BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, And BYRON SANDBERG	)	
Petitioners	)	
v.	)	
	)	PCB Nos 04-33, 04-34, 04-35
THE CITY OF KANKAKEE, ILLINOIS, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C. LIVINGSTON COUNTY, ILLINOIS	)	
Respondents	)	

REQUEST CONCERNING APPEARANCE

Now comes, CLAIRE A. MANNING, of Posegate & Denes, P.C. and, on behalf of Town and Country Utilities, Inc, respectfully requests and moves that the Board or Hearing Officer make a determination regarding the applicability of Board procedural rule 101.112 (35 Ill. Adm. Code 101.112) to my continued participation in this matter. In support of this request, I offer the following:

(1) From May 1, 1993 through December 31, 2002, I was the Chairman of the Illinois Pollution Control Board and, as such, participated in decision-making with the Board on a variety of cases pursuant to the Illinois Environmental Protection Act. I resigned from the Board, and state government, on December 31, 2002.

(2) In March of 2003 I began practicing law, as counsel to the Springfield firm of Posegate & Denes, P.C.

(3) In early October, Town and Country Utilities, Inc. contacted me to seek my services, as co-counsel, along with attorney George Mueller, in representing that entity in the

pending appeals of a landfill siting application filed with the City of Kankakee on March 7, 2003. Those appeals were filed with the Board on September 22, 2003 and have been docketed as PCB 04-33, 04-34 and 04-35.

(4) My services have been sought to generally serve as co-counsel with Mr. Mueller but more specifically to provide input and advice on two discrete legal issues that are involved in this appeal. Both issues involve questions of first impression for the Pollution Control Board: (a) whether the bar after "disapproval" provision contained in Section 39.2(m) of the Environmental Protection Act (Act) applies to Pollution Control Board reversal of a local jurisdiction's approval; and (b) whether, pursuant to the Act, the Illinois Solid Waste Management Act and Illinois law and constitution, a county solid waste plan can serve to limit a home rule municipality's authority to site a landfill within its jurisdiction.

(5) Section 101.112 (b) of the Board's Procedural rules applies directly to my participation before the Board. It reads:

> "No former Board Member or Board employee may represent any other person in any Board proceeding in which he or she participated personally and substantially as a Board Member or Board employee, unless the Board and, as applicable, all parties or proponents in the proceeding consent in writing after disclosure of the participation."

(6) The Board drew this language from similar language found in the Code of Professional Ethics applicable to Illinois attorneys (See Rule 1.12 of the Supreme Court's Rules of Professional Conduct, Article VII, entitled "Former Judges and Arbitrators"). See *In the Matter of Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130*, R00-20 (March 16, 2000).

(7) Well aware of both these rules, I reviewed them prior to my agreement to serve as co-counsel in this matter and, in order to ensure that my practice before the Board is always in compliance with not only Board rules, but also with the Supreme Court rules referenced above, I

have had contact with the Attorney Registration and Disciplinary Commission, the entity that oversees implementation of those rules. Based upon this review, I agreed to participate and, in order to participate in an upcoming status conference, filed my appearance with the Board.

(8) Upon my first appearance before the Board in this proceeding, a status conference with Hearing Officer Bradley Halloran on October 6, 2003, my prior position with the Board was fully disclosed. I advised all parties to this proceeding that, since these cases were filed after I had left the Board, I did not believe that Section 101.112 of the Board's procedural rules was implicated. When one of the parties raised the earlier City of Kankakee siting appeal (docketed as PCB 03-31, 03-33,and 03-35), I indicated that this proceeding was distinct from the earlier one, in that it was based upon a different application and a separate set of hearings before the City of Kankakee. Moreover, I also explained that my participation in those cases was not "substantial" as I did not participate in any deliberations or decision-making concerning any of the substantive issues facing the Board in that matter.

(9) Subsequent to that status conference, on October 17, 2003, I received a letter from Donald J. Moran, counsel for Waste Management, indicating his position that Section 101.112 of the Board's procedural rules required that the parties and Board consent to my appearance in this matter. See *Attachment A*.

(10) On October 23, 2003, I responded to Mr. Moran in a letter, which I addressed to all parties, and included Mr. Moran's letter to me. My response indicated that while I did not agree with Mr. Moran that Section 101.112 (b) required consent of the parties and the Board for my participation in PCB 04, 33, 04, 34 and 04, 35, in order to avoid even the appearance of impropriety, I asked for the parties' consent to my participation. See *Attachment B*.

(11) At or near that very same time, the Board issued an order in *People of the State of Illinois v. Skokie Valley Asphalt Co., Inc.*, PCB 96-98 (October 16, 2003) that disqualified former Board Attorney Assistant Joel Sternstein, now an Assistant Attorney General, from participating before the Board in that matter.

(12) On October 31, 2003, I received a letter from Ed Smith, the State's Attorney of Kankakee County, which declared that, based upon his reading of the Board's order in *Skokie Valley*, "the existing state of the law prohibits [you] from representing Town & Country, and the issue of "consent" of the parties is largely (if not totally) irrelevant." See *Attachment C.*

(13) The Smith letter has presented the parties to this proceeding, particularly Town and Country, with a quagmire that needs Board interpretation regarding the application of Rule 101.112 (b) to these circumstances.

(14) While I agree with Ed Smith that the Board's decision in *Skokie Valley* suggests that Rule 101.112 (b) is implicated whenever a former Board employee or member appears in a proceeding that had been pending while he or she was at the Board, I do not agree that *Skokie Valley* applies to disqualify me in this matter. Further, I fully appreciate the Board's decision in *Skokie Valley* and I had, as a matter of personal circumstance, already determined that I would NOT appear in any proceeding that had been pending while I was at the Board.

(15) Rule 101.112 (b), however, is based upon Rule 112 of the Supreme Court Rules of Professional Conduct, which rules are exclusively applied, by the courts, to the practice of law in Illinois. These rules, by their language, are only implicated when there is a conflict because a former judge, member or attorney-employee participated in the proceeding while it was pending in the judicial forum at the time he or she worked there. The basis for this rule is

that, because it is the same matter, there is an identifiable conflict, because it's the very same proceeding, and that conflict requires disclosure and consent.

(16) There is no such conflict here as this is a new and distinct proceeding, an entirely different docket, based upon a separate application, a separate local government hearing, a new appeal and with new issues, novel issues, not applicable to the earlier proceeding, which I have been hired to address.

(17) However, the Smith letter has stymied the issue of my participation in this proceeding. Because such a broad reading of *Skokie Valley* might serve to unnecessarily limit my participation, and that of other former employees and members of the Board, from acting as counsel in a Board proceeding, in a way that is neither contemplated by the Board's procedural rules or those of the Supreme Court, I have filed this request.

(18) Since there is, quite often, a similarity of issues and identity of parties in the practice of law, and especially so in a specialized practice, the Board should exercise great care in its interpretation of Rule 101.112 (b). Specifically, to interpret the rule so broadly that it applies, and consent is required, whenever there is a similarity of issues and identify of parties would unduly restrict me, and others, in the proper and appropriate practice of law. As the Board knows, the environmental law community has a myriad of lawyers within its ranks that were once members or employees of the Illinois Pollution Control Board. Indeed, there is another attorney in this very proceeding, engaged by the county, who was an attorney assistant at the Board during the late 80's and early 90's who, during her tenure, provided considerable input into the landfill siting decisions that today serve as the precedent for other landfill siting issues, some of which are relevant to the legal issues in this very proceeding.

(19) In its rather recent review and revision of the Board's procedural rules, the Board contemplated a more conservative approach: requiring a six month bar which would completely prohibit former Board members and employees from participating before the Board during the first six months of separation. While my appearance in this matter would have qualified even under that more conservative approach, the Board declined to establish such a bar in favor of the approach used to govern the practice of law generally. See *In the Matter of Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130*, R00-20 (March 16, 2000)

WHEREFORE, I pray that, for the above-stated reasons, the Board or Hearing Officer forthwith make a determination regarding the applicability or non-applicability of Rule 101.112 (b) to my appearance in these docketed proceedings.

Respectfully submitted,

Claire A. Manning

Claire A. Manning, Attorney

CLAIRE A. MANNING
Posegate & Denes, P.C.
111 N. Sixth Street
Springfield, Illinois 62705
(217) 522-6152
(217) 522-6184 (FAX)
claire@posegate-denes.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, And BYRON SANDBERG	)	
Petitioners	)	
v.	)	
	)	PCB Nos 04-33, 04-34, 04-35
THE CITY OF KANKAKEE, ILLINOIS, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C. LIVINGSTON COUNTY, ILLINOIS	)	
Respondents	)	

AFFIDAVIT OF CLAIRE A. MANNING

Now comes affiant, CLAIRE A. MANNING, of Posegate & Denes, P.C. and states that all of the facts set forth in the preceding document, entitled REQUEST CONCERNING APPEARANCE, are, to the best of my knowledge, true and accurate.

Furthereth, Affiant sayeth not.

Respectfully submitted,

Claire A. Manning

Claire A. Manning, Attorney

State of Illinois)
) ss
County of Sangamon)

Subscribed and sworn to before me this 19th day of November, 2003.

OFFICIAL SEAL
DEBORAH D. COOPER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-2-2005

Notary Public

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, COUNTY OF KANKAKEE, ILLINOIS and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, And BYRON SANDBERG	)	
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Respondents	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that on November 19, 2003, I caused to be filed, with Brad Halloran, the Hearing Officer of the Illinois Pollution Control Board, one copy of the attached REQUEST CONCERNING APPEARANCE, via fax, with appropriate copies via fax, followed by United States Mail, to all those on the effective service list, as set forth in the attached PROOF OF SERVICE. PLEASE TAKE NOTICE that on this same day, I also caused to be filed, with the Clerk of the Illinois Pollution Control Board, via overnight mail, an original and nine (9) copies of this document, addressed as follows:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601-3218

with appropriate copies via United States Mail to all those on the effective service list, as set forth in the attached PROOF OF SERVICE.

Claire A. Manning, Attorney

AFFIDAVIT OF SERVICE

The undersigned hereby under penalty of perjury under the laws of the United States of America, certifies that on November 19, 2003 she served a copy of the foregoing upon:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601-3218

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601-3218
(312) 814-8917
(312) 814-3669 FAX

George Mueller
501 State Street
Ottawa, IL 61350
(815) 433-4705
(815) 433-4913 FAX

Donald J. Moran
Pedersen & Houpt
161 North Clark Street
Suite 3100
Chicago, IL 60601-3224
(312) 261-2149
(312) 261-1149 – FAX

Elizabeth S. Harvey
Swanson, Martin & Bell
One IBM Plaza, 330 North Wabash
Suite 2900
Chicago, IL 60611
(312) 321-9100
(312) 321-0900 FAX

Edward Smith
Kankakee County Administration Bldg
189 E. Court St.
Kankakee, IL 60901
(815) 937-3932 FAX

Kenneth A. Leshen
Leshen & Sliwinski
One Dearborn Square, Suite 550
Kankakee, IL 60901
(815) 933-3385
(815) 933-3397 FAX

Christopher Bohlen
Barmann, Kramer and Bohlen, P.C.
200 East Court Street, Suite 602
P.O. Box 1787
Kankakee, IL 60901
(815) 939-1133
(815) 939-0994 FAX

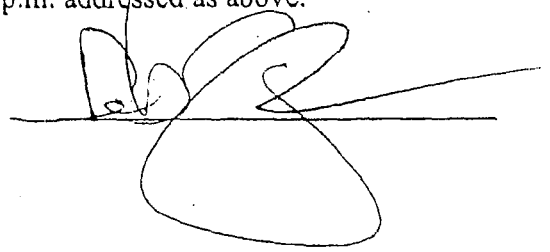
L. Patrick Power
956 North Fifth Avenue
Kankakee, IL 60901
(815) 937-6937
(815) 937-0056 FAX

Richard S. Porter
Charles F. Helsten
Hinshaw & Culbertson
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(815) 490-4900

Byron Sandberg
109 Raub St.
Donovan, IL 60931
byronsandberg@starband.net

Anjanita Dumas, Clerk
City of Kankakee
385 E. Oak Street
Kankakee, IL 60901
(815) 933-0480
(815) 933-0482 FAX

by depositing a copy thereof enclosed in an envelope in the U.S. Mail at Springfield, Illinois, proper postage prepaid, before the hour of 5:00 p.m. addressed as above.



Claire A. Manning
Posegate & Denes, P.C.
111 N. Sixth Street
Springfield, Illinois 62701
(217) 522-6152
(217) 522-6184 (FAX)
claire@posegate-denes.com

ATTACHMENT A

PEDERSEN & HOUPT

October 15, 2003

Donald J. Moran
Attorney at Law
312.261.2149
Fax 312.261.1149
dmoran@pedersenhoupt.com

Claire A. Manning
Posegate & Denes, P.C.
111 N. Sixth Street
Springfield, IL 62705

Re: Sandberg et al v. City of Kankakee et al
PCB Nos. 04-33, 34, 35

Dear Ms. Manning:

I have received your appearance as additional counsel on behalf of respondent, Town & Country Utilities, Inc in the above referenced appeal. As you aware, this appeal involves siting approval for the same facility which was considered by the Board while you served as its Chairperson. As such, your representation of Town & Country Utilities in this appeal is governed by Section 101.112 of the Board's Procedural Rules.

Section 101.112 provides that no former Board Member may represent a person in a Board proceeding "in which he or she participated personally and substantially as a Board Member ... unless the Board and, as applicable, all parties or proponents in the proceeding consent in writing after disclosure of the participation." As a Board member, you issued two orders in the prior appeals, *County of Kankakee et al v. City of Kankakee et al*, Nos. PCB 03-31, 33, 35 (consolidated). In the first order, the Board accepted the petitions for reviews and consolidated them for hearing, denied Mr. Sandberg's request for a waiver of the appeal filing fee, and ordered the County and Waste Management to pay the City of Kankakee the cost of preparing and certifying the record. *County of Kankakee et al v. City of Kankakee et al*, Nos. PCB 03-31, 33, 35 (cons.), slip op. at 2, 4 (October 3, 2002). In the second order, the Board denied the County's motion for expedited decision and its motion for summary judgment. *County of Kankakee et al v. City of Kankakee et al*, Nos. PCB 03-31, 33, 35 (cons.), slip op. at 3 (November 7, 2002). The Board further found that the County provided no persuasive legal authority establishing its right to summary judgment, and held that the Board's opinion in *American Bottom Conservancy v. Village of Fairmont City* was inapposite to the facts of the case. *Id.*

PEDERSEN&HOUPT

Based upon these facts, it appears that you personally and substantially participated as a Board member in the prior appeal of the siting approval for the Town & Country proposed landfill. The issues in the prior appeal are the same issues that have been raised in this appeal, namely, the sufficiency of notice, fundamental fairness, and compliance with statutory criteria two and eight. Accordingly, it would appear that Section 101.112 requires the written consent of the Board and the parties in this appeal to your representation of Town & Country Utilities.

I am confident that you have considered Section 101.112 and are prepared to comply with its requirements. I appreciate your prompt consideration and look forward to hearing from you at your earliest convenience.

Very truly yours,

Donald J. Moran

DJM:vlk

ATTACHMENT B

POSEGATE & DENES, P.C.
Attorneys at Law
111 N. 6th Street, Suite 200
P.O. Box 338
Springfield, IL 62705-0338

Carol Hansen Posegate
Jane Nolan Dene's

Telephone (217) 522-0
Facsimile (217) 522-0

Claire A. Manning
Of Counsel

October 23, 2003

Donald J. Moran
Pedersen & Houpt
161 North Clark Street, Suite 3100
Chicago, Illinois 60601-3242

Re: Sandberg et. al. v. City of Kankakee et. al., PCB. Nos. 04-33, 34, 35.

Dear Mr. Moran:

I have received your correspondence, dated October 15, concerning my participation in the above-referenced matter. As you suggested, I am well aware of Section 101.112 of the Board's procedural rules that prohibits me from representing a person in any Board proceeding in which I participated "personally and substantially" while at the Board --- unless all parties and the Board consent.

However, I do not believe that Section 101.112 of the Board's procedural rules restricts my participation in this matter for two very important reasons. First, the appeal that was pending during my final days at the Pollution Control Board (PCB 03-31, 33 and 35), which is the subject of your objection, was an entirely different Board proceeding than the one that is pending now. The current matter involves a review of a second siting decision made by the City of Kankakee, based upon a second hearing and an entirely different, separate record. Both the hearing and the City's decision are separate and distinct from that which was the subject of the appeal to the Board in PCB 03-31, 33 and 35. While you argue a commonality of issues in these two proceedings, the actual legal issues facing the Board are distinct from those they faced in the prior landfill siting decision and appeal. The notice issues are distinct; the fundamental fairness issues are different – based upon an entirely different hearing; the criteria issues are distinct – based upon an entirely different record.

Second and, even more to the point, I did not substantively participate in the prior proceeding with which you argue the commonality. As you know, the PCB 03-34, 33 and 35 cases were filed and docketed in late 2002. Since I was aware that I would be departing from the Board prior to the Board's decision date, I purposefully did not participate in any substantial way in this appeal. My major role was to assign this matter to a Board member who would lead the Board in its decision-making. The two initial orders that you cite, which I did author, were simple administrative, case management orders – intended to move this case along expeditiously, as required by law. Even the summary judgment order, which *denied* summary judgment, was not

a "substantive" decision of the Board – it simply denied summary judgment because questions of fact existed on the fundamental fairness issues that were raised concerning the siting hearing. Rather, the Board did not address *any* substantive issues, including those issues that were the subject of the summary judgment motion, until its decision on January 8, 2003 – a decision that took place after my departure from the Board and in which I did not participate.

Further, I did not participate in any deliberations that led to the Board's January 8 decision, which is now on appeal to the Third District Appellate Court. A phone call to the attorney assistant who, on behalf of Board Member Girard, assisted in the drafting of Board's decision in PCB 03-31, 33 and 35, has confirmed my lack of substantive participation in that prior proceeding. While that attorney is now in private practice, he was my attorney assistant at the time of the prior proceeding but, since I was leaving the Board, I asked him to work with Board Member Girard in drafting the Board's decision. I advised him, and the rest of the Board and staff, that I would not be participating in the decision in any way – and I did not. For those reasons, I continue to believe that my participation in the instant matter does not require the invocation of Rule 101.112.

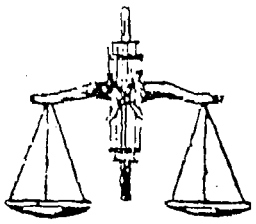
Nonetheless, so that the question of my participation will not in any way unnecessarily jeopardize the current Board proceeding, and to avoid any appearance of impropriety, I will agree to participate only with the written consent of the parties and the Board. Accordingly, I have drafted the attached letter to all parties – and will enclose the instant letter. Given the assurances presented in this letter, which I will be happy to set forth in an affidavit, it is my hope that you and the other parties will grant consent for my participation. If I hear affirmatively from all parties, I will file the necessary paperwork to ascertain the Board's consent. I look forward to hearing from you.

Yours very truly,

Claire A. Manning

Claire A. Manning

ATTACHMENT C



STATE'S ATTORNEY
COUNTY OF KANKAKEE

450 EAST COURT STREET • KANKAKEE, ILLINOIS 60901-3992
(815) 937-2930 FAX • (815) 937-3932

EDWARD D. SMITH
State's Attorney

October 28, 2003

Ms. Claire A. Manning
Posegate & Denes, P.C.
Attorneys at Law
111 N. 6th Street, Suite 200
P.O. Box 338
Springfield, IL 62705-0338

RE: Sandberg et. al. v. City of Kankakee et. al., PCB Nos. 04-33, 34, 35

Dear Ms. Manning:

Thank you for your letter and attachments of October 23, 2003 concerning the above-mentioned matter. In that correspondence, you had indicated that you would only participate in this matter with the "consent" of all parties of record. While I have no doubt that during your career as a lawyer and government official you have earned great respect for your integrity and ethical conduct, I do not believe we need to even get to the issue of the "consent" of all parties of record to your representation of the Respondent Town & Country Utilities in this matter.

Rather, I think the issue at hand has already been decided by the Illinois Pollution Control Board in its October 16, 2003 decision in the case of The People of the State of Illinois v. Skokie Valley Asphalt Company, Inc., et al, (PCB matter 96-98). If you have not already reviewed that decision, I would commend you to a review of that ruling at this time. As I read the decision, in that case, the Respondents moved to recuse one of the attorneys that were representing the Complainant in that matter (Mr. Joel Sternstein). The basis for the motion to recuse Mr. Sternstein was that he had previously served as an assistant to Pollution Control Board Member Melas during the pendancy of this case. The Complainant countered the Respondents' motion to disqualify Sternstein from participating in the case by raising the fact that: (1) no fact specific reference was made to any matters Sternstein worked on which would provide a basis for an inference that Sternstein personally and substantially participated in this case, and (2) this case was never assigned to Mr. Sternstein's superior (Board Member

Melas) for rendering a decision by Mr. Melas during the time Mr. Sternstein worked for him and the Board.

However, as you will note by the Pollution Control Board's discussion of this matter, although the case was never assigned to Board Member Melas during Sternstein's tenure, the docket reveals the Board issued two orders in the case during that time period. As the Pollution Control Board also notes, a review of the Board's meeting minutes concerning those two decisions concerned the Board Member Melas voted on each of those orders. The Board went on to note that while Mr. Sternstein asserted in his affidavit that he had never drafted any opinions or orders or had any other substantive involvement in the Skokie Valley Asphalt matter during his tenure with the Board, the Board went on to note that attorney assistants play an important role in preparing Board Members for each meeting (and in turn, for each vote). Further, although attorney assistants do not cast votes, as the Pollution Control Board aptly notes, it is presumed that all Board Members reach well-decisions on each case they vote on, are adequately prepared to make such decisions, and accordingly, rely upon their attorney assistants for edification and information in this regard.

I would then respectfully submit that if, under the facts presented in the Skokie Valley Asphalt case, the Board found that Attorney Sternstein was, as a matter of law, disqualified from subsequent representation of one of the parties in essentially the same matter, then under the facts as outlined to me in the various correspondence on which I have been copied over the course of the past several weeks, the existing state of the law prohibits you from representing Town & Country, and the issue of "consent" of the parties is largely (if not totally) irrelevant.

In summary, as the Chief Law Enforcement Officer for the County, I feel the law in all such cases should be strictly adhered to, and the decision of the Pollution Control Board in the Skokie Valley case noted above is dispositive on this issue without even going to the issue of the matter of "consent" of the parties.

Sincerely,

Ed Smith
State's Attorney
Kankakee County

POSEGATE & DENES, P.C.
Attorneys at Law
111 North 6th Street, Suite 200
P.O. Box 338
Springfield, IL 62705-0338

Carol Hansen Posegate
Jane Nolan Denes

Claire A. Manning
Of Counsel

Telephone (217) 522-6152
Facsimile (217) 522-6184

Bradley P. Halloran 312-814-3669
Geo. Mueller 815-433-4913
Donald J. Moran 312-261-1149
Elizabeth S. Harvey 312-321-0900
Kenneth A. Leshen 815-933-3397
Christopher Bohlen 815-939-0994
L. Patrick Power 815-937-0056
Richard Porter/Charles Helsten 815-963-9989
Anjanita Dumas 815-933-0482

FAX TRANSMISSION

DATE:

TO:

FAX NO:

FROM: Claire Manning

FAX NO: (217) 522-6184

RE: 11-19-03

MESSAGE:

NUMBER OF PAGES INCLUDING THIS SHEET: 17