

AUG 17 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

Midwest Generation EME, LLC
Petitioner,

v.

Illinois Environmental Protection Agency,
Respondent.

PCB 04-216
Trade Secret Appeal

NOTICE OF FILING


To: Robert A. Messina
Illinois Environmental Regulatory Group
3150 Roland Avenue
Springfield, IL 62703

Keith Harley
Chicago Legal Clinic
205 W. Monroe, 4th Floor
Chicago, IL 60606

Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
188 West Randolph Street, Suite 2000
Chicago, IL 60601

Dorothy Gunn, Clerk
Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board one original and nine copies of Midwest Generation EME, LLC's Response to Sierra Club's Motion for Intervention, a copy of which is herewith served upon you.


Andrew N. Sawula

Dated: August 17, 2004

Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5577

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Response to Sierra Club's Motion for Intervention, by U.S. Mail, upon the following persons:

Dorothy Gunn, Clerk
Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph
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Chicago, Illinois 60601

Lisa Madigan, Attorney General of the State of Illinois
Matthew Dunn, Environmental Enforcement/Asbestos Litigation Division
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Dated: Chicago, Illinois
August 17, 2004

Respectfully submitted,

MIDWEST GENERATION EME, LLC

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One of the Attorneys for
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STATE OF ILLINOIS
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Illinois Environmental Protection Agency,

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Case No. PCB 04-216

RESPONSE TO SIERRA CLUB'S MOTION FOR INTERVENTION

Pursuant to 35 Ill. Adm. Code 101.402, Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Response to Sierra Club's Motion for Intervention ("MFI").

1. On January 30, 2004, Commonwealth Edison Company ("ComEd") submitted final responses to a Clean Air Act § 114 Information Request issued by the United States Environmental Protection Agency ("U.S. EPA"). At U.S. EPA's suggestion, ComEd submitted a courtesy copy of the final responses and attachments to the Illinois Environmental Protection Agency ("IEPA").

2. Included in ComEd's final response were excerpts from a continuing property record ("CPR") relating to six coal-fired generating stations formerly owned by ComEd and currently owned by Midwest Generation (the "Stations"). Midwest Generation purchased the Stations in December 1999. Pursuant to the Asset Sale Agreement between ComEd and Edison Mission Energy, Midwest Generation's parent, ComEd provided Midwest Generation a copy of the portions of the CPR that relate to the Stations.

3. ComEd conspicuously marked information on the CPR as “Confidential Business Information.”

4. On February 26, 2004, IEPA requested that ComEd submit a Statement of Justification for ComEd’s trade secret claims. Midwest Generation was informed of this request and submitted an independent Statement of Justification on March 11, 2004.

5. On April 29, 2004, Midwest Generation received a letter from IEPA, dated April 23, 2004, granting in part and denying in part Midwest Generation’s trade secret claims as to the information on the CPR.

6. On June 3, 2004, Midwest Generation filed this action, requesting that the Illinois Pollution Control Board (the “Board) review IEPA’s denial of trade secret protection to the information in the CPR that ComEd submitted to IEPA.

7. On August 3, 2004, Sierra Club filed the MFI “on the basis that the final order of the IPCB may adversely affect and materially prejudice its interests.” Pursuant to 35 Ill. Adm. Code 101.402(d)(2) and (3), the Illinois Pollution Control Board (the “Board”) “may permit” Sierra Club to intervene if Sierra Club may be “materially prejudiced absent intervention” or “adversely affected by a final Board order.” Sierra Club failed to establish that it would be materially prejudiced absent intervention or adversely affected by a final Board order.

8. Midwest Generation obtained a copy of the MFI from the Board’s website; however Midwest Generation has not yet been served with, or at least has yet to receive, a copy of the MFI. Nonetheless, in the interest of moving this proceeding forward, Midwest Generation is filing this Response to Sierra Club’s MFI.

9. Before explaining why the Board should conclude that Sierra Club failed to establish that it would be materially prejudiced or adversely affected, Midwest Generation would like to correct factual errors in the MFI.

(a) In Paragraph 4, Sierra Club states that ComEd is the Petitioner in this proceeding. ComEd, in fact, is not a party to this proceeding and, thus, is not the Petitioner; rather, Midwest Generation is the Petitioner.

(b) In Paragraph 4, Sierra Club states that ComEd owned and operated nine coal-generated power plants. Regardless of how many plants ComEd may have owned or operated in the past, only documents related to six Illinois coal-fired generating stations are at issue in this proceeding.

10. In Paragraph 15(a) of the MFI, Sierra Club asserts that denial of the MFI may materially prejudice Sierra Club by preventing it "from making an adequate record of its interests" if it "decides to appeal any adverse decision regarding the release of requested records." In Paragraph 18, Sierra Club states that its interest "involves creating a record of the public's interests in having access to information consistent with Illinois and federal law." While Sierra Club would like to make a record of its interests, Sierra Club, in fact, has no interest in the issues that are currently before the Board. Midwest Generation's Petition for Review is based on a narrow question of whether IEPA correctly determined whether information submitted to IEPA constitutes trade secret information. That determination requires a factual analysis concerning the nature of the information submitted to the Board, and the manner in which Midwest Generation has treated that information; the determination does not involve an

analysis of Sierra Club's or the general public's interest, if any, in the information. Trade secret information is protected from disclosure pursuant to 415 ILCS 5/7(a) and 5/7.1(a), and the following sections of the Illinois Administrative Code: 2 Ill. Adm. Code 1828.401; 35 Ill. Adm. Code 130. IEPA may not release trade secret information even if the public has an interest in access to the information. Because the Board will not need to consider, and properly should not consider, the public's interest, if any, in this information during this proceeding, Sierra Club will not be materially prejudiced if it cannot make a record of Sierra Club's or the public's interest in this information.

11. In Paragraph 15(b) of the MFI, Sierra Club asserts that denial of the MFI may materially prejudice the Sierra Club by "preventing it from adequately representing the interests of its members and the public at large in having access to information compiled by the IEPA." As stated in Paragraph 10 of this Response, Sierra Club's and the public's interest in having access to this information is not an issue that the Board will address to make a decision concerning Midwest Generation's Petition for Review. On the contrary, IEPA may not release trade secret information even if Sierra Club or the public has an interest in access to the information. Thus, Sierra Club will not be materially prejudiced if it cannot represent its interests, the interests of its members or of the public at large in having access to the information.

12. In Paragraph 15(c) of the MFI, Sierra Club asserts that denial of the MFI may materially prejudice Sierra Club by preventing it and the public "from gaining a better understanding of how the IEPA enforces laws and regulations related to air and water pollution in keeping with the public's right to educate itself on the environmental protection process." Sierra Club fails to explain, however, how *intervening* in the proceeding could assist Sierra Club

in gaining a better understanding of how IEPA enforces laws and regulations relating to air and water pollution. One can only surmise, because Sierra Club does not explain, that Sierra Club believes it would gain this understanding by learning what type of information is afforded trade secret protection. As Sierra Club admits in Paragraph 18 of the MFI, it is not attempting to gain access to the disputed documents during this proceeding; thus, intervening in this proceeding will not enable Sierra Club to learn more about the type of information IEPA affords trade secret protection. Thus, Sierra Club will not be materially prejudiced absent intervention.

13. In Paragraph 15(d) of the MFI, Sierra Club asserts that denial of the MFI may materially prejudice Sierra Club by preventing it and the public “from gaining a well-grounded understanding of the compliance status of Midwest Generation and, in turn, evaluating opportunities for members of the public to participate in efforts to remedy any non-compliance.” Presumably, Sierra Club would like to intervene to improve the chance that the Board will deny Midwest Generation’s appeal of IEPA’s determination to release portions of the CPR to Sierra Club. As explained in Paragraphs 10 and 11 of this Response, however, Sierra Club seeks to intervene only to represent its and the public’s interest in the information, which, for the reasons stated in Paragraph 10 of this Response, is not relevant to, and should not even be admissible on, the issue before the Board. Sierra Club’s intervention, therefore, will have no impact on the Board’s decision in this proceeding, and will not further Sierra Club’s goal of gaining access to this information. Thus, Sierra Club will not be materially prejudiced absent intervention.

14. In Paragraph 13 of the MFI, Sierra Club asserts that, “[b]ecause it has a pending Freedom of Information Act request for the information that is the subject of this proceeding, the Sierra Club will be adversely affected if the Illinois Pollution Control Board prohibits releasing

some or all of the information to it.” Sierra Club fails to establish, however, how it will be adversely affected by a final Board order. Sierra Club has no legal right to these documents to the extent that they contain Midwest Generation’s trade secret information. Midwest Generation, through this proceeding, has asked the Board to determine whether the documents contain trade secret information. If the Board determines that these documents contain trade secret information, then Sierra Club has no legal interest in this information and cannot be adversely affected by not receiving the documents. That Sierra Club may claim it is interested in these documents, that the documents may even, in fact, contain information of interest to Sierra Club is simply irrelevant to the question of whether IEPA can release the documents.

15. Because Sierra Club failed to establish that it would be materially prejudiced absent intervention or adversely affected by a final Board order, it has not asserted any grounds on which the Board may permit its intervention. 35 Ill. Adm. Code 101.402.

16. Even if the Board determines that Sierra Club has established grounds for intervention pursuant to 35 Ill. Adm. Code 101.402(d), that section states that the Board “may permit” the intervention, subject to Section 101.402(b). Pursuant to Section 101.402(b), however, “the Board will consider ... whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.”

17. Sierra Club’s intervention would unduly delay, materially prejudice and otherwise interfere with an orderly and efficient proceeding.

18. Sierra Club admits that it has no interest in the issue that is before the Board. In Paragraph 17 of the MFI, Sierra Club states, “For the parties already involved in this appeal, the focus of the hearing is to determine whether ComEd’s records are protected from disclosure to

the SIERRA CLUB because they are trade secrets.” In Paragraph 18, Sierra Club asserts, “The SIERRA CLUB’S focus in this hearing is altogether different and involves creating a record of the public’s interests in having access to information consistent with Illinois and federal law.” Sierra Club goes on to state that it will not seek access, during this proceeding, to the information that is the subject of the proceeding. Through Paragraphs 17 and 18; Sierra Club attempts to establish how its interest is not currently represented in the proceeding. Sierra Club ignores, however, that its interest is not and need not be represented because it is irrelevant to the issue before the Board. Sierra Club is correct that the current parties’ focus is to determine whether certain documents are protected from disclosure because they contain trade secret information. Sierra Club overlooks that the parties are focused on this issue because it is the only issue before the Board. IEPA may not disclose Midwest Generation’s trade secrets to the public without Midwest Generation’s consent. Trade secrets do not cease being trade secrets merely because someone contends the public has an interest in seeing them. On the contrary, demonstrating that the public (especially Midwest Generation’s competitors and suppliers) has an interest in this information would only strengthen Midwest Generation’s claims. Because Sierra Club has indicated its desire to obtain these documents, it clearly has not filed a motion to intervene in order to present extra evidence of the competitive value of this information.

19. As Sierra Club admits, it seeks to intervene in order to pursue its own agenda. As explained in Paragraph 18 of this Response, Sierra Club’s intervention would in no way assist the Board in determining whether the disputed documents contain trade secret information and, therefore, may not be disclosed to the public. Sierra Club’s intervention, by definition, would “unduly delay” the proceeding. By attempting to bring irrelevant issues and politics into this

proceeding in a manner that is completely unrelated to the only issue the Board is called upon to decide, Sierra Club's intervention would "materially prejudice" and "interfere" with an orderly and efficient proceeding.

20. Not only does Sierra Club seek to bring irrelevant issues and politics into this proceeding, but it has also already demonstrated that it does not follow the Board's rules and regulations, and it has already prolonged and complicated this proceeding. For example, on July 20, 2004, Sierra Club filed a Motion for Leave to File Sierra Club's Reply to Commonwealth Edison's Response to Sierra Club's Motion for Intervention (the "July 20th Motion"); however, at that time, Sierra Club had not yet filed a motion for intervention and, obviously, ComEd had filed no response. When filing its July 20th Motion, Sierra Club neglected to file an appearance before the Board. On July 23, 2004, Midwest Generation filed an opposition to Sierra Club's July 20th Motion and, through a courtesy copy, alerted Sierra Club to its failure to file an appearance before the Board. *See* Paragraph 4, Midwest Generation's Opposition to Sierra Club's Motion for Leave to File Sierra Club's Reply to Commonwealth Edison's Response to Sierra Club's Motion for Intervention. Subsequently, Sierra Club filed this MFI and, in the Notice of Filing, indicated that it was filing an appearance; however, Midwest Generation was not served with, or has not received, an appearance from either of Sierra Club's attorneys, and no appearance is posted on the Board's website. Adding even more confusion, Sierra Club's Notice of Filing the MFI captioned both PCB 04-216 and 04-215; however, the MFI only captioned PCB 04-216, and Sierra Club previously filed a motion for intervention in PCB 04-215 on June 21, 2004. Sierra Club, thus, has already interfered with an orderly and efficient proceeding and,

if allowed to intervene, would continue to “materially prejudice” and “interfere” with an orderly and efficient proceeding.

21. If the Board, nonetheless, determines to grant Sierra Club’s MFI, the Board should “limit the rights” of Sierra Club pursuant to 35 Ill. Adm. Code 101.402(e). For example, the Board should ensure that Sierra Club would “not control any decision deadline.” *Id.* The Board should bar Sierra Club from serving or reviewing discovery, interrogatories, and requests to admit. The Board should bar Sierra Club from conducting, attending, or reviewing transcripts of any depositions. Sierra Club should be bound by all Board and hearing officer orders issued to date, and should not be allowed to raise any issues that were raised and decided, or might have been raised, earlier in the proceeding. Moreover, the Board should not permit Sierra Club to gain access to the disputed documents or the information contained therein prior to the Board’s final decision on trade secret protection issue. Release of this information to Sierra Club, whether written or verbal, permanent or temporary, would irreparably harm Midwest Generation.

WHEREFORE, Midwest Generation respectfully requests that the Illinois Pollution Control Board enter its order denying Sierra Club's motion to intervene and denying leave for its attorneys to file their Appearances.

Respectfully submitted,

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