

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

|                                   |   |                                   |
|-----------------------------------|---|-----------------------------------|
| NATURAL RESOURCES DEFENSE COUNCIL | ) |                                   |
| PRAIRIE RIVERS NETWORK, and       | ) |                                   |
| SIERRA CLUB,                      | ) |                                   |
|                                   | ) | PCB 13-17                         |
| Petitioners,                      | ) | (Third-Party NPDES Permit Appeal) |
|                                   | ) |                                   |
| v.                                | ) |                                   |
|                                   | ) |                                   |
| ILLINOIS ENVIRONMENTAL PROTECTION | ) | PCB 13-65                         |
| AGENCY and DYNEGY MIDWEST         | ) | (Citizens Enforcement – NPDES)    |
| GENERATION, INC.,                 | ) |                                   |
|                                   | ) |                                   |
| Respondents.                      | ) |                                   |

**NOTICE OF FILING**

TO:

John Therriault, Assistant Clerk  
Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
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Natural Resources Defense Council, Prairie  
Rivers Network, and Sierra Club  
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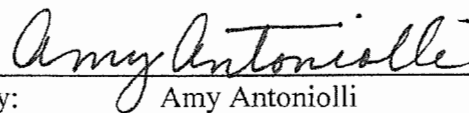
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53 W. Jackson, #1664  
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board, the attached **Response to Motion to Strike**, copies of which are herewith served upon you.

DYNEGY MIDWEST GENERATION, INC.,

  
By: Amy Antonioli

Dated: August 21, 2013

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|                                   | ) | PCB 13-65                      |
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| Respondents.                      | ) |                                |

**RESPONSE IN OPPOSITON TO MOTION TO STRIKE**

1. Respondent Dynegy Midwest Generation (“DMG”), by its attorneys, Schiff Hardin LLP, respectfully submits this response to “Plaintiff’s Motion to Strike Defendant’s Reply Memorandum” (“Motion to Strike”) filed electronically on August 6, 2013 by complainants Natural Resources Defense Council, Prairie Rivers Network, and the Sierra Club (collectively, “Complainants”), and received by U.S. Mail by DMG on August 8, 2013.

2. DMG filed a Motion to Dismiss (the “Motion to Dismiss”) the Petition to Modify, Suspend, or Revoke a Permit Issued by the Illinois Environmental Protection Agency (the “Complaint”) electronically on June 17, 2013. Responses to the Motion to Dismiss were respectively electronically filed by the Illinois Attorney General’s Office on July 17, 2013 (the “AGO Response”) and Complainants on July 18, 2013 (the “Complainants’ Response”) (collectively, the AGO Response and Complainants’ Response may herein be referenced as the “Responses”). Hearing Officer Webb granted DMG leave to file a reply to the Responses on July 22, 2013 and issued a hearing officer order so stating that same day (the “Order”). Subsequently, counsel for Complainants wrote to counsel for DMG stating that she believed the

Order to have been based on an improper *ex parte* communication. Counsel for DMG explained in a written response that the communication was procedural and not *ex parte* and asked opposing counsel, if she at all disagreed, to kindly advise how the purported *ex parte* communication substantively reflected on the proceedings.<sup>1</sup> No such explanation was provided, nor has such been presented in the Motion to Strike.

3. Notwithstanding DMG's continued complete belief in the validity of the Order, DMG filed a motion to extend the reply deadline ("Motion to Extend Deadline") on August 2, 2013 for the reasons explained therein. When it became clear that the Motion to Extend Deadline would not be immediately granted, DMG proceeded to timely electronically file its Reply in Support of Motion to Dismiss (the "Reply") on August 5, 2013.

4. The Motion to Strike contends that DMG failed to make a motion for leave to file the Reply and that DMG's contact with the hearing officer on July 22, 2013 constituted an *ex parte* communication. The Motion to Strike further alleges that DMG has not alleged material prejudice sufficient to merit leave to file a reply under 35 Ill. Adm. Code 101.500(e). All such allegations are without merit.

5. There was no *ex parte* communication. The Board's procedural rules define "ex parte communication" as:

*"Ex parte communication" means any written or oral communication by any person that imparts or requests material information or makes a material argument regarding potential action concerning regulatory, quasi-adjudicatory, investment, or licensing matters pending before or under consideration by the Board. "Ex parte communication" does not include the following:*

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<sup>1</sup> This written correspondence between Complainants' and counsel for DMG was attached as Exhibit 2 to the Motion to Strike.

*statements by a person publicly made in a public forum, including pleadings, transcripts, and public comments made part of the proceeding's record;*

*statements regarding matters of procedure and practice, such as format, the number of copies required, the manner of filing, and the status of a matter; and*

*statements made by a State employee of the Board to Board members or other employees of the Board. [5 ILCS 430/5-50(b)]. For purposes of this definition, "Board employee" means a person the Board employs on a full-time, part-time, contract or intern basis. (See Section 101.114 of this Part.)*

35 Ill. Adm. Code 101.202 (emphasis in original). The Board has held that "[c]ommunications regarding matters of procedure and practice are specifically exempted from the definition" of *ex parte* communication. *People, et al. v. Stringini*, PCB 01-43, slip op. at 1 (Aug. 5, 2004); see also, *Streit v. Oberweis Dairy, Inc.*, PCB 95-122 (Feb. 1, 1996) ("matters of procedure and practice are not considered *ex parte*").

6. In *Stringini*, the hearing officer allowed the respondent to file a motion for an extension of time to file a response by facsimile and then granted the motion by hearing officer order the same day. *PCB 01-43, slip op. at 1*. The Board found that "communications which were procedural in nature and did not reflect the substance of the proceeding" were not *ex parte*. *Id.* The Board further held that the hearing officer was familiar with the procedural history of the case, had the discretion to grant a procedural motion and that the opposing parties were not materially prejudiced by the hearing officer's action. *Id.*

7. A request for leave is not substantive and does not influence the Board's decision in an NPDES enforcement matter. See *People v. Joslyn Mfg. and Supply Co.*, PCB 83-83 (Oct. 6, 1983) (referring to a motion for leave to reply as a procedural motion).

8. Although the Board's procedural rules have been modified since 2004, the exemption for "matters of procedure and practice" relied on in *Stringini* remains part of the *ex*

*parte* definition today.<sup>2</sup> As in *Stringini*, here the (a) motion at issue was procedural and did not reflect the substance of the proceeding, (b) the Hearing Officer was familiar with the procedural history of the pending matter and had the discretion to issue the Order and (c) no material prejudice has (or could be) established by Complainants.

9. Complainants' argument that the procedural issue in *Stringini* was somehow distinguishable from a request for leave to file a reply misses the legal standard articulated by the Board – i.e., whether a communication reflects on the substance of a pending matter. As explained above, the request for leave and Order did not reflect on the substance of the pending matter. The request and Order related to the procedural matter of filing a reply brief and have no bearing on the substantive issues of the case.

10. The Board's opinion and order adopting revisions to the definition of *ex parte* communications in 2004 clarifies that the revisions to the definition did not change the intent of the prohibition against *ex parte* communications by stating:

The new ethics statute necessitates changes to the Board's procedural rules on "ex parte communications." The Board is amending the definition of "ex parte communication" in Section 101.202 to track the statutory language defining the term. The Board does not believe, however, that the new definition differs fundamentally from the Board's current definition. The objective of the Board's rule remains to prevent off-the-record communications designed to influence the Board's decision in any pending adjudicatory or regulatory proceeding.

The Board also is amending Section 101.114 on *ex parte* communications. The main change to this section reflects new statutory reporting requirements for the Board's ethics officer.

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<sup>2</sup> We note that *Stringini* was decided at a time when the issue of *ex parte* communications was given heightened attention by the Board: after the General Assembly adopted the State Officials and Employees Ethics Act (5 ILCS 430, adopted by P.A. 93-617, effective Dec. 9, 2003) in 2003 and while revisions to the Board's procedural rules, including the definition of *ex parte* communication to the definition cited above, were pending before the Board. *In the Matter of: Amendments to the Board's Procedural Rules to Accommodate New Statutory Provisions: 35 Ill. Adm. Code 101-130 ("Amendments to the Board's Procedural Rules")*, R04-24 (May 19, 2005).

*Amendments to the Board's Procedural Rules*, R04-24, slip op. at 3. A review of the definition and the Board's intent behind the 2004 revisions shows that the fundamental purpose of the prohibition against *ex parte* communications remains the same: to prevent closed-door communications meant to influence the Board's decision on a pending matter. *Stringini* further confirms that conversations regarding procedural matters do not constitute *ex parte* communications. As demonstrated by the Board's *Joslyn Mfg.* decision cited above, a request for leave is a procedural, not substantive, matter. *Joslyn Mfg. and Supply Co.*, PCB 83-83 (Oct. 6, 1983).

11. In the interest of expediency, DMG quickly addressed the Board regarding leave to file a reply on July 22, 2013, one business day after its receipt of the Responses. It is well-established that the Board or Hearing Officer has discretion to grant leave whether or not the specific language of Section 101.500(e) is used. *City of Quincy v. IEPA*, PCB 08-86, slip op. at 2 (Jun. 17, 2010) (granting the Illinois Environmental Protection Agency's motion for leave even though it did not use the specific "to prevent material prejudice" language of Section 101.500(e)). In addition, the Board, in its discretion, has allowed replies to be filed when no motion for leave has been filed. See e.g. *A&H Implement Co. v. IEPA*, PCB 12-53 (May 17, 2012) (accepting reply when it would not materially prejudice either party); *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America and UAW Local 974 v. Caterpillar Inc.*, PCB 94-240 (Apr. 6, 1995) (allowing reply "to prevent material prejudice" and "due to the importance of the matter at hand").

12. DMG's Reply identified significant misstatements and mischaracterizations of fact and law within the Responses. As expressed in the Motion to Extend Deadline, this matter is one of first impression for the Board; a reply to the Responses was necessary to correct the

record and allow the Board to make a fully informed decision on the substance of the case. Leave to file the Reply was warranted to prevent material prejudice within the meaning of Section 101.500(e).

13. The Motion to Strike fails to anywhere (i) explain how the communication at issue at all reflected on the substance of the proceeding or (ii) allege or demonstrate that any material prejudice to Complainants resulted from said communication.

WHEREFORE, for the reasons stated above, Dynegy Midwest Generation respectfully requests that the Board deny the Complainant's Motion to Strike and address the pending motions before the Board without further delay.

Respectfully submitted,

DYNEGY MIDWEST GENERATION

By: 

\_\_\_\_\_  
Daniel Deeb

Dated: August 21, 2013

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Amy Antonioli  
Stephen Bonebrake  
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Phone: (312) 258-5500



**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 21st day of August, 2013, I have served electronically the attached **Response to Motion to Strike**, upon the following persons:

John Therriault, Assistant Clerk  
Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph, Suite 11-500  
Chicago, Illinois 60601

and electronically and by first class mail, postage affixed, upon:

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Meleah Geertsma  
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Prairie Rivers Network, and Sierra Club  
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Albert Ettinger  
Sierra Club  
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Chicago, Illinois 60604

  
By: \_\_\_\_\_ Amy Antonioli

Dated: August 21, 2013

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