BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHICAGO COKE CO., INC., an Illinois corporation,

Petitioner,

v.

PCB 10-75
(Permit Appeal--Air)

THE ILLINOIS ENVIROMENTAL PROTECTION AGENCY,

Respondent.

NOTICE OF FILING

To: Counsel of Record
(See attached Service List.)

PLEASE TAKE NOTICE that on this 28th day of February 2011, the following was filed electronically with the Illinois Pollution Control Board: **Chicago Coke Co., Inc.'s Response to IEPA's Motion for Leave to File Reply,** which is attached and herewith served upon you.

CHICAGO COKE CO., INC.

By: *s/Elizabeth S. Harvey*
One of its attorneys Michael J. Maher

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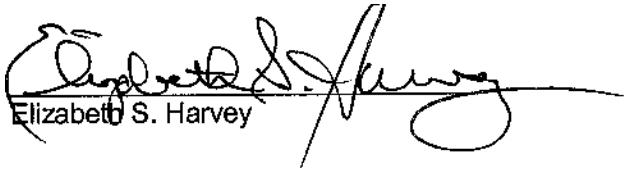
CERTIFICATE OF SERVICE

I state that I served copies of the foregoing document to counsel of record via U.S. Mail at 330 North Wabash Avenue, Chicago, IL 60611, at or before 5:00 p.m. on February 28, 2011.



[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

SERVICE LIST

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PCB 10-75
(Permit Appeal -- Air)

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RESPONSE TO MOTION FOR LEAVE TO FILE REPLY

Petitioner CHICAGO COKE, INC. ("petitioner" or "Chicago Coke"), by its attorneys Swanson, Martin & Bell, LLP, opposes respondent the ILLINOIS. ENVIRONMENTAL PROTECTION AGENCY's ("IEPA") motion for leave to file a reply.

1. Chicago Coke received IEPA's motion for leave to file a reply on February 16, 2011. IEPA seeks leave to file a reply to Chicago Coke's response in opposition to the motion to intervene filed by the NATURAL RESOURCES DEFENSE COUNCIL and the SIERRA CLUB (collectively, "NRDC").

2. The Board's procedural rules specifically state that a "moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." (35 III.Adm.Code 101.501(e)(emphasis added).)

3. Chicago Coke objects to the NRDC's motion to file a reply. IEPA is taking a needlessly aggressive posture, by attempting to reply to a response to motion, where IEPA was not even the movant. IEPA's motion is procedurally curious. IEPA seeks to reply to Chicago Coke's response to a motion filed by the NRDC-not to reply to a response to a motion IEPA filed. While Section 101.501(e) of the Board's rules

contemplate a situation in which a "moving person" might be allowed to reply, here IEPA is not the "moving person". For purposes of the motion to intervene, IEPA and Chicago Coke are similarly situated: both filed responses to the NRDC's motion to intervene. The Board's rules do not provide for a non-moving party to be allowed to file a reply to a response.

4. Further, IEPA cannot demonstrate that it would be "materially prejudiced" if it is not allowed to file a reply. (EPA's claimed reason for filing a reply---that Chicago Coke has supposedly misstated the reasons given in IEPA's February 2010 decision that is the basis for this appeal---are simply irrelevant to a decision on the NRDC's motion to intervene. IEPA essentially admits that it will suffer "material prejudice" when it states, in its proposed reply, that it "will address these issues in greater detail during the hearing of this matter." (Proposed IEPA reply, p. 1.) That is the one thing on which Chicago Coke agrees with IEPA: that the issue of the scope and meaning of (EPA's February 2010 decision is a matter for the hearing on the merits of this appeal---not a matter for consideration or decision on the NRDC's motion to intervene.

5. IEPA asserts that a reply is needed because it disagrees with "several inaccurate statements" purportedly made by Chicago Coke about the basis of the IEPA decision. First, Chicago Coke denies it made any inaccurate statements about the basis for the IEPA decision.[1] Second, even assuming, *arguendo,* that IEPA and Chicago Coke disagree about the reasons provided in (EPA's February 2010 decision, that issue is not relevant to a decision on the NRDC's motion to intervene. The issue on that motion to intervene is whether the NRDC has satisfactorily demonstrated that: 1) it

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[1] Chicago Coke notes that IEPA's proposed reply does not specifically identify these alleged misstatements.

will suffer material prejudice if it is not allowed to intervene; 2) it will be adversely affected by a final Board order; and 3) intervention will not cause undue delay, materially prejudice the appeal, or otherwise interfere with an orderly and efficient proceeding. Any dispute between Chicago Coke and IEPA about the reasons for IEPA's decision belong in the hearing on the merits of the appeal----as IEPA itself recognizes---not in a proposed reply regarding the NRDC motion to intervene.

6. Thus, because IEPA cannot show that it will be materially prejudiced in the absence of a reply, IEPA's motion to file a reply should be denied.

WHEREFORE, Chicago Coke asks the Board to deny the (EPA's motion to file a reply, and for such other relief as the Board finds appropriate.

CHICAGO COKE CO., INC.

By: *s/Elizabeth S. Harvey*
One of its attorneys

Date: February 28, 2011.

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