

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
SECTION 27 PROPOSED RULES FOR)
NITROGEN OXIDE (NO_x) EMISSIONS) R07-19
FROM STATIONARY RECIPROCATING) (Rulemaking – Air)
INTERNAL COMBUSTION ENGINES AND)
TURBINES: AMENDMENTS TO 35 ILL.)
ADM. CODE PARTS 211 AND 217)

**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
MOTION FOR RECONSIDERATION OF HEARING OFFICER ORDER**

NOW COMES the Illinois Environmental Protection Agency (“Illinois EPA”), by one of its attorneys, pursuant to 35 Ill. Adm. Code 101.500(d), 101.502, 101.504, 101.520, and 102.402, and hereby requests that the assigned Hearing Officer for the Illinois Pollution Control Board (“Board”) reconsider his decision dated July 11, 2007. Further, as will be explained in more detail below, the Illinois EPA responds to the Pipeline Consortium’s Motion for Production of Information.

I. BACKGROUND

On April 6, 2007, the Illinois EPA filed a proposal to amend Section 201.146,¹ and Parts 211 and 217 of the Board’s regulations. The proposal addressed the control of nitrogen oxides (“NO_x”) emissions from stationary reciprocating internal combustion engines and turbines. On May 11, 2007, the Illinois EPA filed the written testimony of Robert Kaleel, Yoginder Mahajan, and Michael Koerber. On May 17, 2007, the Board split the proposal into two dockets: In the Matter of: Fast-Track Nitrogen (NO_x) SIP Call Phase II: Amendments to 35 Ill. Adm. Code Parts 211 and 217 (R07-18) and Section 201.146, AND In the Matter of: Section 27 Proposed Rules for Nitrogen Oxide (NO_x) Emissions from Stationary Reciprocating Internal Engines and

¹ The Illinois EPA notes that the caption for this matter should be changed to add a reference to the proposed change to Section 201.146, in addition to Parts 211 and 217 as already shown.

Turbines: Amendments to Parts 211 and 217 (R07-19). On May 18, 2007, the Illinois EPA filed a Motion seeking approval to withdraw the testimony of Michael Koerber and Scott Leopold as filed on May 11, 2007. On May 21, 2007, the Hearing Officer orally granted the Motion at the hearing for R07-18. Transcript of May 21, 2007 hearing, p. 3. Therefore, there is no pre-filed testimony from Mr. Koerber currently on file in the present rulemaking (or in PCB R07-18).

On June 15, 2007, the Hearing Officer issued an order setting R07-19 for two hearings commencing on September 16, 2007, and November 5, 2007, respectively. In addition, the Order specified that testimony by the Illinois EPA for the first hearing was to be filed no later than August 27, 2007.

At the end of June, the Pipeline Consortium sent an electronic mail to counsel for the Illinois EPA, requesting a copy of CAMx modeling cited to in Mr. Koerber's withdrawn testimony for R07-18. The Illinois EPA indicated that it did not have the information but that it would request the information from the Lake Michigan Air Directors Consortium ("LADCO") and that the Pipeline Consortium should file a formal request with the Illinois EPA seeking the information following the procedures set forth in the Freedom of Information Act ("FOIA"). Counsel for the Illinois EPA and the Pipeline Consortium then had a call with the Hearing Officer at which time the Pipeline Consortium requested that the Illinois EPA be required to produce the information; the Illinois EPA repeated that it was in the process of obtaining the information but had requested that the Pipeline Consortium follow the FOIA procedures.

Despite the Illinois EPA's agreement to seek the information identified by the Pipeline Consortium from LADCO for the purpose of then providing it to the Pipeline Consortium, based only on the requirement that a request for the information pursuant to FOIA be submitted, on June 29, 2007, the Pipeline Consortium filed a Motion for Production of Information ("Motion

for Production”) in this docket (R07-19). The Motion for Production is based on testimony that had been filed and subsequently withdrawn in docket R07-18. The Motion for Production was served on the Illinois EPA on July 2, 2007. The Pipeline Consortium seeks the information concerning CAMx modeling cited to in Mr. Koerber’s withdrawn testimony in R07-18. The Motion for Production requests that the Hearing Officer order the Illinois EPA to order the LADCO to provide this information directly to the Pipeline Consortium’s consultant. On July 3, 2007, the Pipeline Consortium supplemented the Motion for Production to the Board and requested that information be provided using a USB hard drive via overnight carrier. The supplement was served on the Illinois EPA on July 11, 2007.

II. ARGUMENTS

A. The Illinois EPA Was Not Allowed An Opportunity To File A Timely Response

Pursuant to Section 101.500(d) of the Board’s procedural rules, within 14 days after service of a motion, a party may file a response to the motion. Arguably, the date of service of the supplement filed by the Pipeline Consortium should be the date by which the Illinois EPA’s response is due. However, even looking to the Motion for Production itself, the Illinois EPA has until July 16, 2007, by which to file a response. (Indeed, although it is not the date specified in Section 101.500(d), using the date the Motion for Production was filed with the Board (i.e., June 29, 2007), the Illinois EPA would have until July 13, 2007, to file a response.)

The Hearing Officer’s Order dated July 11, 2007, notes that the Illinois EPA has not filed with the Board any response either to the Motion for Production or to the supplement. Hearing Officer Order, p. 1. That statement, while true, does not go on to note that the Illinois EPA’s time for filing such response(s) had not yet tolled. The Illinois EPA had every intention of filing a timely response to the Motion for Production and the related supplement, and the substance of

that response is provided below. Given that the Illinois EPA was not provided with an opportunity to have the Hearing Officer consider the response to the Motion for Production prior to issuing his order, and that there is no exigent circumstance either cited to by the Hearing Officer or known to the Illinois EPA that would justify the early issuance of an order, the Illinois EPA requests that the Hearing Officer reconsider his Order dated July 11, 2007.

B. The Illinois EPA Does Not Have The Information Sought By The Pipeline Consortium

The Motion for Production provides that the Pipeline Consortium was informed by the Illinois EPA that the Illinois EPA “is processing the data and will provide it within 10-14 days, which would be July 10, 2007, at the latest.” Motion for Production, p. 2. This representation is apparently drawn from a discussion between counsel for the Pipeline Consortium and the Illinois EPA. As the Pipeline Consortium acknowledged in the Motion for Production, the information being sought was not generated by the Illinois EPA, but rather was prepared by LADCO. To date, despite whatever estimates were previously discussed, the Illinois EPA is not in possession of the information sought from LADCO.

As a result, the Motion for Production is premature. Further, in that the Illinois EPA has until August 27, 2007, to file written testimony in this docket, there is no testimony on file from Mr. Koerber or any other Illinois EPA witness. The Hearing Officer is thus being asked, pursuant to the requirements of Section 101.614 and 102.402, to determine that the information sought by the Pipeline Consortium is relevant to this proceeding when in fact no underlying testimony related to that information has yet been filed. The Illinois EPA has already indicated to the Pipeline Consortium that it does not have this information within its possession, but is in the process of obtaining a copy. Those efforts are continuing, but it must be understood that the Illinois EPA is the entity seeking the information, not preparing the information. It is a well-

established principle among the courts of this state and others that a party cannot be compelled to produce that which is not within its possession or control. *Robert J. Wiebusch v. Alan Taylor*, 97 Ill. App. 3d. 210, 422 N.E.2d 875, (Ill. App. 5th Dist. 1981). LADCO is a not-for-profit agency separate from the Illinois EPA. The Illinois EPA does not control this not-for-profit agency or direct its personnel. Therefore, the Illinois EPA is without authority to compel LADCO to produce that which is not in its possession or control; rather, the Illinois EPA can take the route currently being pursued, which is to ask for the information from LADCO and then wait while LADCO responds to that request.

The Illinois EPA again notes that while the Board moved all the documents included with the Illinois EPA's original proposal into new docket R07-19, the Illinois EPA has not yet filed its final testimony for R07-19, and is not required to do so until August 27, 2007.² It is still in the process of determining the extent to which the testimony filed in conjunction with original docket R07-18 is relevant. Sometime between now and August 27, 2007, will the Illinois EPA finalize the testimony it intends to present to the Board in support of this docket.

The regulatory provisions upon which the Pipeline Consortium has filed its Motion for Production require that the information be relevant to the matter under consideration. For the reasons specified above (i.e., the information sought relates to testimony that has been withdrawn, the Illinois EPA has yet to receive this information, and the Illinois EPA cannot force LADCO to provide the information), upon reconsideration the Hearing Officer should deny the Motion for Production. This denial should be on the grounds that the Pipeline Consortium's request is premature, along with the fact that the Illinois EPA does not to date have the

² As part of the wholesale movement of the Illinois EPA's filing in R07-18 into newly created R07-19, the Board also included Mr. Koerber's pre-filed testimony. However, that testimony was docketed as being filed in R07-18, and subsequent to the Board's movement of that (and other) document into the new docket, the Hearing Officer on May 21, 2007, granted the Illinois EPA's request to withdraw Mr. Koerber's testimony. In other words, the Illinois EPA did not seek to withdraw Mr. Koerber's testimony from R07-19 since it was never filed in R07-19.

information sought. In the alternative, if the information sought is to be the subject of an Order, the Hearing Officer should provide that the Illinois EPA produce the information within a time certain after its receipt of the data. Finally, as the Illinois EPA does not yet know what form the data will be in when provided by LADCO, or the size of the data itself, the Illinois EPA cannot yet commit to any particular means of production of the data.

WHEREFORE, for the reasons stated above, the Illinois EPA respectfully requests that the Hearing Officer and the Board deny the Pipeline Consortium's Motion for Production of Information.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Rachel L. Doctors
Rachel L. Doctors
Assistant Counsel
Air Regulatory Unit
Division of Legal Counsel

DATED: July 12, 2007

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STATE OF ILLINOIS)
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SANGAMON COUNTY)

AFFIDAVIT

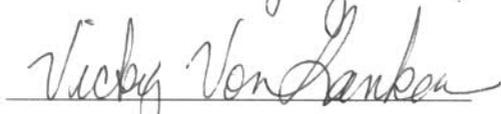
I, Robert Kaleel, upon my oath, do hereby state as follows:

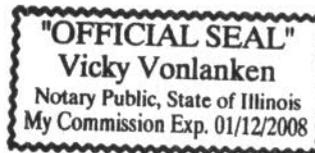
1. I am employed as the Manager of the Air Quality Planning Section of the Division of Air Pollution Control in the Bureau of Air for the Illinois Environmental Protection Agency ("Illinois EPA").
2. In my current position as Section Manager, my responsibilities include oversight of staff that provides technical support for regulatory initiatives needed to address air quality issues in Illinois, including the regulatory proposal to develop the proposal for Section 27 Proposed Rules for Nitrogen Oxide Emissions from Stationary Emissions from Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217, and Section 201.146. I have also been closely involved with the development of Illinois' State Implementation Plans to address the PM2.5 and ozone nonattainment areas in Illinois.
3. I have reviewed the Motion for Reconsideration of the Hearing Officer Order dated July 11, 2007 concerning the Pipeline Consortium's Motion for Production of Information submitted in the rulemaking docketed as PCB R07-19.
4. To the best of my knowledge, the factual information and representations contained within the Motion are true and accurate.

FURTHER AFFIANT SAYETH NOT.


Robert Kaleel

Subscribed and sworn to before me
this 12th day of July, 2007.


Notary Public



R07-19 Service List

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