

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB,	)	
	)	
<b>Complainant,</b>	)	
	)	
v.	)	PCB 13-27
	)	(Citizen Enforcement - Air)
MIDWEST GENERATION, LLC,	)	
	)	
<b>Respondent.</b>	)	
	)	

NOTICE OF ELECTRONIC FILING

TO:

John Therriault, Assistant Clerk  
Bradley Halloran, Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph, Suite 11-500  
Chicago, Illinois 60601  
john.therriault@illinois.gov

David L. Wentworth II  
Hasselberg, Williams, Grebe, Snodgrass &  
Birdsall  
124 SW Adams, Suite 360  
Peoria, IL 61602-1320  
dwentworth@hwgsb.com


David C. Bender  
McGillivray, Westerberg & Bender  
211 S. Paterson Street, Suite 320  
Madison, WI 53703  
bender@mwbattorneys.com

Zoran Balac  
Goldstein & McClintock, LLP  
208 S. LaSalle Street, Suite 1750  
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board of the State of Illinois, **MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANT'S SUPPLEMENTAL AUTHORITY FILING**, copies of which are herewith served upon you.

Dated: November 3, 2014

MIDWEST GENERATION, LLC,

  
\_\_\_\_\_  
Bina Joshi

Stephen J. Bonebrake  
Bina Joshi  
Schiff Hardin LLP  
233 South Wacker Drive  
Suite 6600  
Chicago, Illinois 60606  
(312) 258-5500

Andrew N. Sawula  
Schiff Hardin LLP  
One Westminster Place  
Lake Forest, IL 60045  
(847) 295-4336

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MIDWEST GENERATION, LLC,	)	
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	)	

**MIDWEST GENERATION, LLC’S RESPONSE TO  
COMPLAINANT’S SUPPLEMENTAL AUTHORITY FILING**

On or about October 20, 2014, without first seeking leave from the Board, the Complainant filed a “Notice of Supplemental Authority in Response to Midwest Generation, LLC’s Motion to Dismiss” (the “Notice”). The Notice purports to summarize four court decisions from other jurisdictions that Complainant appears to believe are somehow relevant to Midwest Generation, LLC’s (“Midwest Generation”) pending Motion to Dismiss (the “Motion”) the asserted claims in this action. The Board should disallow and disregard this filing because it is effectively a tardy brief on the Motion that was filed without leave and, in any event, the court decisions cited are completely irrelevant to the Motion.

By order dated January 16, 2014, the hearing officer in this matter set a briefing schedule for the Motion. Complainant was required to file its response to the Motion by February 18, 2014. Now, months after that deadline and months after briefing on the Motion was completed, Complainant filed the Notice in which it offers further argument in response to the Motion. Even if the cited authorities were relevant to the Motion, and they are not as discussed below, the Complainant first should have sought leave to file a late response before filing the Notice. Given

its failure to seek such leave and given that the Notice was filed months after the deadline for its response to the Motion, the Notice should be disallowed.

Even if the Notice filing is allowed by the Board, it should be disregarded because the authorities cited are completely irrelevant to the Motion. Complainant asserts in its Notice that each of the court decisions holds that the federal Clean Air Act (the "CAA") does not preempt state law claims such as those asserted by Complainant and implies that this is somehow relevant to the Motion. Complainant misconstrues its own claims and Midwest Generation's arguments and asserts relevance when there is none.

Complainant incorrectly asserts that the cited decisions hold that the CAA does not preempt state law claims like those asserted by Complainant in this action. Each of the cited decisions addresses whether the CAA preempts state law **tort** claims, such as negligence claims for damages and nuisance claims.<sup>1</sup> See Bell v. Cheswick Generating Station, 734 F.3d 188, 198 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014) ("We see nothing in the Clean Air Act to indicate that Congress intended to preempt source state common law **tort claims**") (emphasis added); Little v. Louisville Gas & Elec. Co., 2014 U.S. Dist. LEXIS 96947, at \* 64 (W.D. Ky., July 17, 2014) ("the Plaintiffs' state common law **tort claims** are not preempted by the CAA") (emphasis added); Freeman v. Grain Processing Corp., 2014 Iowa Sup. LEXIS 72, at \* 55 (Iowa June 13, 2014) ("conflict preemption with the CAA does not apply to a **private lawsuit seeking damages** anchored in ownership or real property") (emphasis added); Merrick v. Diageo Americas Supply, Inc., Case No. 3:12-CV-334-CRS, Memorandum Opinion at 10, 17 (W.D.

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<sup>1</sup> Midwest Generation notes that some courts have found that state law tort claims are preempted by the CAA, e.g., Comer v. Murphy Oil, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (state law nuisance, trespass and negligence claims are preempted) but there is no reason to engage in argument about whether the CAA does or not does not preempt such tort claims because the issue is irrelevant to the Motion.

Ky., March 19, 2014) (“Plaintiffs’ state common law **tort claims** against Diageo are not preempted by the CAA”) (emphasis added). Complainant does not assert tort claims here, but instead Complainant asserts regulatory violation claims. Thus, the cited decisions do not address claims of the type at issue in this Board action.

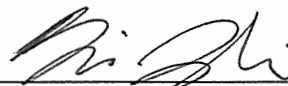
Further, as explained in greater detail in Midwest Generation’s briefs related to the Motion, Midwest Generation does not contend that Complainant’s claims should be dismissed because they are preempted by the CAA, as asserted by Complainant. See, e.g., Reply Brief, page 5. This is a straw man argument constructed by Complainant that misconstrues Midwest Generation’s arguments. Midwest Generation explains in its Motion briefs several reasons that independently justify dismissal of Complainant’s claims in this action, including that Complainant is attempting to usurp the roles of Illinois EPA and the United States Environmental Protection Agency and to fabricate violations of emission standards before such standards even exist. Indeed, in connection with the 1-hour SO<sub>2</sub> NAAQS at issue in this action Illinois EPA continues to develop and will file with the Board a proposed state rule to impose SO<sub>2</sub> emission standards for various sources, including some of the plants at issue in this action. That ongoing regulatory action is the proper means to address NAAQS attainment. But Midwest Generation does not argue that Complainant’s claims are preempted by the CAA, let alone that Complainant’s claims are preempted state law tort claims. Complainant’s new authorities are quite simply beside the point.

For the forgoing reasons, the Notice should be disallowed and disregarded.

Dated: November 3, 2014

Respectfully Submitted,

MIDWEST GENERATION, LLC,



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Stephen J. Bonebrake

Bina Joshi

Schiff Hardin LLP

233 South Wacker Drive, Suite 6600

Chicago, Illinois 60606

Telephone: 312-258-5500

Andrew N. Sawula

Schiff Hardin LLP

One Westminster Place

Lake Forest, Illinois 60045

Telephone: 847-295-4336

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 3d day of November, 2014, I have served electronically the attached **MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANT'S SUPPLEMENTAL AUTHORITY FILING**, upon the following persons:

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

and by U.S. mail, postage affixed, upon:

David L. Wentworth II  
Hasselberg, Williams, Grebe,  
Snodgrass & Birdsall  
124 SW Adams, Suite 360  
Peoria, IL 61602-1320  
dwentworth@hwgsb.com

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