

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|---|---|----------------------------------|
| IN THE MATTER OF: |) | |
| |) | |
| PETITION OF MIDWEST GENERATION, LLC, |) | AS 07-04 |
| WILL COUNTY GENERATING STATION |) | (Adjusted Standard – Air) |
| FOR AN ADJUSTED STANDARD FROM |) | |
| 35 ILL.ADM.CODE 225.230. |) | |

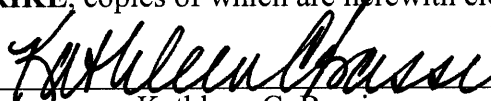
NOTICE OF FILING

To:

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

Persons included on the
ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that we have today electronically filed with the Office of the Clerk of the Pollution Control Board **MOTION FOR LEAVE TO FILE REPLY TO ELPC'S RESPONSE TO MOTION TO STRIKE** and **REPLY TO ENVIRONMENTAL LAW AND POLICY CENTER'S RESPONSE TO MIDWEST GENERATION'S MOTION TO STRIKE**, copies of which are herewith electronically served upon you.



 Kathleen C. Bassi

Dated: February 7, 2008

Kathleen C. Bassi
Stephen J. Bonebrake
Sheldon A. Zabel
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 7th day of February, 2008, I have served electronically the attached **MOTION FOR LEAVE TO FILE REPLY TO ELPC'S RESPONSE TO MOTION TO STRIKE** and **REPLY TO ENVIRONMENTAL LAW AND POLICY CENTER'S RESPONSE TO MIDWEST GENERATION'S MOTION TO STRIKE**, upon the following persons:

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

and electronically and by first class mail, postage affixed, to the persons listed on the **ATTACHED SERVICE LIST**.



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(AS 07-04)

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Courtesy copy to Meleah Geertsma at ELPC

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
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PETITION OF MIDWEST GENERATION, LLC,) **AS 07-04**
WILL COUNTY GENERATING STATION) **(Adjusted Standard – Air)**
FOR AN ADJUSTED STANDARD FROM)
35 ILL.ADM.CODE 225.230.)

**MOTION FOR LEAVE TO FILE REPLY TO ELPC'S
RESPONSE TO MOTION TO STRIKE**

NOW COMES Petitioner, MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION, by and through its attorneys, SCHIFF HARDIN LLP, pursuant to 35 Ill.Adm.Code § 101.500(e), and moves the Board for leave to reply to the Environmental Law & Policy Center's ("ELPC") apparent response to Midwest Generation's Motion to Strike. In support of this Motion for Leave to Reply, Midwest Generation states as follows:

1. Midwest Generation filed a Motion to Strike ELPC's Motion to Intervene on January 14, 2008.
2. On January 22, 2008, ELPC filed a Motion to Withdraw and Refile Motion to Intervene, in Response to Midwest Generation's Motion to Strike. This apparently is ELPC's response to Midwest Generation's Motion to Strike allowed under 35 Ill.Adm.Code § 101.500(d), although it is stylized, at least in part, as a motion.
3. If the Board views ELPC's filing of January 22, 2008, to be a response to the Motion to Strike, then Midwest Generation requests leave to file a reply. Midwest Generation's Reply is included with this filing.
4. Midwest Generation will be materially prejudiced if the Board does not grant this Motion for Leave to Reply and consider Midwest Generation's Reply. The requested adjusted

standard that underlies these motions is currently pending before the Board. The inclusion of additional parties, to which Midwest Generation objects, could cause the proceeding to become more complex than necessary, thus materially prejudicing Midwest Generation.

WHEREFORE, for the reasons stated above, Midwest Generation requests Leave to Reply to ELPC's response to Midwest Generation's Motion to Strike.

Respectfully submitted,

MIDWEST GENERATION, LLC,
WILL COUNTY GENERATING STATION

by:



One of Its Attorneys

Dated: February 7, 2008

Kathleen C. Bassi
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PETITION OF MIDWEST GENERATION, LLC,) **AS 07-04**
WILL COUNTY GENERATING STATION) **(Adjusted Standard – Air)**
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35 ILL.ADM.CODE 225.230.)

**REPLY TO ENVIRONMENTAL LAW AND POLICY CENTER'S
RESPONSE TO MIDWEST GENERATION'S MOTION TO STRIKE**

NOW COMES Petitioner, MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION, by and through its attorneys, SCHIFF HARDIN LLP, and, pursuant to 35 Ill.Adm.Code § 101.500(d), replies to the Environmental Law & Policy Center's ("ELPC") "Motion to Withdraw and Refile Motion to Intervene, in Response to Midwest Generation's Motion to Strike." Midwest Generation offers no response at this time to ELPC's "Renewed Motion to Intervene" because the Board has not yet ruled on Midwest Generation's Motion to Strike and then, possibly, ELPC's Motion to Withdraw and Refile Motion to Intervene." As discussed below, the Board's orders in either of the first two motions could affect the third motion. Midwest Generation requests that the Board enter its order regarding Midwest Generation's Motion to Strike and ELPC's Motion to Withdraw and Refile. If the Board denies Midwest Generation's Motion to Strike and grants ELPC's Motion to Withdraw and Refile, then, in that case, Midwest Generation requests that the Board establish a date by which responses to ELPC's Renewed Motion to Intervene are due. In support of its requests, Petitioner states as follows:

1. Petitioner requests that the Board consider paragraphs 1 through 6 of its Motion to Strike (filed January 14, 2008) as incorporated in this Reply by way of background.

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2. At its January 24, 2008, meeting, the Board held over and took no action on Midwest Generation's Motion to Strike because the time for response had not yet passed.

3. However, on January 22, 2008 (according to the Board's website but dated January 23, 2008 in the certificate of service) ELPC responded to Midwest Generation's Motion to Strike with ELPC's Motion to Withdraw and Refile Motion to Intervene, in Response to Midwest Generation's Motion to Strike and its Renewed Motion to Intervene. The Board noted at this meeting that this filing had occurred.

4. Counsel for Midwest Generation received ELPC's Response on January 25, 2008.

5. There are now currently one or possibly two ripe motions pending before the Board, one of which is characterized as a response to Midwest Generation's Motion to Strike: (1) Midwest Generation's Motion to Strike ELPC's Motion to Intervene, and (2) ELPC's Motion to Withdraw and Refile Motion to Intervene, in Response to Midwest Generation's Motion to Strike. Accepting for purposes of discussion that a motion is a proper response to a motion, because the Board may grant Midwest Generation's Motion to Strike and deny ELPC's Motion to Withdraw and Refile, Midwest Generation believes that the Board must enter its orders regarding these two motions before it reaches ELPC's Renewed Motion to Intervene, which was filed with and is the subject of ELPC's Motion to Refile. Midwest Generation reminds the Board that its Motion to Strike requested that it be granted with prejudice. If the Board were to grant Midwest Generation's Motion to Strike with prejudice, ELPC would be barred from the relief it seeks in its Renewed Motion to Intervene. Therefore, the Board must enter its order on Midwest Generation's Motion to Strike before either Midwest Generation or the Illinois Environmental Protection Agency should be required to respond to ELPC's Renewed Motion to Intervene.

6. Midwest Generation notes that responding to a motion with a motion is not provided for in the Board's rules. Such a response seems to keep open the chain of response and reply, arguably *ad infinitum*. The Board's rules at Part 101, Subpart E do not provide for such a scenario. Particularly in a situation like this one, where a person's participation in a proceeding is in question, the practice of assuming that the Board will grant a motion is quite presumptuous and causes confusion. In the situation where a party files a Motion to File *Instante* with the motion it wishes to file *instanter*, the Board has the option of denying the Motion to File *Instante* and ignoring the substantive motion filed with it. Here, if Midwest Generation responds to ELPC's Renewed Motion to Intervene prior to the Board's order on Midwest Generation's Motion to Strike, it may have expended time and research unnecessarily.

7. Midwest Generation asserts that ELPC has not responded to Midwest Generation's Motion to Strike and thereby waives objection to that motion pursuant to 35 Ill. Adm. Code § 101.500(d) ("If no response is filed, the party will be deemed to have waived objection to the granting of the motion. . ."). If the Board agrees and grants Midwest Generation's Motion to Strike with prejudice, then the two remaining motions filed by ELPC are moot.

8. If the Board grants Midwest Generation's Motion to Strike but without prejudice, then Midwest Generation should be granted time to respond to each of the two motions filed by ELPC on January 22, 2008.

9. If the Board determines that Midwest Generation should have responded to the two motions in this Reply, then Midwest Generation requests that the Board grant it an extension of the time in which to respond, pursuant to 35 Ill. Adm. Code § 101.500(d).

WHEREFORE, for the reasons set forth above, Midwest Generation requests that the Board consider ELPC to have waived its response to Midwest Generation's Motion to Strike and grant that motion with prejudice. In the alternative, if the Board either does not grant the Motion to Strike with prejudice or views ELPC's motions filed in response to Midwest Generation's Motion to Strike as motions rather than a response, Midwest Generation requests that the Board establish a response schedule for each of the motions.

Respectfully submitted,

MIDWEST GENERATION, LLC,
WILL COUNTY GENERATING STATION

by:



One of Its Attorneys

Dated: February 7, 2008

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