

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Petitioner, Midwest Generation, LLC's Motion for Modification which was electronically filed on November 12, 2019, 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 a true copy was sent via email on November 12, 2019, to the parties listed on the foregoing Service List.

Dated: November 12, 2019

/s/ Susan M. Franzetti

Susan M. Franzetti
Vincent R. Angermeier
Nijman Franzetti LLP
10 S. LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-5590

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC)	
Petitioner,)	
)	PCB 18-58 (Thermal Demonstration)
v.)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
Respondent.)	

MOTION FOR MODIFICATION

Midwest Generation, LLC, (“MWGen”), by and through its attorneys Susan M. Franzetti and Vincent R. Angermeier, and pursuant to Sections 101.520 and 106.1175(a) of Title 35 of the Illinois Administrative Code, hereby submits its Motion for Modification with respect to the Alternative Effluent Limitations for Thermal Discharges (“AELs”) approved by the Illinois Pollution Control Board (“the Board”) in its November 7, 2019 Order & Opinion in the above-captioned proceeding.

In support thereof, MWGen states as follows:

1) On January 28, 2018, MWGen filed with the Illinois Pollution Control Board a Petition to Approve Alternative Thermal Effluent Limitations pursuant to 35 Ill. Adm. Code 106.Subpart K and 35 Ill. Adm. Code 304.141(c) (the “Petition”).

2) MWGen proposed AELs based on monthly temperature maximums different from those required by the Chicago Area Waterway System and Brandon Pool Aquatic Life Use B standards in 35 Ill. Adm. Code 302.408(h). Those monthly temperature limitations were subject to a 5% excursion-hours allowance, provided that the excursions do not exceed the daily temperature limits by more than 3°F. *Id.* at 302.408(f).

3) On April 5, 2019, the Board asked MWGen to suggest revised language to address possible ambiguities in the way MWGen’s Petition phrased the excursion-hours allowance.

4) On April 15, 2019, MWGen responded and proposed that the language read as follows:

[Subsection (1)(b) of Proposed AELs] In lieu of the water temperature requirements of 35 Ill. Adm. Code 302.408(c), (d), (e), and (f), water temperature must not exceed the daily maximum temperature limits in paragraph (1)(a), during more than five percent of the hours (438 hours) in the 12-month period ending with any month. Moreover, at no time shall the water temperature exceed the maximum limits in the applicable table by more than 1.7°C (3.0°F)

5) On November 7, 2019, the Board issued an Opinion & Order granting the AELs proposed by MWGen. Although the Board's Opinion & Order does not state a desire to make substantive modifications to the proposed AELs, the Board refined and improved the readability of the language that MWGen proposed in its April 2019 response to the Board's questions.

6) The Board revised the proposed excursion-hours language as follows:

~~In lieu~~ Instead of the water temperature requirements of 35 Ill. Adm. Code 302.408(c), (d), (e), and (f), ~~water effluent~~ temperatures must not exceed the daily maximum temperature limitations in paragraph (1)(a) during more than ~~five percent~~ 5% of the hours (438 hours) in ~~the 12-month period ending with any month~~ a calendar year. Moreover, ~~at no time shall~~ the water temperature must never exceed the daily maximum limits ~~temperature limitations~~ in paragraph (1)(a) by more than ~~1.7°C (3.0°F)~~ 3°F.

This language is on page 74 of the Opinion & Order.

7) MWGen does not object to the Board's changes, including the Board's decision to replace the term "water temperature" with "effluent temperature." But MWGen's proposed excursion-hours language used the term "water temperature" three times, and the Board only changed one of those instances. This results in an ambiguity: General rules of construction would suggest that "effluent temperature" and "water temperature" have different meanings, yet this was probably not what the Board intended.

8) The Illinois Legislative Reference Bureau's *Bill Drafting Manual* warns:

Although variation is often recommended to enliven standard prose, variation without purpose in statutory prose can lead to confusion. Using synonyms to express the same concept is confusing. Using the same word to refer to different concepts is confusing. Thus, consistent use of words and phrases in statutes is a great virtue.

Illinois Legislative Reference Bureau, *Bill Drafting Manual*, at p. 208 (Dec. 2012).¹

9) Section 106.1175(a) allows the petitioner in a Subpart K proceeding to file any motions allowable under Part 101 of Title 35 of the Illinois Administrative Code. Accordingly, MWGen moves pursuant to 35 Ill. Adm. Code 101.520—or, alternatively, pursuant to 35 Ill. Adm. Code 101.904(a), which allows parties to move for the correction of apparent clerical errors²—that the Board modify its Order as follows:

Instead of the water temperature requirements of 35 Ill. Adm. Code 302.408(c), (d), (e), and (f), effluent temperatures must not exceed the daily maximum temperature limitations in paragraph (1)(a) during more than 5% of the hours (438 hours) in a calendar year. Moreover, the ~~water~~-effluent temperature must never exceed the daily maximum temperature limitations in paragraph (1)(a) by more than 3°F.

10) The reference in the first sentence to “water temperature requirements” does not need to be modified to say “effluent temperature requirements.” Section 302.408 explicitly regulates “water temperature” and not effluent temperature. An accurate description of Section 302.408 will not create undue ambiguity.

¹ Available at <http://www.ilga.gov/commission/lrb/manual.pdf>.

² If there is a future rulemaking concerning Part 106 of Title 35 of the Illinois Administrative Code, the Board should consider addressing the distinction between Motions for Modification (*see* 35 Ill. Adm. Code 101.520) and the correction of clerical errors through a Motion for Relief from a Final Opinion and Order (*see* 35 Ill. Adm. Code 101.904(a).) It may also want to clarify the difference between a Motion for Modification and a Motion for Reconsideration, and whether the various rules in Part 101 of Title 35 of the Illinois Administrative Code (*e.g.*, 35 Ill. Adm. Code 101.300(d)(3) & 101.902) applicable to Motions for Reconsideration also apply to Motions for Modification.

11) MWGen has consulted with counsel for the Illinois Environmental Protection Agency, who agrees with the modifications proposed in this motion.

WHEREFORE, MWGen requests that the Board modify the approved AELs in this matter to eliminate a potential ambiguity.

Respectfully submitted,

Midwest Generation, LLC

By: /s/ Susan M. Franzetti
Susan M. Franzetti

DATED: November 12, 2019

Of Counsel:

Susan M. Franzetti
Vincent R. Angermeier
Nijman Franzetti LLP
10 S. LaSalle St., Suite 3600
Chicago, IL 60603
(312) 251-5590 (phone)