

ILLINOIS POLLUTION CONTROL BOARD
August 21, 2014

SIERRA CLUB, ENVIRONMENTAL LAW)
AND POLICY CENTER, PRAIRIE RIVERS)
NETWORK, and CITIZENS AGAINST)
RUINING THE ENVIRONMENT,)
)
Complainants,)
)
v.) PCB 13-15
) (Enforcement - Water)
MIDWEST GENERATION, LLC,)
)
Respondent.)

ORDER OF THE BOARD (by J.D. O’Leary):

On January 23, 2014, the Board accepted for hearing a complaint filed by Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, complainants) as the complaint was modified by the October 3, 2013 Board order partially denying and partially granting a motion to dismiss filed by Midwest Generation, LLC (MWG). The complaint alleges that various violations of the Environmental Protection Act (Act) (415 ILCS 5 (2012)) and the Board’s land and groundwater regulations result from MWG’s disposal of coal ash in ash ponds. The ash ponds at issue are located at MWG’s Powerton generating station in Tazewell County; the Joliet 29 generating station in Will and Kendall counties; the Waukegan generating station in Lake County; and the Will County generating station in Will County.

On December 5, 2012, Whitney C. Ferrell of the Environmental Integrity Project filed a request to appear *pro hac vice* on behalf of Sierra Club in this matter and her appearance. On July 29, 2014, complainants filed a motion to withdraw the request and appearance (Mot.). The motion states that Ms. Ferrell “resigned from the Environmental Integrity Project as on July 23, 2014” and that two other attorneys have filed appearances on behalf of Sierra Club. Mot. at 1. Complainants request that the Board grant their motion to withdraw Ms. Ferrell’s motion to appear *pro hac vice* and her appearance. *Id.*

The Board’s procedural rules provide that, “[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d). Having reviewed the motion and in the absence of any response, the Board grants the motion to withdraw the request by Ms. Ferrell to appear *pro hac vice* and her appearance.

On July 29, 2014, the Board received a request from Jennifer S. Duggan to appear *pro hac vice* on behalf of Sierra Club in this matter. Ms. Duggan’s request states that she is licensed

and registered to practice before the bar of the District of Columbia. In addition, the Board has pending before it a request filed December 5, 2012, by Abel Russ to appear *pro hac vice* on behalf of Sierra Club in this matter. Mr. Russ' request states that he is licensed and registered to practice before the bar of both the District of Columbia and the State of Vermont.

The motions to appear *pro hac vice* were filed pursuant to Section 101.400(a)(3) of the Board's procedural rules (35 Ill. Adm. Code 101.400(a)(3)). Under this provision, the Board has allowed out-of-state attorneys (*i.e.*, not licensed and registered in the State of Illinois) to appear before the Board in particular proceedings, if the out-of-state attorney's *pro hac vice* motion represents that the attorney is licensed and registered to practice law in another state. *Id.* The Illinois Supreme Court, however, recently overhauled the process for permitting out-of-state attorneys to appear *pro hac vice* in Illinois by amending its Rule 707. Ill. S. Ct. R. 707 (eff. July 1, 2013).

The Supreme Court's amended Rule 707 applies to cases "before an agency or administrative tribunal of the State of Illinois . . . if the representation by the out-of-state attorney constitutes the practice of law in Illinois or the agency or tribunal requires that a representative be an attorney." Ill. S. Ct. R. 707(c)(3). The Board, an agency and administrative tribunal of the State of Illinois (415 ILCS 5/5 (2012)), has long held that its adjudicatory proceedings involve the practice of law. *See, e.g., Petition of Recycle Technologies, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 720.131(c)*, AS 97-9, slip op. at 3-5 (July 10, 1997); *see also Stone Street Partners, LLC v. City of Chicago Dept. of Admin. Hrgs.*, 2014 IL App (1st) 123654, ¶ 15 (City of Chicago administrative hearings, like judicial proceedings, entail admission of evidence and examination of sworn witnesses, "all of which clearly constitute the practice of law"). Further, under the Board's procedural rules, though an individual may represent himself or herself, a party other than an individual must be represented by an attorney. 35 Ill. Adm. Code 101.400(a)(2), (a)(3). The Board therefore finds that Rule 707 applies to adjudicatory proceedings before the Board.

For Ms. Duggan or Mr. Russ to represent Sierra Club, they must comply with Supreme Court Rule 707. Their motions to appear *pro hac vice* do not mention Rule 707. The Rule establishes a procedure by which "an eligible out-of-state attorney . . . is permitted to appear as counsel and provide legal services in the proceeding *without order of the tribunal.*" Ill. S. Ct. R. 707(a) (emphasis added). Under these circumstances, the Board denies the pending *pro hac vice* motions. The Board plans to propose amendments to its procedural rules to reflect the Supreme Court's changes to Rule 707. In the meantime, the Board will permit out-of-state attorneys to appear *pro hac vice* in an adjudicatory proceeding only if they comply with Rule 707.

Accordingly, the out-of-state attorneys seeking to represent Sierra Club may file new appearances with the Board. Each appearance must include the out-of-state attorney's representation that he or she is in, and will maintain throughout the proceeding, compliance with Rule 707. One requirement of Rule 707 is "the filing of an appearance of an active status Illinois attorney associated with the [out-of-state] attorney in the proceeding." Ill. S. Ct. R. 707(a). Therefore, each out-of-state attorney's appearance must identify the active status Illinois attorney with whom the out-of-state attorney is associated in this proceeding, as well as the date on which the active status Illinois attorney filed an appearance.

For the reasons stated above, the Board grants complainants' motion to withdraw the request by Ms. Ferrell to appear *pro hac vice* and her appearance and denies the two pending request to appear *pro hac vice* in this matter.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 21, 2014, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Clerk
Illinois Pollution Control Board