can operate the three plants as they are being operated today, likely continuing to cause exceedances of the 1-hour SO_2 standard until such time as the sources are addressed by a SIP revision (by 2018 in the case of Edwards and even later for Joppa and Newton, depending on when USEPA completes the attainment designations for those areas).

In PCB 12-126, the People focused their commentary on the higher amounts of SO_2 emissions that the variance would permit from 2015-2020 compared to what would otherwise occur under the MPS. While the Board ultimately accepted the use of emission reductions in 2012-2014 to offset the increase, neither the People nor the Board had the benefit of the air

modeling analyses now being provided by the Citizens Groups. The People believe the analyses support the view that citizens could be exposed to unsafe levels of air pollution longer under the proposed variance than they otherwise would be if IPH was required to comply with the MPS—and that this is true regardless of offsetting emission reductions in earlier years. The Board should acknowledge this factor and incorporate it into its evaluation of whether IPH has shown that its hardship outweighs harm to public health and the environment.

III. Additional Conditions to a Granted Variance

The People support the use of annual mass emission caps as a means of ensuring that actual emissions under the variance do not exceed levels that the Board may find appropriate in its analysis. While petitioners have expressed their willingness to accept an overall cap, Response to Sept. 12th Questions at 2-3, annual caps would be preferable as a safeguard against pollution spikes occurring in one or more particular years during the variance. The People also support inclusion of the additional variance conditions identified by IEPA and agreed to by IPH regarding scrubber efficiency, sulfur content of fuel, and the commitment not to operate Edwards Unit 1 upon approval by the system operator.

Dated: September 24, 2013

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney
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CERTIFICATE OF SERVICE

I, James P. Gignac, an Assistant Attorney General in this case, do certify that I caused to be served this 24th day of September, 2013, the foregoing Comments of the Illinois Attorney General's Office upon the persons listed on the Service List by depositing same in an envelope, first class postage prepaid, with the United States Postal Service at 69 W. Washington St., Chicago, Illinois, at or before the hour of 5:00 p.m.

JAMES P. GIGNAC