

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC,)	
Petitioner)	PCB 04-216
)	Trade Secret Appeal
v.)	
)	
Illinois Environmental Protection Agency,)	
Respondent)	

NOTICE OF FILING

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Sheldon A. Zabel
Mary A. Mullin
Andrew N. Sawula
Schiff Hardin LLP
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Chicago, Illinois 60606

Brad Halloran
Hearing Officer
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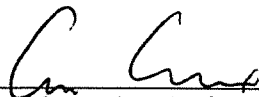
Please take notice that today we have filed via electronic filing with the Office of the Clerk of the Pollution Control Board the Respondent's Memorandum in Opposition to Commonwealth Edison's Motion for Leave to File a Reply to IEPA Memorandum in Opposition to Motion to Compel. A copy is herewith served upon the assigned Hearing Officer and the attorneys for the Petitioner, Midwest Generation EME, LLC.

Dated: Chicago, Illinois
March 28, 2006

LISA MADIGAN, Attorney General of the
State of Illinois

ELECTRONIC FILING, RECEIVED, CLERK'S OFFICE, MARCH 28, 2006

MATTHEW DUNN, Chief, Environmental Enforcement/
Asbestos Litigation Division

BY:  _____

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Petitioner)	PCB 04-216
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**MEMORANDUM IN OPPOSITION TO MIDWEST
GENERATION'S MOTION FOR LEAVE TO FILE A REPLY
TO IEPA MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL**

Under the Board's procedural rules, a reply memorandum will not be allowed except to "prevent material prejudice." 35 Ill. Adm. Code 101.500(e). Petitioner has utterly failed to meet that standard. While it claims that Respondent IEPA's Memorandum in Opposition to Midwest Generation's Motion to Compel "misrepresents Midwest Generation's position and misquotes authority," it is in fact Petitioner's proposed reply memorandum that contains significant misrepresentations.

Concerning the purportedly misquoted authority, the proposed reply memorandum asserts, bizarrely, that Respondent's quoted language from the Board's decision in Oscar Mayer & Co. v. Environmental Protection Agency, PCB 78-14 (June 8, 1978) "does not relate to the parameters of discovery." A copy of that decision, which Respondent cited for the proposition that the Board does not allow discovery concerning unrelated matters in record-only cases such as this one, is attached for your reference as Appendix 1, with relevant portions highlighted. The *entire decision*, in fact, concerned the scope of discovery. It was issued in response to an IEPA appeal from a hearing officer order compelling answers to interrogatories that – like Petitioner's discovery here – concerned prior unrelated decisions by the Agency. Appendix 1, p. 1. The Board, in reversing the hearing officer's order, held that "[t]he scope of discovery . . . is controlled

by the general issue presented.” Appendix 1, p. 3. The discussion of the Board’s standard of review cited by Petitioner in its proposed reply (Petitioner’s proposed reply at 2; Appendix 1, p. 4) defines the “general issue presented” in that matter, which the Board then concludes – in the language quoted in Respondent’s opposition memorandum – does not concern the prior IEPA decisions requested in the interrogatories.

Concerning Respondent’s purported misrepresentation of Midwest Generation’s position, Midwest Generation offers no specifics to support that assertion, but does offer up its own misrepresentation of Respondent’s position. The proposed reply memorandum states that IEPA “appears to suggest” that communications regarding Sierra Club’s FOIA request are the only discoverable and relevant information, because such communications are the only documents we provided in our response. Petitioner’s proposed reply memorandum at 3. In fact, as Respondent IEPA made quite clear in its discovery response and Memorandum in Opposition – and is equally clear in the Board’s ruling in related matter 04-185 – we consider relevant any information that either should have been included in the record (i.e., was considered by the Agency in its decision) and was not, or any new information that was unavailable to either IEPA or Petitioner at the time the decision was made. The documents concerning the Sierra Club FOIA request that IEPA provided in discovery were the only relevant documents that were not already included in the administrative record filed earlier.

Since the misrepresentations are on Petitioner’s part, not Respondent’s, rejection of the proposed reply memorandum would not prejudice Petitioner, but its acceptance would prejudice Respondent.

Conclusion

For the foregoing reasons, Respondent IEPA requests that Petitioner's proposed reply memorandum be rejected.

Dated: Chicago, Illinois
March 28, 2006

Respectfully submitted,

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental
Enforcement/
Asbestos Litigation Division

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ELECTRONIC FILING, RECEIVED, CLERK'S OFFICE, MARCH 28, 2006

APPENDIX 1

1978 WL 9190
1978 WL 9190 (Ill.Pol.Control.Bd.)
(Cite as: 1978 WL 9190 (Ill.Pol.Control.Bd.))

Page 1

Illinois Pollution Control Board
State of Illinois

*1 OSCAR MAYER & CO., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

PCB 78-14

June 8, 1978

INTERIM ORDER OF THE BOARD

On May 9, 1978, the Environmental Protection Agency filed a Motion for an Interlocutory Appeal and for stay of a ruling by the Hearing Officer in a matter concerning the scope of discovery in an action under Section 40 of the Act to contest Agency denial of a permit. Petitioner filed a Response on May 19, 1978, objecting to the Agency's Motions. On May 25, 1978, the Board granted the Agency's Motion for Interlocutory Appeal together with a stay in the proceedings.

The Environmental Protection Agency appeals from an Order of the Hearing Officer compelling answers to Interrogatories which the Agency claims are beyond the scope of discovery in this type of proceeding. In essence, the Interrogatories request that the Agency identify all personnel who were consulted for advice, gave an opinion, or participated in making the previous weight rate determination for Petitioner's 1973 and 1977 permit applications and all materials, including internal Agency memoranda, consulted or referred to in making these decisions.

Section 39 of the Environmental Protection Act provides that the Agency shall issue a permit on proof by the applicant that the permitted activity will not cause a violation of the Act or of regulations adopted in accordance with the Act. Section 40 of the Act provides that an applicant who has been refused a permit by the Agency may petition the Board for a hearing to contest the decision of the Agency and that the burden of proof in such hearing shall be on the applicant.

While a very few of the Section 40 petitions filed with the Board have involved a dispute between the applicant and the Agency over the validity of the facts contained in an application, most Section 40 petitions arise from a difference in interpretation of a regulatory

definition. Since there is no provision in the Act under which the Board might provide an advisory opinion in such a controversy, the Section 40 petition affords the only avenue to secure a Board interpretation of its regulations or a finding of fact, short of an enforcement action.

From the beginning the Board experienced some difficulty in structuring the hearing on a Section 40 petition. [FN1] One of the continuing reasons therefore has no doubt been the early styling of the proceeding in Board practice as a "permit denial appeal." It is obviously not an appellate review of an administrative decision, nor could it seem to be so when there has been no recorded hearing and written finding of fact at the permit issuance level. More importantly, the Act does not confer jurisdiction on the Board to sit in appellate review of Agency decisions. Neither is a Section 40 hearing available for a rehearing or contest of the adoption of Board regulations or as a review of Agency policy and procedure in the exercise of its permit authority under Sections 4 and 39 of the Act. Under the statute, all the Board has authority to do in a hearing and determination on a Section 40 petition is to decide after a hearing in accordance with Sections 32 and 33(a) whether or not, based upon the facts of the application, the applicant has provided proof that the activity in question will not cause a violation of the Act or of the regulations.

*2 In a hearing on a Section 40 petition, the applicant must verify the facts of his application as submitted to the Agency, and, having done so, must persuade the Board that the activity will comply with the Act and regulations. At hearing, the Agency may attempt to controvert the applicant's facts by cross examination or direct testimony; may submit argument on the applicable law and regulations and may urge conclusions therefrom; or, it may choose to do either; or, it may choose to present nothing. The written Agency statement to the applicant of the specific, detailed reasons that the permit application was denied is not evidence of the truth of the material therein nor do any Agency interpretations of the Act and regulations therein enjoy any presumption before the Board. After hearing, the Board may direct the Agency to issue the permit, or order the petition dismissed, depending on the Board's finding that the applicant has or has not proven to the Board that his activity will not cause a violation of the Act or regulations.

The Board opinion most frequently cited on the question of the scope of a hearing on a Section 40 petition is Soil Enrichment Materials Corporation v. EPA, 5 PCB 715 (1972). Much therein is still applicable; however, it must be kept in mind that Section 39 of the

[REDACTED]

If the Agency knows or ascertains, during the pendency of a permit application, that either the facts or conclusions presented by the applicant are inaccurate or incomplete, the Agency must disclose such information in writing during the statutory permit review period or in the detailed written statement of the reasons for denial required by Section 39 of the Act. The Agency may not at hearing assert reliance on any material not included in the record, and disclosed to the applicant in the manner described above, as the basis for Agency denial of the permit, any more than the applicant may introduce new material in support of the application that was not before the Agency at the time of denial."

[REDACTED]

For the reasons set forth above, the Board, having reviewed the Order of the Hearing Officer entered on May 8, 1978, sustains the Order of the Hearing Officer in regard to Interrogatories 7 and 8 of Petitioner's Interrogatories to the Respondent dated March 14, 1978. The Order of the Hearing Officer is sustained as to Interrogatories 1(a) and 2(a); the Order of the Hearing Officer is reversed as to Interrogatory 1(b) through 1(g); Interrogatory 2(b) through 2(g), and Interrogatories 3, 4, 5, 6, 9 and 10.

The matter is remanded to the Hearing Officer for revision of his Order of May 8, 1978, consistent with the foregoing.

IT IS SO ORDERED.

Mr. Werner dissented.

Mr. Young

FN(1) Currie, David P., "Enforcement Under the Illinois Pollution Law," 70 N.W. Univ. L.Rev. 389, 475-479 (1975).

1978 WL 9190 (Ill. Pol. Control. Bd.)

END OF DOCUMENT

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CERTIFICATE OF SERVICE

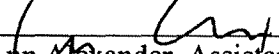
I hereby certify that I did on the 2nd day of March, 2006 send by United States mail a copy of Respondent's Memorandum in Opposition to Midwest Generation's Motion for Leave to File a Reply to IEPA Memorandum in Opposition to Motion to Compel, to:

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Andrew N. Sawula
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

Dated: Chicago, Illinois
March 28, 2006

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
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