BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

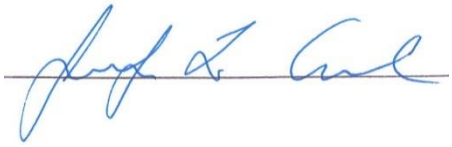
DYNERGY MIDWEST GENERATION, LLC.	)	
Petitioner,	)	PCB 12-135 (Variance - Air)
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent	)	

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on July 21, 2015, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois a **PUBLIC COMMENT** on behalf of the Environmental Law & Policy Center, Natural Resources Defense Council, Sierra Club, and the Respiratory Health Association, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,



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PUBLIC COMMENT

I. Introduction

Pursuant to 35 Ill. Adm. Code 104.224(b), the Environmental Law & Policy Center, Natural Resources Defense Council, Sierra Club, and the Respiratory Health Association (collectively, "Citizens Groups") hereby file this public comment on the Amended Petition for Variance ("the Amended Petition") filed by Dynegy Midwest Generation, LLC ("Dynegy") with the Pollution Control Board ("Board") on April 17, 2015. As discussed below, the Board should deny the Amended Petition because Dynegy has fallen far short of meeting the high bar the Board has set for granting of a variance. Dynegy's proposed variance would allow for a significant increase of costly, harmful air pollution that vastly outweighs any minimal hardship that would be borne by Dynegy if the variance were denied. Moreover, denial of this Amended Petition would not subject Dynegy to hardship, much less arbitrary or unreasonable hardship. Accordingly, the Amended Petition should be denied.

II. Background

Dynegy has renewed its 2012 request for a variance from provisions of Illinois' Multi-Pollutant Standard ("MPS")[1] which (i) prohibit electric generating unit ("EGU") owners or operators from trading or selling sulfur dioxide ("SO_2") allowances "that would otherwise be available for sale or

[1] The MPS is codified at 35 Ill. Adm. Code 225.233.

trade" due to compliance with the SO_2 requirements of the MPS, and (ii) require EGU owners or operators to surrender any excess SO_2 emissions to the Illinois Environmental Protection Agency ("IEPA"). As Dynegy explains, the MPS requires Dynegy's "MPS Group," for which it seeks the variance, to meet fleet-wide SO_2 limits of .19 lb/mmBtu in 2015 and beyond. Amended Petition at 2, n.3. In order to comply with the MPS as well as a 2005 Consent Decree covering the Dynegy MPS Group EGUs[2], Dynegy has installed SO_2 pollution controls at several of its EGUs, and therefore, it alleges, it currently complies with the MPS' SO_2 limits. Amended Petition at paras. 3, 12-16.

Dynegy's MPS Group EGUs, all of which are coal-fired power plants, are also subject to federal law limiting SO_2 emissions. After years of legal challenges, U.S. EPA has now begun to implement its rule regulating cross-state emissions of SO_2 under the "good neighbor" provision of the Clean Air Act ("CAA"), CAA § 110(a)(2)(d)(i)(I): namely, the Cross-State Air Pollution Rule ("CSAPR").[3] CSAPR provides for limited trading programs for SO_2 emissions. Under those programs, covered sources are allocated a certain number of emission allowances for a given year and are required, at the end of that year, to surrender to U.S. EPA the number of allowances equal to their emissions of SO_2 during that year. Amended Petition at para. 17. A source that was allocated insufficient allowances may buy allowances from another source that has excess allowances.[4] Due to its compliance with the SO_2 requirements of MPS and the Consent Decree, Dynegy expects to have

[2] *See* Consent Decree, *available at* http://www2.epa.gov/sites/production/files/documents/dmgfinal-cd.pdf (last visited July 20, 2015).

[3] *See Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals*, 76 Fed. Reg. 48,208 (Aug. 8, 2011) and *Rulemaking to Amend Dates in Federal Implementation Plans Addressing Interstate Transport of Ozone and Particulate Matter*, 79 Fed. Reg. 71,663 (Dec. 3, 2014).

[4] A source has "excess" allowances if its SO_2 emissions during a given period are less than the number of allowances it was allocated for that pollutant during that period. *See* Amended Petition at para. 17.

over 60,000 "excess" allowances under CSAPR,[5] which it would like to be able to sell as part of the CSAPR trading program for total profits it forecasts will amount to $3 million. Amended Petition at para. 41.

III. The Board Should Deny the Petition Because Dynegy Has Failed to Prove That Compliance With the MPS Would Impose an Arbitrary or Unreasonable Hardship.

The Illinois Environmental Protection Act ("Act") places the burden on a petitioner to prove that its proposed variance is necessary to avoid an "arbitrary or unreasonable hardship." 415 ILCS 5/35, 37. A key component of that burden is the requirement that a petitioner demonstrate 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." *Marathon Oil Co. v. IEPA*, 242 Ill. App. 3d 200, 206 (5th Dist. 1993). A petitioner for a variance bears a "heavy" burden. *Willowbrook Motel P'ship v. Ill. Pollution Control Bd.*, 135 Ill. App. 3d 343, 349 (1st Dist. 1985). The petitioner must show "that a variance *is necessary* to avoid arbitrary or unreasonable hardship." *Id*. (emphasis added). Critically, hardship is neither arbitrary nor unreasonable if it has been "self-imposed by the petitioner's inactivity or decision making." *Marathon Oil Co.*, PCB 94-27 (May 16, 1996), at 10; *Ekco Glaco v. Ill. Envt'l Prot. Agency*, PCB 87-41 (Dec. 17, 1987), at 4, *aff'd* 186 Ill. App. 3d 141 (1st Dist. 1989); *see also Willowbrook Motel P'ship*, 135 Ill. App. 3d at 344; *Allaert Rendering*, 91 Ill. App. 3d at 162 (3d Dist. 1980).

Dynegy does not, and in fact cannot, meet its burden here. In this case, the injury to the public from allowing the variance far outweighs any "hardship" Dynegy alleges it would experience if the variance were denied. What is more, Dynegy has failed to show that it would experience *any* cognizable hardship if the variance were denied, because (a) it cannot claim a grave need for the $3 million it estimates it would gain from this variance when it has just received a tens-of-millions-of-

[5] As Dynegy notes, under CSAPR, U.S. EPA determined the emission allocations for covered sources "based on [a] unit's maximum historic emissions," Amended Petition at para. 20, without taking into account the emissions reductions that would be achievable – and in Dynegy's case, are already being achieved – using SO_2 pollution controls.

dollars windfall in a recent Mid-Continent Independent System Operator ("MISO") capacity auction and has just spent billions of dollars to almost double the size of its fleet, and (b) any minimal hardship Dynegy might face without this variance was self-imposed by Dynegy's own business decisions to opt in to the MPS, not to oppose regulatory changes to the MPS in 2009, and to operate in a deregulated power market. Accordingly, the Amended Petition must be denied.

A. Granting the Variance Would Result In Far Greater Injury To the Public Than Any Hardship Dynegy Might Bear If The Variance Were Denied.

As noted above, the Act provides that the Board may grant a variance only when it finds "that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." 415 ILCS 5/35(a). In evaluating whether a proposed variance is necessary to avoid an "arbitrary or unreasonable hardship," 415 ILCS 5/35, the Board must balance individual hardship against environmental impact. *Monsanto Co. v. IPCB,* 67 Ill. 2d 276, 292 (1977). Dynegy bears the heavy burden of demonstrating 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." *Marathon Oil Co. v. IEPA*, 242 Ill. App. 3d 200, 206 (5th Dist. 1993).

Dynegy has not, and cannot, meet that burden. To begin with, Dynegy's allegations that allowing it to sell or trade 60,175 excess SO_2 emission allowances would be "without detriment to the environment," Amended Petition at para. 50, are simply false. Dynegy's sale or trade of over 60,000 SO_2 emission allowances would allow up to 60,175 *additional* tons of SO_2 pollution than would otherwise be released into the air in Illinois[6] or other states, some of which are upwind of Illinois. *See* Amended Petition at para. 24. Because SO_2 emissions travel far and wide – indeed, that is why EPA adopted CSAPR, to avoid SO_2 emission in one state affecting other states' air quality – additional SO_2

[6] Dynegy could sell its SO_2 allowances either in Illinois, to sources not covered by the MPS or the similar Combined Pollutant Standard, or to a CSAPR state upwind of Illinois, such as Missouri, or in several downwind states.

emissions in Illinois or upwind states could strongly affect air quality and public health in this state. And nothing limits Dynegy from selling or trading many or even all of those 60,175 SO_2 pollution allowances to plants in Illinois and upwind states, meaning that the people of this state could bear the brunt of that additional pollution.[7] This is exactly the type of activity the Board anticipated could undermine air quality standards in Illinois, and which it sought to preclude by preventing sales of emission allowances beyond MPS standards.

Contrary to Dynegy's claims, this additional pollution is not harmless. Although Citizens Groups do not here challenge U.S. EPA's conclusion that the emissions allowances under CSAPR eliminate covered states' "significant contribution" to nonattainment and interference with the maintenance of the National Ambient Air Quality Standards in downwind states, that does not mean that additional SO_2 emissions will have no environmental or health impact. In fact, research conducted by the National Research Council ("NRC") for a 2010 report[8] found that each additional ton of SO_2 emitted by EGUs creates health impacts to the tune of thousands of dollars in damages.[9] Specifically, NRC found that the mean cost of each ton of SO_2 emitted from the 407 coal plants evaluated in the NRC study was $5,800 per ton in 2007 dollars.[10] If the emission allowances Dynegy proposes to sell or trade result in 60,175 tons of SO_2 pollution, the damages would amount to approximately

[7] As Dynegy urges the Board to note, coal plants in other states covered by CSAPR – including upwind states – are not subject to the additional SO_2 constraints of the MPS. Amended Petition at para. 45. Therefore, it is fully reasonable to expect that upwind plants might be in need of additional SO_2 allowances and be first in line to purchase Dynegy's.

[8] National Research Council, "Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use," 2010, National Academies Press, *available at* http://www.nap.edu/catalog.php?record_id=12794 (last visited July 21, 2015) (hereafter "Hidden Costs of Energy").

[9] *See* National Research Council, spreadsheet noting costs per ton of SO_2 and other emissions from 407 power plants in the United States, attached as Ex. A to PC #1, "Public Comment of Environmental Law & Policy Center, Natural Resources Defense Council, Sierra Club and The Respiratory Health Association," PCB 12-135 (July 12, 2012).

[10] Hidden Costs of Energy at 90, Table 2-8.

$349,015,000 in 2007 dollars,[11] which translates to just above $400 million in damages in today's dollars.[12] Much of that harm would be borne by vulnerable populations—children, the elderly, and individuals with respiratory disease—because SO_2 pollution causes the most harm to those populations. Thus, Dynegy's claim that the 60,175 additional allowances the variance would make available would be "without detriment to the environment," Amended Petition at para. 50, is simply not accurate.

The injury to public health from these 60,175 additional tons of SO_2 pollution is even more striking when compared to the "harm" Dynegy alleges it will suffer should the variance not be granted. As dictated by Board precedent, the hardship to Dynegy must be compared to the injury to the public and the environment. It is clear that, in this case, the injury to public health that would be created by the variance far outweighs any financial impacts to Dynegy resulting from denial of the variance. Dynegy asks this Board to allow it to cause up to $400 million in damages to human health so it can recover $3 million. In monetary terms alone, the harm borne by the public from the variance would be more than one hundred times the benefits that Dynegy would reap from obtaining the variance. Thus, Dynegy has not proven, nor could it prove, 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." *Marathon Oil Co.*, 242 Ill. App. 3d at 206. Accordingly, the Board should deny Dynegy's Amended Petition.

It is important to note that Dynegy's claim that it has "mitigated" the air quality impacts of the variance also should be rejected. Specifically, Dynegy claims that certain actions it has taken or will take, which amount to (a) complying – as it must – with the MPS and the Consent Decree, and (b) the

[11] The mean cost of $5,800 per ton of SO_2 pollution is used because, due to sale or trade of the emission allowances, it is not possible to determine at this point which EGUs will emit the pollution. $5,800 x 60,175 = $349,015,000.

[12] *See, e.g.*, U.S. Department of Labor, Bureau of Labor Statistics, CPI Inflation Calculator, available at http://www.bls.gov/data/inflation_calculator.htm (last visited July 19, 2015) (showing that $1 in 2007 equals $1.15 in 2015).

long-ago shuttering of additional coal-fired units at Vermillion, Wood River and Havana, "mitigate" the SO_2 pollution that would result if this variance were granted. *See* Amended Petition at paras. 53-58. The inclusion of these sets of "emissions reductions" as somehow mitigating the impact of the Dynegy's proposed variance is inappropriate. To obtain a variance, the petitioner must establish 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*." *Marathon Oil Co.,* 242 Ill. App. 3d at 206 (emphasis added). The actions that Dynegy lists are entirely unrelated to the variance, and, in many cases, occurred many years before Dynegy sought the variance. It is unreasonable for Dynegy to claim that reductions in emissions resulting from actions it took years ago "mitigate" the impact of the variance it now proposes. Nor should actions that are entirely unrelated to the variance be considered in evaluating the air quality impacts of the same. Evaluating the air quality impact of the variance, excluding those farfetched "emission reductions," makes clear that the variance would allow significant additional harmful SO_2 pollution. The variance, as such, should be denied.

B. Dynegy Will Not Face Hardship If Its Petition is Denied

The damage threatened by Dynegy's proposed variance stands in stark contrast to Dynegy's slight financial need for the variance. The absence of any urgent need for the variance is demonstrated both by Dynegy's recent windfall in the energy markets for Illinois and also by Dynegy's recent large expenditures of cash on other priorities. Demonstrating hardship requires more than simple financial harm: a regulated entity must demonstrate that continued compliance represents a significant burden to its financial health. *Marathon Oil Co.*, 242 Ill. App. 3d at 206-07. Dynegy here fails to demonstrate that denial of the variance would represent even a small risk to its financial health, much less a "significant burden" to it. In fact, the evidence shows that Dynegy's financial health is robust and

Dynegy has no pressing need for the $3 million in revenue that would come from selling SO_2 emission allowances.

First, in the 2015-2016 Planning Resource Auction for Midcontinent Independent System Operator (MISO), Zone 4 (covering central and southern Illinois), capacity prices increased from $16.75 to $150.00 per megawatt-day, a 900% increase from last year's auction. This price also is over 40 times higher than this year's price in other MISO regions; all other MISO region prices were $3.48 or less. This means that Illinois consumers will pay $102 million more for capacity than they paid last year.[13] Much of this money will flow directly into Dynegy's accounts: Dynegy currently owns almost half (6,400 megawatts of 13,500 megawatts total) of the capacity in Zone 4, so it will receive about $50 million more in capacity payments this year than it received last year or ever before through the Auction. This windfall alone obviates any "great need" for the $3 million in sales Dynegy anticipated from the variance.

In addition to Dynegy's recent financial windfall from the MISO capacity markets, Dynegy's recent actions demonstrate that it has ample financial assets to comply with the MPS's prohibition of SO_2 allowance sales. Dynegy acquired five coal-burning power plants from Ameren in 2013 that had significant debt, and in April 2015 it paid $2.8 billion dollars in April 2015 to purchase an additional 12,500 megawatts of mostly coal-burning generation capacity in Ohio, Illinois, and Pennsylvania. These acquisitions reveal that the company that is flush with cash. Dynegy's financial health is further demonstrated by its stock offering: since October 2012, when the company emerged from bankruptcy, its stock has surged from $18 per share to over $33 per share in June 2015. This has enabled Dynegy to issue three dividends to its stockholders in 2015 alone, in January, April, and July of this year.

[13] Evidencing how shocking the Auction results were, the Illinois Attorney General and other groups, including the Sierra Club, have filed a complaint with the Federal Energy Regulatory Commission requesting an investigation into this windfall profit and into the possibility that Dynegy unlawfully manipulated the capacity markets to secure its windfall payments.

In short, Dynegy is a major player in the energy industry that has significant and expanding financial assets. Given these facts, Dynegy's assertion that it would suffer a "hardship" without the $3 million in extra revenue that selling its SO_2 allowances would offer is without merit.

C. Any Hardship Ameren Faces is Self-Imposed and Therefore Not Arbitrary or Unreasonable.

As explained above, the Board may only grant a variance when it finds that "compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." 415 ILCS 5/35(a). The Board has made clear on numerous occasions that a self-imposed hardship is neither arbitrary nor unreasonable, and thus no variance may be granted where the petitioner's hardship is self-imposed. *See Marathon Oil Co. v. Ill. Envt'l Prot. Agency*, PCB 94-27 (May 16, 1996), at 10-11 (variance denied even if entire refinery had to be shut down because that result "was a hardship Marathon brought on itself"); *Ekco Glaco v. Ill. Envt'l Prot. Agency*, PCB 87-41 (Dec. 17, 1987) (variance denied when petitioner's own business decisions led to noncompliance); *Allaert Rendering, Inc. v. Ill. Pollution Control Bd.*, 91 Ill. App. 3d 160, 162 (3d Dist. 1980) (upholding denial of variance when Board found that "any hardship visited upon [the petitioner] is largely self-imposed"). As explained further below, Dynegy's claimed hardships in the present case are self-imposed and, as a result, under prior Board precedent its request for a variance must be denied.

1. Dynegy Willingly Signed The 2005 Consent Decree Requiring Installation and Operation of Pollution Controls at Several Plants.

Dynegy's assertions that it has undertaken "emission reduction initiatives" at its coal plants in its MPS fleet, and that it "did not defer its plans to install dry scrubbers" due to the remand of CAIR, are rather disingenuous. *See* Amended Petition at para. 3 and p. 33, header D. In point of fact, Dynegy invested in SO_2 and other pollution controls as a result of both the MPS and a Consent Decree it entered into with the State of Illinois, US EPA, and several environmental groups in 2005. Dynegy

mentions that Consent Decree in its petition,[14] but fails to note that the Consent Decree did not represent a voluntary effort by Dynegy to reduce pollution, but rather was an obligation the company accepted after years of litigation in which Illinois, US EPA and others alleged that Dynegy violated the CAA by, among other things, failing to install required pollution control technologies for SO_2 and other pollutants at its Baldwin coal plant.[15] Dynegy admitted to no liability in signing the Consent Decree, but had the case proceeded in court Dynegy could have been subject to additional millions of dollars in penalties as well as costly injunctive relief.[16] Its decision to sign the Consent Decree was doubtless made in view of the massive sums it risked paying if held liable, not, as Dynegy implies, out of its pure corporate generosity. In sum, Dynegy made a calculated business decision to agree to the Consent Decree, so its complaints concerning investments it was obligated to make as a result of it ring hollow. The variance should be denied.

2. Dynegy's Claimed Hardships From MPS Compliance Were Foreseeable When Dynegy Opted Into the MPS And Re-Negotiated the MPS In 2009, So They Are Not Arbitrary or Unreasonable.

Dynegy proposed, negotiated, opted into, and re-negotiated the standards it now seeks to undermine. As a result, any hardship Dynegy may face in complying with the MPS is self-imposed. Longstanding Board precedent has established that a self-imposed hardship includes hardship that is foreseeable at the time a petitioner subjects itself to regulation. *See Willowbrook Motel P'ship v. Ill. Pollution Control Bd.*, 135 Ill. App. 343, 345 (1st Dist. 1985) (upholding Board's denial of a variance after Board found that petitioners' acquisition of property near sewage system on restricted status was "a gamble on its ability to obtain permits" to develop that property); *Ill. Envtl. Prot. Agency v.*

[14] *See* Amended Petition at, *e.g.*, paras. 13-14.

[15] *See* US EPA, "Illinois Power Company and Dynegy Midwest Generation Settlement," http://www2.epa.gov/enforcement/illinois-power-company-and-dynegy-midwest-generation-settlement (last visited July 20, 2015).

[16] *See id*. and Consent Decree, *available at* http://www2.epa.gov/sites/production/files/documents/dmgfinal-cd.pdf (last visited July 20, 2015).

Lindgren Foundry Co., PCB 70-1, at 8-13 (Sept. 25, 1970) (hardship self-imposed, and variance denied, when the petitioners purchased foundry with "full knowledge, or with reason to know, that they could not operate the foundry without complying with the air pollution laws or obtaining a variance, and variances have never been a matter of right"). Thus, where the hardship borne by a petitioner is foreseeable at the time a petitioner subjects itself to regulation, that hardship is neither arbitrary nor unreasonable. In such circumstances, a request for variance must be denied. *See Willowbrook Motel P'ship*, 135 Ill. App. At 345; *Lindgren Foundry*, PCB 70-1 (Sept. 25, 1970) at 8-13; *see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 ("ordinarily. . . modification[s to consent decrees] should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree").

Here, Dynegy's Amended Petition must be denied because any hardships Dynegy faces were foreseeable in 2006, 2007, and 2009, when Dynegy proposed, negotiated, re-negotiated, and agreed to subject itself to the MPS. Dynegy claims that operating its dry scrubbers, recent modulations in power prices and market conditions, and being deprived of the value of CSAPR – as differentiated from CAIR – pollution allowances all combine to render compliance with the MPS's bar on selling or trading pollution allowances an arbitrary and unreasonable hardship. Amended Petition at paras. 41-48.

Dynegy is wrong as a matter of law. First, Dynegy signed the Consent Decree discussed above well *before* opting into the MPS. Thus, as Dynegy itself acknowledges, it was fully aware at the time it negotiated and opted into the MPS that it was obligated to install and operate the pollution control equipment set out in that Consent Decree, including the dry scrubbers it complains of here. *See* Amended Petition at paras. 12-15. Second, "changes in power prices and market conditions" were entirely foreseeable when Dynegy proposed, negotiated, and opted into the MPS in 2006-07. Natural

gas prices, for example, have been volatile for many years, and certainly were volatile prior to 2006.[17] In fact, energy forecasts at the time the MPS was developed projected near-term declines in power prices.[18] In short, when Dynegy made the business decisions to propose, negotiate, and opt into the MPS, it did so fully aware that energy markets and power prices would vary—possibly in ways detrimental to the company—yet it did not make compliance with the MPS contingent on a robust power market.[19] Any hardship Dynegy experiences from operating in a deregulated market is, as such, self-imposed, and is thus neither arbitrary nor unreasonable.[20]

[17] *See* U.S. Energy Information Administration, "Table 6.8 Natural Gas Prices by Sector, Selected Years, 1967-2010," Annual Energy Review 2010 (*available at* http://www.eia.gov/totalenergy/data/annual/pdf/sec6_19.pdf) (last visited July 26, 2012).

[18] Energy Information Administration, "Annual Energy Outlook 2006: With Projections to 2030," (Feb. 2006), at 4, *available at* http://www.eia.gov/oiaf/archive/aeo06/pdf/0383(2006).pdf (last visited August 3, 2012) ("average delivered electricity prices are projected to decline from 7.6 cents per kilowatt hour (2004 dollars) in 2004 to a low of 7.1 cents per kilowatthour in 2015 as a result of declines in natural gas prices and, to a lesser extent, coal prices.")

[19] Relatedly, Dynegy's complaints that it is an independent power producer, without rate recovery, competing in Illinois' energy market, cannot be countenanced. *See* Amended Petition at paras. 46 and 48. Illinois law deregulating power markets was signed in 1997. Dynegy's predecessor participated in the negotiation concerning deregulation, and Dynegy purchased coal power plants in the state subsequent to the adoption of that law. *See, e.g.*, Melita Marie Garza, *Dynegy Emerges As Powerhouse: Critics Content Profits Pursuit Hurts Consumers*, CHI. TRIB., Mar. 25, 2001, *available at* http://articles.chicagotribune.com/2001-03-25/business/0103250155_1_dynegy-plans-illinois-power-illinois-residents (last visited July 21, 2015) ("If not for the Illinois deregulation bill, it is unlikely Dynegy would have pursued its 1999 acquisition of Illinova Group, parent company of Illinois Power."). Thus, Dynegy's participation in that market is wholly intentional and it cannot be heard to complain about the risks that come with participation in a deregulated market.

[20] Dynegy's argument that changing prices and market volatility constitute an arbitrary and unreasonable hardship is even more untenable when viewed through the lens of Illinois law on agreements. Illinois courts adjudicating contract disputes have made clear that changes in prices and market conditions are always foreseeable, and do not excuse an entity from performance of a contract it has entered into. *See Northern Ill. Gas Co. v. Energy Coop., Inc.*, 122 Ill. App. 3d 940, 952-53, 461 N.E.2d 1049 (Ill. App. Ct. 3d Dist. 1984) (commercial frustration defense to contractual performance does not apply to financial distress resulting from changed natural gas prices); *YPI 180 N. LaSalle Owner, LLC*, 403 Ill. App. 3d 1 (impossibility of performance doctrine does not excuse nonperformance due to financial distress); *see also Bank of America, N.A. v. Shelbourne Development Group, LLC*, No. 09 C 4963, 2011 U.S. Dist. Lexis 21258, *14-15 (N.D. Ill. Mar. 3, 2011). As the court in *Northern Ill. Gas Co*. eloquently explained, "as any trader knows, the only certainty of the market is that prices will change. Changing and shifting markets and prices from multitudinous causes is endemic to the economy in which we live." 122 Ill. App. 3d at 952. Here, Dynegy's agreement with the State and other parties to enter into and abide by the MPS is the functional equivalent of a contract. As Dynegy acknowledges, the company itself worked with IEPA to develop the MPS and chose to opt in to that standard. Amended Petition at para. 15. Because Dynegy's agreement to comply with the MPS is tantamount to a contract, the Board should act consistent with our courts' decisions in contract cases and hold that changing prices and market conditions are foreseeable and thus do not excuse Dynegy from fulfilling its commitment to IEPA and others to turn in to IEPA excess SO_2 emission allowances allotted to it under CSAPR.

Finally, Dynegy's argument that it was unforeseeable that CSAPR would allow for additional emissions trading, different from the trading of acid rain allowances, is unavailing. Both CSAPR and the formerly-in-effect Clean Air Interstate Rule ("CAIR") implement the "good neighbor" provision of the Clean Air Act, CAA § 110(a)(2)(d)(i)(I), which was adopted in its current form in 1990—long before the MPS was ever conceived—and remains in place today. The CAIR rule, adopted in 2005, allowed for emission trading, so it is not surprising that its successor CSAPR follows the same model. Most importantly, by the time the MPS was modified in June 2009 to add the language "or any future federal NOx or SO_2 emissions trading program that modify or replace these programs," Amendment Petition at para. 32, CAIR had been vacated,[21] and prices for SO_2 allowances traded under the acid rain program had plummeted.[22] It was, as such, foreseeable in 2009 that future Good Neighbor Provision implementing rules would not rely on those underpriced, too-abundant allowances to drive SO_2 reductions. Yet Dynegy made *no* comment to IEPA or the Board in 2009, when the MPS was modified, opposing the inclusion of the language "or any future federal NOx or SO_2 emissions trading program that modify or replace these programs" in Section 225.233(f) of the MPS, despite ample opportunity to do so in the several comments it filed.[23] In sum, it is and has been clear to Dynegy, including when it negotiated, opted into, and re-negotiated the MPS that federal emissions trading of SO_2 credits – and not necessarily acid rain emission allowances – was part of the federal regulatory regime that would apply to its MPS coal fleet.

[21] *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

[22] *See* Burtraw, Dallas and Sarah Jo Szambelan, Resources for the Future, "Discussion Paper: US Trading Markets for SO_2 and NO_x," Oct. 2009, at 10, *available at* http://www.rff.org/documents/RFF-DP-09-40.pdf (last visited July 20, 2015).

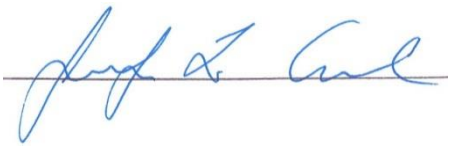
[23] *See* "Testimony of Aric Diericx on behalf of Dynegy Midwest Generation, Inc." R09-10 (Feb. 2, 2009); "Post-Hearing Comments of Dynegy Midwest Generation," R09-10 (March 5, 2009); "Motion to File Dynegy Midwest Generation's Response to the Agency's Post-Hearing Comments Instanter and Dynegy Midwest Generation's Response to the Agency's Posthearing Comments," R09-10, (March 13, 2009).

Because compliance with the Consent Decree, modulations in power prices and market conditions, and a non-acid rain pollution allowance trading program were all foreseeable at the time Dynegy negotiated, opted into, or re-negotiated the MPS in 2009, any "hardships" Dynegy may experience based on those factors are the result of its own calculated business decision to opt into, and not later oppose changes to, the MPS. They are self-imposed hardships, and therefore fail the longstanding test this Board has established for a petitioner to prove entitlement to a variance. Dynegy's Amended Petition should be denied.

IV. Conclusion.

For the reasons discussed in these comments, the Board should deny Dynegy's Amended Petition for Variance.

Respectfully submitted,



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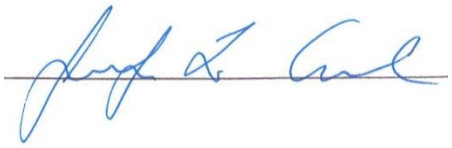
DATED: July 21, 2015

CERTIFICATE OF SERVICE

I, Jennifer Cassel, hereby certify that I have filed the attached **PUBLIC COMMENT** on behalf of the Environmental Law & Policy Center, Natural Resources Defense Council, Sierra Club, and the Respiratory Health Association in PCB 12-135 upon the attached service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on July 21, 2012.



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July 21, 2015

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