BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
WEGLARZ HOTEL III, L.L.C.,	)	
WEGLARZ HOTEL IV, L.L.C,	)	
WEGLARZ HOTEL V, L.L.C.,	)	
	)	
Complainants.	)	
	)	
v.	)	PCB 2019-064
	)	
THE BELT RAILWAY COMPANY	)	
OF CHICAGO,	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: Richard J. Skrodzki
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Motion for Permission to File Reply in Support of Motion to Stay Proceedings of The Belt Railway Company of Chicago, a copy of which is herewith served upon you.

Dated: December 3, 2018

THE BELT RAILWAY COMPANY
OF CHICAGO

By: _____
One of Its Attorneys

Of Counsel:

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CERTIFICATE OF SERVICE

I, the undersigned, on affirmation state the following:

That I have served the attached Notice of Filing by e-mail upon the persons listed below at the e-mail addresses listed below.

That my e-mail address is bthompson@fletcher-sippel.com.

That the number of pages in the e-mail transmission is 13.

That the e-mail transmission took place before 5:00 p.m. on the date of December 3, 2018.

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By: _____
Brandon M. Thompson

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MOTION FOR PERMISSION TO FILE
REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

The Belt Railway Company of Chicago ("The Belt"), by and through its attorneys Fletcher & Sippel LLC and pursuant to 35 Ill. Admin. Code § 101.500(e), hereby moves for permission to file its Reply in Support of Motion to Stay Proceedings. In support, The Belt states:

1. The Belt filed its Motion to Stay on November 5, 2018, and Weglarz Hotel III, L.L.C., Weglarz Hotel IV, L.L.C., and Weglarz Hotel V, L.L.C. (collectively, "Weglarz Hotels") responded on November 19, 2018.

2. The Belt recognizes that parties have no *per se* right to file a reply in proceedings before the Board. The Belt respectfully requests the Board's permission to file a reply to prevent material prejudice. 35 Ill. Admin Code § 101.500(e).

3. When a response contains new information not addressed in the initial motion, a reply is appropriate. *Illinois v. Texaco Refining & Marketing, Inc.*, No. PCB 02-03 (Ill. Pol. Control Bd., Nov. 6, 2003), 2003 WL 22761198 at *1. Similarly, if a response contains "errors

and misstatements," then material prejudice will result if the moving party is not given an opportunity to reply. *Am. Disposal Serv. of Ill., Inc. v. Cnty. Bd. of McLean Cnty.*, No. PCB 11-60 (Ill. Pol. Control Bd., Oct. 16, 2014), 2014 WL 5395319 at *2.

4. The proposed reply is attached hereto as Exhibit A. As that reply demonstrates, it is limited solely to matters that The Belt did not anticipate Weglarz Hotels would raise. The reply does not seek to rebut the Weglarz Hotels' incorrect arguments about the preemption issue, as the entire point of the original Motion was that the Board should not decide that issue.

5. Rather, the reply seeks to rebut the unanticipated argument Weglarz Hotels made about *Younger* abstention. As explained in more detail in the reply, that argument is based on outdated law and misrepresents the applicability of *Younger*.

6. Along those lines, the reply rebuts Weglarz Hotels' arguments regarding the test applicable to whether the Board should stay this proceeding. Weglarz Hotels cited a series of factors that, while used by the Board in the past, are inappropriate here because The Belt has named the Board members in their official capacities in the federal court suit. The Belt seeks a stay of this proceeding solely to obviate the need for seeking preliminary injunctive relief against the Board in federal court.

7. The Belt will suffer material prejudice if it does not have the opportunity to respond to these arguments. Given their extraordinary nature, The Belt did not anticipate them in its initial Motion to Stay.

8. In addition, The Belt does not seek to use the reply to re-hash arguments The Belt already made in its initial Motion. Therefore, the reply is appropriately limited and warranted under 35 Ill. Admin. Code § 101.500(e).

WHEREFORE, The Belt respectfully requests that the Board grant The Belt permission to file a reply in support of its Motion to Stay and any other and further relief the Board deems appropriate.

Dated: December 3, 2018

THE BELT RAILWAY COMPANY
OF CHICAGO

By: _____
One of Its Attorneys

Of Counsel:

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James D. Helenhouse
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REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

The Belt Railway Company of Chicago ("The Belt") hereby files its reply in support of its request that the Board stay the above-captioned proceedings brought by Weglarz Hotel III, L.L.C., Weglarz Hotel IV, L.L.C., and Weglarz Hotel V, L.L.C. (collectively, "Weglarz Hotels") pending the resolution of *The Belt Railway Company of Chicago v. Weglarz Hotel III, L.L.C. et al.*, Case No. 1:18-cv-07361, which The Belt filed in the United States District Court for the Northern District of Illinois (the "Federal Court Action") on November 5, 2018. In support, The Belt states:

The Reply Standard

1. The Belt recognizes that replies are generally not allowed under Board Rule 101.500(e). Therefore, rather than pointing out each of the many errors in Weglarz Hotels' brief—particularly on the preemption issue—The Belt addresses only those arguments that are so meritless that The Belt did not anticipate Weglarz Hotels would raise them. The Belt did not

EXHIBIT A

expect that Weglarz Hotels would take the extraordinarily tenuous positions below, so The Belt will be materially prejudiced without a chance to respond to them.

***Younger* Abstention**

2. Tucked away in a footnote, Weglarz Hotels suggests the federal court will abstain from hearing the Federal Court Action under the *Younger* abstention doctrine. Opp. at 10 n.3 (indirectly referencing, but not citing, *Younger v. Harris*, 401 U.S. 37 (1971)). This is wrong. In support of this footnote, Weglarz Hotels cites two cases from before the Supreme Court's unanimous landmark decision in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013). *Sprint* drastically re-defined the application of *Younger* abstention by correcting lower courts for applying that doctrine too broadly. In *Sprint*, the Supreme Court held that courts should abstain from hearing a federal case under *Younger* only in three "extraordinary" circumstances: where there are (1) on-going state *criminal* proceedings, (2) on-going *state-initiated* civil-enforcement proceedings that are akin to criminal proceedings, and (3) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." 571 U.S. at 78–80.

3. Obviously, this matter does not fall into any of those categories. It is not a criminal proceeding or a state-initiated enforcement proceeding, and it does not involve any orders of any state court, let alone an order "uniquely in furtherance" of the state's judicial functions.

4. In fact, the *Sprint* Court explicitly held *Younger* abstention does not apply to an administrative proceeding initiated by a private citizen—like this one:

> [The underlying administrative proceeding] does not resemble the state enforcement actions this Court has found appropriate for *Younger* abstention. It is not "akin to a criminal prosecution." Nor was it initiated by "the State in its sovereign capacity." A private corporation, Sprint, initiated the action. No state

> authority conducted an investigation into Sprint's activities, and no state actor lodged a formal complaint against Sprint.

Id. at 80. Moreover, like The Belt, the plaintiff in *Sprint* was seeking a declaratory judgment that federal law preempted the action of a state regulatory agency. *Id.* at 74. The Supreme Court reiterated a federal court's "virtually unflagging" obligation to hear and decide such a case within its jurisdiction, notwithstanding the pendency of the parallel state proceeding. *Id*. at 77. The Federal Court Action is going to proceed.[1]

5. Weglarz Hotels did not cite *Sprint*—despite the fact that it is controlling law. Further confusing the issue, the cases Weglarz Hotels cited do not support its position. *Employers Resource Mgmt. Co. v. Shannon* involved a state-initiated administrative proceeding, which materially distinguishes the case for the purposes of *Younger* abstention. 65 F.3d 1126, 1128 (4th Cir. 1995). And the *Colonial Life* case is obviously no longer good law after *Sprint*, because it does not fit within any of the three remaining and limited categories of cases appropriate for *Younger* abstention cited above. 572 F.3d 22 (1st Cir. 2009).

6. The Belt does not know why Weglarz Hotels would raise the *Younger* issue without even mentioning *Sprint* when that intervening Supreme Court decision is directly on point. Either Weglarz Hotels is not aware of this seminal, five-year-old case, or Weglarz Hotels did not want the Board to be aware of it. In any event, there is no reason for the federal court to apply *Younger* abstention.

Motion to Stay Standard

7. Next, The Belt addresses the standard Weglarz Hotels claims should apply to the Motion to Stay. The Belt recognizes the Board has used a four-part, state-law test in the past.

[1] To that end, the federal court has already acted quickly and set the initial status hearing for the Federal Court Action on December 19, 2018.

Opp. at 3. But that test is ill-suited to address a situation like this one where a federal court lawsuit seeks to enjoin the Board from taking action in this administrative proceeding.

8. Comity is irrelevant when talking about preemption, because the purpose of federal preemption is to stop the operation of state law. In that vein, the likelihood of complete relief in another forum is inapplicable because the very purpose of the Federal Court Action is to have the question of whether Weglarz Hotels is entitled to any relief at all decided by a federal court. Along those lines, the *res judicata* factor is similarly irrelevant. If The Belt is successful in the Federal Court Action, the federal court will enter an order enjoining the Board. There will be no question about the effect on this case. To the extent the four-part test did apply, the last factor supports the entry of a stay: such action will prevent multiplicity of litigation because it will avoid having the federal preemption issue proceeding in two forums concurrently.

9. Staying this matter is the first step towards resolving the preemption issue efficiently; refusing to do so will have the opposite effect. If the Board denies the Motion to Stay, The Belt would need to proceed and seek preliminary injunctive relief against the Board in the Federal Court Action. The Belt intends no heavy-handed threat in that; it aims only to demonstrate, with due deference and respect, that a stay is appropriate because it will conserve the Board's resources and judicial resources. Initially, a stay will make it unnecessary for The Belt to seek preliminary injunctive relief, and for the Board and its members to defend against such a request.

10. In the long run, staying this case will eliminate the risk of the parties unnecessarily litigating before the Board. It would make little sense for the Board to evaluate the asserted merits of this matter when a federal court could enter an order finding federal law preempts Weglarz Hotels' requested relief at any time. If the federal court sides with The Belt

(as governing precedent indicates it should), that would bar further litigation of this matter. If the federal court were to find that federal law did not preempt Weglarz Hotels' Complaint here, then the Board can resume this case.

11. Weglarz Hotels' claim of prejudice rings hollow in light of the history of this dispute. According to Weglarz Hotels' own Complaint, the noise at issue in this matter began in 2014. (Compl. at ¶ 7.) Weglarz Hotels waited four years to bring its Complaint. Yes, that delay resulted in part because the parties were trying to resolve the matter without litigation. Still, the fact remains: Weglarz Hotels has admitted that it was able to operate its properties successfully for the past four years while the inert retarders were in place. By comparison, unless Weglarz Hotels deliberately tries to stall the Federal Court Action, the parties should be ready to brief summary judgment in six months or less. The federal preemption argument is not fact-intensive; it is largely an issue of law. Weglarz Hotels can wait a few more months to avoid unnecessary and likely impermissible litigation in front of the Board while the federal court addresses the preemption issue.

12. That the Federal Court Action seeks to enjoin the Board distinguishes cases like *Sierra Club v. Midwest Generation, LLC*, in which the movant requested a one-year stay so it could work through a number of regulatory and business processes. PCB No. 13-15 (Ill. Pol. Control Bd., Apr. 17, 2014), 2104 WL 1630316 at *3–5. Similarly, in *Mather Investment Properties, L.L.C. v. Illinois State Trapshooters*, the contemporary state-court action concerned a breach of contract claim against a private party. It did not seek to enjoin the Board. PCB No. 05-29 (Ill. Pol. Control Bd., July 21, 2005), 2005 WL 1943585 at *5.

13. The only other case Weglarz Hotel cited about the motion to stay standard is also distinguishable because, in that case, the resolution of the federal case would not affect the Board

proceeding. Opp. at 10 (quoting *White & Brewer*). By contrast, in the Federal Court Action, The Belt seeks a determination that Weglarz Hotels' claims here are preempted, which should resolve this matter.

14. More importantly, none of those decisions address whether the Board should stay a proceeding so a federal court can decide federal preemption issues. The Belt is trying to conserve administrative resources. The Belt did not want to force the Board and Weglarz Hotels to respond to a motion for preliminary injunction in the Federal Court Action where the Board has sufficient bases to stay this matter itself.

Preemption

15. The merits of the federal preemption argument are not the central focus of the Motion to Stay. The Belt provided a preview of its preemption arguments only to demonstrate to the Board the substantive basis for the Federal Court Action. Therefore, this reply is neither the time nor the place for The Belt to respond to Weglarz Hotels' preemption arguments. Weglarz Hotels' preemption arguments are as wrong as Weglarz Hotels' other arguments, like their position on *Younger* abstention. ICCTA gives the STB exclusive jurisdiction over The Belt's yard operations, and Weglarz Hotels is trying to force The Belt to change those same operations through state law. Knowing the uphill battle it faces, Weglarz Hotels has bombarded the Board with lengthy, intricate, but inherently flawed preemption arguments. The Belt looks forward to addressing them at the appropriate time and in the appropriate forum.

Dated: December 3, 2018

THE BELT RAILWAY COMPANY
OF CHICAGO

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One of Its Attorneys

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