

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PETITION OF MIDWEST GENERATION,)
LLC, WILL COUNTY GENERATING) **AS07-04**
STATION FOR AN ADJUSTED STANDARD) **(Adjusted Standard – Air)**
FROM 35 ILL. CODE SECTION 225.230)

**RESPONSE TO THE ENVIRONMENTAL LAW & POLICY CENTER'S
MOTION TO WITHDRAW AND REFILE MOTION TO INTERVENE, IN
RESPONSE TO MIDWEST GENERATIONS' MOTION TO STRIKE, and
RENEWED MOTION TO INTERVENE**

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”) by one of its attorneys, Rachel L. Doctors, Assistant Counsel, and, pursuant to 35 Ill. Adm. Code 101.500(d) and 101.504, hereby respectfully responds to the Environmental Law & Policy Center’s (hereinafter, “ELPC”) Motion to Withdraw and Refile Motion to Intervene, In Response to Midwest Generations’ Motion to Strike, and Renewed Motion to Intervene (“Motion to Withdraw” and “Renewed Motion,” respectively). The Illinois EPA requests that the Illinois Pollution Control Board (“Board”) enter an order denying ELPC’s request to intervene in the above matter. In support of this request, the Illinois EPA states as follows:

1. On December 6, 2007, ELPC filed a Motion to Intervene in the above adjusted standard. The Illinois EPA first became aware of the request when Stephen Bonebrake, counsel for Midwest Generation, contacted Rachel Doctors, counsel for the Illinois EPA in the above matter. To date the Illinois EPA has not received a copy of ELPC’s Motion to Intervene. The Service List attached to the Motion, as found on the Board’s website, indicates that service was sent to Alec Messina, General Counsel, and John J. Kim, Managing Attorney of the Illinois EPA. However, to date they have never received direct service of the Motion.

Electronic Filing - Received, Clerk's Office, February 11, 2008

2. On January 23, 2008, ELPC filed its Motion to Withdraw and Renewed Motion, received by the Illinois EPA on January 28, 2008. The Board's procedural rules provide that a timely response to a motion must be filed within 14 days of receipt of the motion. In this case, the Illinois EPA must file a response to the Motion to Withdraw and Renewed Motion by no later than February 11, 2008.

3. However, as more fully set forth in the Motion for Leave to File Reply to ELPC's Response to Motion to Strike ("Motion for Leave") and Reply to ELPC's Response to Midwest Generation's Motion to Strike ("Reply") filed by the Petitioner, Midwest Generation, LLC ("Midwest Generation"), there are a number of procedural issues and potential defects in ELPC's filings. These issues relate to the content and form of ELPC's Motion to Withdraw and Renewed Motion.

4. The Illinois EPA agrees with Midwest Generation that it is unclear whether ELPC's Motion to Withdraw and Renewed Motion should collectively be considered as a response to Midwest Generation's Motion to Strike. As Midwest Generation argued, there is no further ruling needed as to the Motion to Withdraw or Renewed Motion if the Board grants Midwest Generation's initial to Motion to Strike. In that case, ELPC's Motion to Withdraw and Renewed Motion will both be moot. Midwest Generation has adequately raised and presented these issues and arguments to the Board, so the Illinois EPA will not further address these arguments here.

5. As contemplated by Midwest Generation in their Motion for Leave and Reply, it is possible that the Board could ultimately rule that ELPC's Renewed Motion remains a viable motion and thus subject to a response. In the event that does happen, and to ensure that the Illinois EPA has timely filed a response to the Renewed Motion, the Illinois EPA now responds

directly to the issues raised in the Renewed Motion.

6. The Board's authority to grant intervention status to non-parties is found in 35 Ill. Adm. Code 101.402 of the Board's procedural rules. There is no claim by the petitioning intervenor, and indeed none is provided in Section 101.402(c), that the petitioning intervenor has a statutory right to intervene. The only means by which the petitioning intervenor may be granted party status is for the Board to find that the discretionary provisions of Section 101.402(d) are applicable and weigh in favor of the petitioning intervenor.

7. Section 101.402(d) provides:

Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:

- 1) The person has a conditional statutory right to intervene in the proceeding;
- 2) The person may be materially prejudiced absent intervention; or
- 3) The person is so situated that the person may be adversely affected by a final Board order.

8. To prevail, the petitioning intervenor must demonstrate that at least one of the three criteria in Section 101.402(d) has been met. ELPC has not met that burden. First, ELPC does not cite to any statutory right for intervention, and therefore ELPC has not demonstrated that it has any statutory right to intervene. 35 Ill. Adm. Code 101.402(d)(1).

9. Next, ELPC may show that they will be materially prejudiced absent intervention. 35 Ill. Adm. Code 101.402(d)(2). Again ELPC has failed to make this requisite showing, as they fail to acknowledge the other means by which they may participate in the proceedings. Non-parties to an adjusted standard may file comments, and if a hearing is held, non-parties may also provide oral comments and ask questions of witnesses. These means provide a more than sufficient opportunity for the petitioning intervenor to present any arguments they feel

appropriate to the Board, either through written or oral comments, or questioning of witnesses. These options preclude the petitioning intervenor from making any credible argument that failure to grant them intervention would result in material prejudice.

10. The last component for the Board's consideration in a case of discretionary intervention is whether the person is so situated that the person may be adversely affected by a final Board order. 35 Ill. Adm. Code 101.402(d)(3). ELPC never directly states that it would be adversely affected by a Board order. Instead, ELPC states that because of their involvement in the Illinois Mercury Rule (R06-25) and Clean Air Interstate Rule ("CAIR") (R06-26), their members have an interest in a proceeding that would affect the applicability of the Illinois Mercury Rules. Renewed Motion, par. 2. And second, ELPC states that its members would be directly affected by the way the Illinois Mercury Rule is applied and the consequent mercury emissions from the above facility. Renewed Motion, par. 3. That conclusory statement aside, ELPC has not provided any arguments or facts on how its members are situated differently than other citizens of Illinois or how its members would be materially prejudiced, should its Renewed Motion be denied.

11. The Board and the Illinois EPA are required by statute to protect all citizens from harmful air pollution through adoption and implementation of air pollution control regulations. 415 ILCS 5/1, et seq. Under the Illinois Environmental Protection Act ("Act"), the Illinois EPA is entrusted with development and proposal to the Board of rules to control the emissions of pollutants, including mercury. The Illinois EPA is also responsible for the implementation and enforcement of these regulations, and the evaluation of requests for adjustments to these regulations. 415 ILCS 5/4 and 5/28.1. The Illinois EPA is the sole entity charged with making a recommendation on the Petitioner's request for an adjusted standard. 35 Ill. Adm. Code

104.416. Part of the Illinois EPA's evaluation of whether the adjusted standard should or should not be granted involves evaluating whether the Petition is protective of the environment. *Id.* The Illinois EPA will fulfill this responsibility by a date that will be determined through a future Board order in this matter.

12. If every individual that participated in a rulemaking is granted intervenor status in a subsequent related adjusted standard proceeding based on the allegation that the individual will be affected by the underlying rule, there could be a very large group of persons that may seek to claim intervenor status. Participation in a rulemaking proceeding is not a circumstance that should be deemed sufficient to warrant granting of a motion to intervene in a subsequent adjusted standard proceeding. Indeed, the rationale that ELPC and its members will be affected by the rulemaking given the scope and content of the Illinois mercury rule is an argument that could be made by literally thousands and thousands of people. If each of those people filed a public comment or otherwise participated in a rulemaking, and then sought intervenor status in a related adjusted standard, there would be a lessening of the standards that are intended to allow only real and affected parties to intervene. Hence, ELPC has not met the requirements for intervention as set forth in Section 101.402(d)(3).

13. The Board has not issued any final order that is persuasive in support of the petitioning intervenor's arguments. ELPC cites to no cases to support their request, as indeed none exist.

14. Relevant to the present proceeding are the Board's decisions in other matters involving requests for intervention. For the most part, the Board has not viewed motions to intervene with favor, properly setting forth the requisite regulatory standard in Section 101.402. This is a standard that should not easily be met, as intervention is a significant act with

implications to the parties that are otherwise clearly identified by the statute.

15. In the case of *2222 Elston LLC v. Purex Industries, et al.*, PCB 03-55 (January 23, 2003), the Board considered a request for intervention filed by the City of Chicago (“City”). In that case, after a review of the facts the Board gave no special deference to the City based on its status as a governmental entity. The Board was not persuaded that the City had provided sufficient justification to allow for intervention, despite the City’s argument that financial implications may result from an adverse Board decision.

16. In another case involving a request by an environmental group to intervene in a trade secret case, the Board ruled that intervention was not warranted even when the Petitioner argued that the goal of the Illinois Environmental Protection Act to increase public participation in protecting the environment is facilitated by giving access to the Illinois EPA’s records. The petitioner for intervention had not articulated how its interest would not be adequately represented by the Illinois EPA. The Board found that such argument did not meet the burden of 35 Ill. Adm. Code 101.402(d), but noted that the Sierra Club could participate in the proceeding through the filing of an *amicus curiae* brief or submitting public comments. *Midwest Generation v. Illinois EPA*, PCB 04-185 (November 4, 2004).

17. Based on those decisions, it is clear that the Board considers the standard of whether to grant discretionary intervention to be a strict one. Based on the facts presented here, the petitioning intervenor has not presented a persuasive case that they should be granted intervention.

WHEREFORE, for the reasons set forth above, the Illinois EPA respectfully requests that if the Board finds that ELPC's Renewed Motion withstands the Motion to Strike and Reply filed by Midwest Generation, the Board deny ELPC's Renewed Motion.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ _____
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DATED: February 11, 2008

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