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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SEP 09 2004

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

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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 "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,'" a copy of which is herewith served upon you.


Andrew N. Sawula

Dated: September 9, 2004

Schiff Hardin LLP
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD SEP 09 2004

Midwest Generation EME, LLC,

Petitioner

v.

Illinois Environmental Protection Agency,

Respondent.

STATE OF ILLINOIS
Pollution Control Board

Case No. PCB 04-216

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"

Pursuant to 35 Ill. Adm. Code 101.402 and 101.500(e), Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this 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."

1. On August 3, 2004, Sierra Club filed a Motion for Intervention ("MFI") in the above captioned proceeding (PCB 04-216). Midwest Generation obtained a copy of the MFI from the Board's website; however, Midwest Generation has yet to be served with, or at least has yet to receive, a copy of the MFI. By way of a letter dated August 16, 2004, from Mary A. Mullin to Keith Harley and Annie Pike, Midwest Generation alerted Sierra Club to the fact that Midwest Generation had not received a copy of the MFI, and requested a copy of that filing. Sierra Club has not responded to Midwest Generation's request.

2. On August 17, 2004, Midwest Generation filed a Response to Sierra Club's Motion for Intervention.

3. On August 26, 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" ("MLFR"), along with a proposed "Reply to Midwest Generation's Response to Sierra Club's Motion for Intervention" ("Proposed Reply"). Pursuant to 35 Ill. Adm. Code 101.500(e), Sierra Club does "not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." Sierra Club failed to establish that it would be materially prejudiced absent an opportunity to reply.

4. Before explaining why the Board should conclude that Sierra Club failed to establish that it would be materially prejudiced absent an opportunity to reply, Midwest Generation submits that clarification of several assertions in Sierra Club's MLFR and Proposed Reply is essential.

Clarifications

5. The Sierra Club's August 26, 2004 filing consisted of three documents. The first, a "Notice of Filing" indicates a Motion for Leave to File a Reply to "Midwest Generation's Response" (emphasis added) to the MFI in PCB 04-216 is being filed. The second document, the MLFR itself, is captioned as a Motion to Reply to "Commonwealth Edison's Response" (emphasis added) to the MFI. The Proposed Reply again refers to "Midwest Generation's Response" (emphasis added). All these documents bear the captions for both PCB 04-215 and PCB 04-216. Based on the text of the MLFR, the title of the Proposed Reply and the Notice, Midwest Generation assumes that Sierra Club intended to title the MLFR the "Motion for Leave to File Sierra Club's Reply to Midwest Generation's Response to Sierra Club's Motion for Intervention" (emphasis added).

6. In Paragraphs 3, 4 and 6 of its Proposed Reply, Sierra Club outlines Commonwealth Edison Company's ("ComEd") submission of documents to IEPA, IEPA's partial granting and partial denial of ComEd's request for trade secret protection, and the Board's acceptance of ComEd's Petition for Review. While many of these facts are irrelevant to PCB 04-216, Sierra Club ignores many key facts concerning Midwest Generation's Petition for Review. In order to prevent any further confusion, Midwest Generation is reiterating the pertinent facts in this Opposition.

7. On January 30, 2004, ComEd submitted its final response 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 response and attachments to the Illinois Environmental Protection Agency ("IEPA").

8. 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.

9. ComEd conspicuously marked information on the CPR as "Confidential Business Information."

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

11. 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 in the CPR.

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

13. On August 3, 2004, Sierra Club filed the MFI.

14. On August 17, 2004, Midwest Generation filed its Response to the MFI ("Response") on the basis that Sierra Club failed to establish that it would be materially prejudiced absent intervention or adversely affected by a final Board order.

15. On August 26, 2004, Sierra Club filed the MLFR along with the Proposed Reply.

Argument

16. The Board should deny Sierra Club's MLFR because Sierra Club failed to establish that it would be materially prejudiced absent an opportunity to reply. In Paragraph 2 of its MLFR, Sierra Club notes that Midwest Generation raised "several detailed arguments" in its Response. In Paragraph 3 of its MLFR, Sierra Club contends that it will be materially prejudiced if the Board does not grant this opportunity to "provide a more complete argument to respond to Midwest Generation's detailed objections." In its Proposed Reply, however, with at most one minor, partial exception, Sierra Club does not directly address any of Midwest Generation's arguments. Sierra Club simply rehashes, in greater detail, the arguments that it presented in its MFI, and then adds one new argument that does not arise out of the Response. The Board's rules do not automatically allow a reply because they expect the movant to make its argument in its

initial filing and not to wait, “sand-bagging” its opposition. The Proposed Reply offers nothing that Sierra Club could not have included in its MFI. In fact, Midwest Generation’s filing in PCB 04-185 alerted Sierra Club to the arguments Midwest Generation has made in PCB 04-216 in opposition to the MFI but Sierra Club still failed to address them. Further, before Sierra Club filed its MFI, it had developed all of the substantive arguments that it now wants to make and had articulated them in a virtually identical manner in its July 20, 2004 premature filing in PCB 04-216 (see paragraph 18, *infra*). The Board must deny Sierra Club’s MLFR unless Sierra Club demonstrates that it would be *materially prejudiced* absent intervention. *See, e.g., City of Kankakee v. County of Kankakee*, PCB 03-125, 03-133, 03-134 and 03-135 (May 1, 2003); *People of the State of Illinois v. Peabody Coal Co.*, PCB 99-134 (April 18, 2002); In this case, where Sierra Club could have offered its arguments in its MFI, Sierra Club has not demonstrated that it would be materially prejudiced absent the opportunity to Reply.

17. The Board should deny Sierra Club’s MLFR because Sierra Club could have, but chose not to, include each of the arguments in its Proposed Reply in its original MFI.

(a) In Paragraphs 1 through 7 of the Proposed Reply, Sierra Club outlined some background facts. These paragraphs, standing alone, do not merit the granting of Sierra Club’s MLFR. Thus, Sierra Club will not be materially prejudiced if the Board denies the MLFR.

(b) In Paragraphs 8 through 11 of the Proposed Reply, Sierra Club details why it believes that IEPA must make records available to Sierra Club, and restates its reason for wishing to intervene. These paragraphs merely elaborate on Paragraphs 16 and 18 of the MFI. While Sierra Club details reasons supporting its position that IEPA must make records available to the public, Sierra Club does not discuss the exceptions to this requirement. Specifically,

Sierra Club does not discuss how IEPA must treat trade secrets or confidential business information, nor does it discuss what constitutes trade secret or confidential business information. As the Board is aware, however, in its Response, Midwest Generation did not present arguments regarding whether Sierra Club and the public have an interest in this information; rather, Midwest Generation argued that Sierra Club's and the public's interest in this information is not an issue before the Board. The only issue before the Board is whether the CPR constitutes trade secret information and, therefore, cannot be released to the public. Paragraphs 8 through 11 do not directly respond to arguments in the Response; thus, Sierra Club will not be materially prejudiced if the Board denies the MLFR.

(c) In Paragraph 12 of the Proposed Reply, Sierra Club presents a new argument, that it must be permitted to intervene based on 35 Ill. Adm. Code 130.214(b). Sierra Club did not raise this argument in its MFI, and it does not respond directly to any argument in Midwest Generation's Response. Sierra Club should not be permitted to raise a new issue in a Reply that it could have, but chose not to, raise in its MFI.¹ Thus, Sierra Club will not be materially prejudiced if the Board denies the MLFR.

(d) In Paragraph 13 of the Proposed Reply, Sierra Club states that it is responding to Paragraphs 10 through 14 of Midwest Generation's Response. Sierra Club does not discuss Midwest Generation's rationale for Midwest Generation's argument that Sierra Club will not be materially prejudiced if it is not allowed to intervene in this proceeding. Midwest Generation argued that Sierra Club will not be materially prejudiced absent intervention because

¹ As Sierra Club notes, its request to IEPA was made pursuant to the Freedom Information Act ("FOIA") but IEPA has acted pursuant to Section 7 of the Illinois Environment Protection Act. If Sierra Club disagrees with IEPA's actions under the FOIA, its remedy lies not with the Board or in an appeal from the Board, but elsewhere. Thus, this argument is not only untimely but irrelevant.

(1) Sierra Club has no interest in the issues currently before the Board (i.e., whether the CPR constitutes trade secret information), (2) the Board need not, and should not, consider the public's interest in this information during this proceeding, (3) Sierra Club fails to explain how intervening in the proceeding could assist it in gaining a better understanding of how IEPA enforces laws and regulations, and (4) Sierra Club fails to establish how it will be adversely affected by a final Board order because, if the CPR contains trade secret information, Sierra Club will have no legal right to the information. Sierra Club does not respond to any of Midwest Generation's arguments. Sierra Club reasserts that the Board should consider its interests in this proceeding, but it does not explain why the Board needs to consider Sierra Club's interest if the only issue before the Board is whether the CPR constitutes trade secret information. Thus, Sierra Club will not be materially prejudiced if the Board denies the MLFR.

(e) In Paragraph 14 of its Proposed Reply, Sierra Club attempts to explain why its intervention would not "unduly delay" these proceedings, or "materially prejudice" Midwest Generation or IEPA. Notably, Sierra Club's Proposed Reply leaves unchallenged Midwest Generation's assertion that its intervention will "interfere with an orderly and efficient proceeding." In the MFI, Sierra Club stated only that it was not seeking access through the Board proceeding to the disputed documents. The Board's rules, § 101.401(b), are explicit that intervention must not "unduly delay, materially prejudice and otherwise interfere with an orderly and efficient proceeding." Sierra Club was clearly on notice of these requirements before its initial filing and chose not to address them, for whatever reason. Thus, the fact that Midwest Generation has addressed these issues cannot constitute the kind of material prejudice that would justify granting the Sierra Club's MLFR.

(f) In Paragraph 15 of the Proposed Reply, Sierra Club misstates Midwest Generation's Response. Sierra Club states that "Midwest Generation asserts that Sierra Club's intervention is unnecessary because the only arguments it would raise are legal arguments that can be raised by the IEPA." Sierra Club does not cite, and could not cite, a Paragraph of Midwest Generation's Response for this assertion. Sierra Club should not be permitted to raise arguments in response to an argument that Midwest Generation never asserted. Thus, Sierra Club will not be materially prejudiced if the Board denies the MLFR.

18. The Board should deny Sierra Club's MLFR because, upon information and belief, neither Keith Harley, who identifies himself as an attorney for Sierra Club, nor any other attorney for Sierra Club, has filed an appearance in PCB 04-216, as required by 35 Ill. Adm. Code 101.400(a)(2) and(4). As the Board is well aware, Midwest Generation has alerted Sierra Club to this apparent oversight numerous times; however, Sierra Club has failed to follow this simple rule of the Board. Sierra Club's attempts to file motions in this proceeding without filing an appearance date back to July 20, 2004, when 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 in PCB 04-216 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 July 20th 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 its MFI and, in the Notice of Filing, indicated that

it was filing an appearance; however, Midwest Generation was not served with, or at least has not received, an appearance from either of Sierra Club's attorneys, and no appearance is posted on the Board's website. In Midwest Generation's Response to the MFI, Midwest Generation, once again, alerted Sierra Club to its failure to file an appearance. See Paragraph 20, Midwest Generation's Response to Sierra Club's Motion for Intervention. Despite Midwest Generation's attempts to alert Sierra Club to its error, upon information and belief, no attorney for Sierra Club has filed an appearance in PCB 04-216.

19. Sierra Club's captioning of the MLFR and Proposed Reply under both PCB 04-215 and 04-216, its inclusion of facts pertaining to PCB 04-215 and omission of facts pertaining to PCB 04-216, and its desire to file a Reply that does not directly respond to Midwest Generation's Response but that raises a new issue are but three more examples of how Sierra Club has already prolonged and complicated this proceeding.

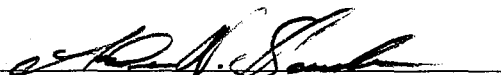
WHEREFORE, Midwest Generation respectfully requests that the Illinois Pollution Control Board enter its order denying Sierra Club's "Motion for Leave to File Sierra Club's Reply to Commonwealth Edison's [sic] Response to Sierra Club's Motion for Intervention." In the alternative, if the Board grants the motion, Midwest Generation respectfully requests that the Illinois Pollution Control Board enter its order granting Sierra Club's "Motion for Leave to File Sierra Club's Reply to Commonwealth Edison's Response to Sierra Club's Motion for Intervention" only to the extent that the Reply responds directly to arguments put forth in Midwest Generation's Response. If the Illinois Pollution Control Board grants Sierra Club's "Motion for Leave to File Sierra Club's Reply to Commonwealth Edison's Response to Sierra Club's Motion for Intervention" in its entirety, then Midwest Generation respectfully requests

that the Illinois Pollution Control Board grant Midwest Generation 14 days to respond to the Sierra Club's Reply.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By:



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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached "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,'" by U.S. Mail, upon the following persons:

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Dated: Chicago, Illinois
September 9, 2004

Respectfully submitted,

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