

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
AMENDMENTS TO 35 ILL. ADM. CODE) R15-21
PART 214, SULFUR LIMITATIONS, PART) (Rulemaking-Air)
217, NITROGEN OXIDES EMISSIONS,)
AND PART 225, CONTROL OF EMISSIONS)
FROM LARGE COMBUSTION SOURCES)

NOTICE

To: John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601-3218

PLEASE TAKE NOTICE that I have today filed with the Office of the Pollution Control Board the Illinois Environmental Protection Agency's Objection to Sierra Club's Pre-Filed Testimony, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Dana Vetterhoffer
Assistant Counsel

DATED: July 28, 2015
1021 N. Grand Ave. East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544

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**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
OBJECTION TO SIERRA CLUB'S PRE-FILED TESTIMONY**

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by its attorney, hereby objects to the pre-filed testimony of Mr. Ranajit Sahu as a result of the notice filed by the Sierra Club and Environmental Law and Policy Center ("Sierra Club") with the Board on July 27, 2015, and the subsequent confirmation by the Sierra Club, indicating that it does not intend to make Mr. Sahu available for questions at the third hearing in this matter.

The Agency requests that the Board order the Sierra Club to either make Mr. Sahu available for questions at the third hearing on August 4, 2015, in order to avoid prejudice to the Agency and potentially other interested persons, or to withdraw his testimony in its entirety.

Background

The deadline for interested persons to file pre-filed testimony for the second hearing, scheduled to take place on July 29, 2015, and third hearing, scheduled to take place on August 4, 2015, was July 17, 2015.

On July 15, 2015, the Agency spoke with representatives of the Sierra Club. They requested additional modeling information, which the Agency provided. The Sierra Club indicated its intent to file with the Board a motion for a one-week extension of time to file pre-filed testimony for the third hearing, explaining that its witnesses needed adequate time to review

the information. The Sierra Club obtained the Agency's agreement not to file an objection to the motion for extension of time, with the mutual understanding that the pre-filed testimony would be presented and the witnesses would be made available for questions at the third hearing, as the Agency (and other interested persons) needed adequate time to review the testimony of, and prepare questions for, the Sierra Club's witnesses. This understanding was confirmed by Sierra Club representatives on multiple occasions.

On July 15, 2015, the Sierra Club filed with the Board a Motion to Extend the Expert Testimony Filing Deadline ("Motion for Extension"), arguing that its witnesses needed an extra week to "fully analyze" the additional modeling information provided by the Agency, and provide the Board with their "complete analysis and review of the proposed Rule." The Sierra Club alluded to its agreement with the Agency that the witnesses would be available at the third hearing, indicating, "[T]he Agency agreed it would not object to the extension requested in this motion. The Agency . . . represented that it would be prepared to respond to this testimony, including with questions, at least by the date of the August 4, 2015 hearing."

On July 16, 2015, the Hearing Officer granted the Sierra Club's Motion for Extension until July 24, 2015.

On July 24, 2015, the Sierra Club pre-filed testimony for Ranajit Sahu and Andrew Gray, and specifically indicated that Mr. Sahu's testimony was being submitted "for presentation at the Aug. 4, 2015, hearing." (Pre-Filed Testimony of Ranajit (Ron) Sahu on Behalf of Sierra Club and ELPC at 2 ("Pre-Filed Testimony of Ron Sahu")). The Sierra Club also filed pre-filed questions for the Agency.

Links to the pre-filed testimony and pre-filed questions were not available on the Board's website until mid-morning on Monday, July 27, 2015.

On Monday afternoon, July 27, less than a day and half before the second hearing in this matter, the Sierra Club filed a notice indicating that Mr. Sahu will present his testimony at the second hearing instead. The Sierra Club did not provide any justification in the notice for the change in dates, nor did the Sierra Club notify the Agency or other interested parties in advance of this change in agreed-upon terms.

Objection

The Agency has confirmed that the Sierra Club does not intend to make Mr. Sahu available for questions at the third hearing. As such, the Agency strongly objects to his pre-filed testimony, as presenting Mr. Sahu for questions at the second hearing alone severely prejudices the Agency's and others' ability to adequately address his testimony. The Agency requests that Mr. Sahu either be made available for questions at the third hearing or his pre-filed testimony be withdrawn in its entirety.

Failing to make both of its witnesses available at the third hearing would violate the Sierra Club's agreement with the Illinois EPA that the Sierra Club's testimony would be presented, and its witnesses be made available for questions, at such hearing. The Agency would have objected to the Motion for Extension had the Agency known that the Sierra Club intended to present either of its witnesses at the second hearing alone, as such an extension would provide the Agency and others insufficient time, a maximum of three business days, to review and prepare. The Agency brought up timing issues with the Sierra Club; the Sierra Club then indicated verbally, in its Motion for Extension, and in the Pre-Filed Testimony of Ron Sahu, that it would make its witnesses available for testimony and questions at the third hearing. It was not until less than a day and a half prior to the second hearing that the Sierra Club "notified" everyone of its change in plans by filing a notice with the Board. The Agency, and any others

who wish to cross-examine Mr. Sahu, would be prejudiced should the Sierra Club be allowed to operate in this disingenuous manner.

As indicated above, the Agency and others would have approximately a day and a half to review and prepare questions to present at the second hearing in response to Mr. Sahu's testimony, as the testimony was not available until Monday morning and the Sierra Club did not notify anyone of its change of plans until Monday afternoon. In actuality, the Agency had even less time, as the Agency has been endeavoring to respond to the Sierra Club's pre-filed questions to present at the second hearing, with the understanding that Agency personnel had more time to review and assess Mr. Sahu's testimony for the third hearing. Further, the Sierra Club failed to provide any explanation in the notice filed with the Board as to why it changed plans at the eleventh hour, or any justification as to why it should be allowed to unilaterally cut the Agency's and others' preparation time so severely.

Additionally, while the Agency agreed not to object to the Sierra Club's Motion for Extension (based on the understanding discussed above), other interested persons made no such agreement. The Hearing Officer granted the Sierra Club's Motion for Extension within a day of its filing, leaving little to no time to formulate and file an objection. The Agency and others therefore deserve an opportunity to thoroughly review both sets of testimony and present questions to both witnesses at the third hearing.¹ The Sierra Club was provided the benefit of an additional week to develop its pre-filed testimony; the Agency and others likewise deserve sufficient time to review and respond to such testimony, and the ability to properly cross-examine the witness about his testimony at the third hearing.

¹ The Agency recently spoke with counsel for Midwest Generation, LLC, who indicated support for the Agency's objection.

WHEREFORE, the Agency respectfully requests that the Board order the Sierra Club to either make Mr. Sahu available for questions at the hearing on August 4, 2015, in order to provide the Agency and all interested persons sufficient time to review and prepare questions based on his pre-filed testimony, or to withdraw his pre-filed testimony in its entirety.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Dana Vetterhoffer
Assistant Counsel

DATED: July 28, 2015
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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, affirm that I have served the attached Illinois Environmental Protection Agency's Objection to Sierra Club's Pre-Filed Testimony upon the following person(s) by e-mailing it to the e-mail address(es) indicated below:

Daniel Robertson, Hearing Officer
Illinois Pollution Control Board
daniel.robertson@illinois.gov

I affirm that my e-mail address is dana.vetterhoffer@illinois.gov; the number of pages in the e-mail transmission is 8; and the e-mail transmission took place today before 5:00 p.m.

I also affirm that I am mailing the attached by first-class mail from Springfield, Illinois, with sufficient postage affixed, to the following persons:

SEE ATTACHED SERVICE LIST

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Dana Vetterhoffer
Assistant Counsel

DATED: July 28, 2015

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P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544

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