

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC)
Petitioner,)
)
)
v.)
)
Illinois Environmental Protection Agency,)
Respondent.)

PCB 04-185
Trade Secret Appeal

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MAY 27 2004

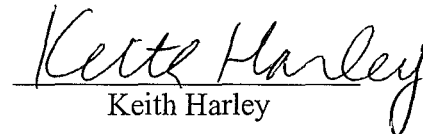
STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To: Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Mary Ann Mullin
Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the SIERRA CLUB'S Motion to Intervene and Appearance, copies of which are herewith served upon you.


Keith Harley

Dated: May 27, 2004

Keith Harley
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MOTION FOR INTERVENTION

NOW COMES THE SIERRA CLUB, by and through its attorneys, KEITH HARLEY and ANNIE PIKE of the CHICAGO LEGAL CLINIC, INC., and respectfully submit this Motion for Intervention pursuant to 35 Ill. Adm. Code 101.402. In support of this motion, the SIERRA CLUB states the following::

1. On or about February 12, 2004, the SIERRA CLUB submitted an Electronic Freedom of Information Act request to the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("IEPA") seeking all documents submitted to IEPA by MIDWEST GENERATION EME, LLC ("Midwest Generation") in response to an information request under Section 114 of the Clean Air Act, 42 U.S.C. § 7414 (c).
2. The SIERRA CLUB is a not-for-profit environmental group with 26,000 members in Illinois. It works on behalf of its members and the general public to restore clean and healthy air to Illinois and to protect Illinois lakes, rivers and streams from pollutants.
3. The records requested by the SIERRA CLUB relate to IEPA oversight of coal-fired power plants and Midwest Generation's compliance with requirements that originate in the Clean Air Act and Illinois Environmental Protection Act.
4. Petitioner, Midwest Generation owns and operates 9 coal-generated power

plants that are subject to the Clean Air Act and other federal and state environmental laws.

5. Respondent, Illinois Environmental Protection Agency is a state agency authorized, among other things, to implement and enforce federal and state environmental laws.

6. At the time it submitted documents to the IEPA, Midwest Generation asserted trade secret protection pursuant to 415 ILCS 5/7.1 and 35 Ill. Adm.Code 130.200 *et seq.*, seeking to prevent public disclosure of these documents.

7. On or about March 10, 2004, the IEPA granted Midwest Generation's request for trade secret protection in part and denied it in part.

8. In its March 10, 2004 letter, IEPA indicated that it would cease protecting information not subject to trade secret protection unless IEPA was served with notice of filing of a Petition for Review. A copy of this letter was sent to the SIERRA CLUB because of its pending Freedom of Information Act request.

9. On or about April 19, 2004, Midwest Generation filed a "Petition For Review of Illinois Environmental Protection Agency's Denial of Trade Secret Protection."

10. This Motion has been filed in a timely manner because, upon information and belief, the IEPA has not yet filed its first responsive pleading to Midwest Generation's Petition and no hearing date has been set to determine Midwest Generation's appeal.

11. The SIERRA CLUB requests that it be allowed to intervene on the

basis that the final order of the IPCB may adversely affect and materially prejudice its interests.

12. Title 35 of the Illinois Administrative Code, Section 101.402 (d)(3), allows for intervention when a party may be adversely affected by a final Board order on the release of information.

13. Because it has a pending Freedom of Information Act request for the information that is the subject of this proceeding, the SIERRA CLUB will be adversely affected if the final decision of the Illinois Pollution Control Board prohibits releasing some or all of the information to it.

14. Moreover, Title 35, Section 101.402 (d)(2), of the Illinois Administrative Code allows for intervention when a party may be materially prejudiced absent intervening.

15. Failure to allow the SIERRA CLUB to intervene may materially prejudice it in several ways, including the following:

- a. preventing the SIERRA CLUB from making an adequate record of its interests in the hearing before the Board in the event that SIERRA CLUB decides to appeal any adverse decision regarding the release of the requested records by the IPCB as authorized by Illinois statute, 415 ILCS 4/41 and Ill. Adm. Code 130.201(b).
- b. preventing it from adequately representing the interests of its members and the public at large in having access to information compiled by the IEPA.

- c. preventing the SIERRA CLUB and the public at large from gaining a better understanding of how the IEPA enforces laws and regulations related to air and water pollution in keeping with the public's right to educate itself on the environmental protection process;
- d. preventing the SIERRA CLUB and the public at large from gaining a well-grounded understanding of the compliance status of MIDWEST GENERATION and, in turn, evaluating opportunities for members of the public to participate in efforts to remedy any non-compliance.

16. One of the stated goals of the Illinois General Assembly in enacting the Illinois Environmental Protection Act is to increase public participation in protecting the environment. 415 ILCS § 5/2(a)(v). This goal is facilitated in part by allowing the public access to the records of the IEPA, with certain well-known exceptions. The public's right to have access to these records is underscored by the Illinois Freedom of Information Act, 5 ILCS 140/1, Section 114 (c) of the Clean Air Act and Section 7 of the Illinois Environmental Protection Act, all of which are intended to allow the free flow of information to the general public, including the SIERRA CLUB..

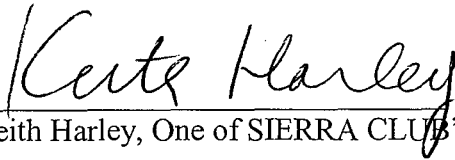
17. For the parties already involved in this appeal, the focus of the hearing is to determine whether Midwest Generation's records are protected from disclosure to the SIERRA CLUB because they are trade secrets.

18. The SIERRA CLUB'S focus in this hearing is altogether different and involves creating a record of the public's interests in having access to information consistent with Illinois and federal law. The SIERRA CLUB is not seeking to

participate in these proceedings in order to gain access to the disputed documents prior to a final IPCB decision on the trade secret protection issue.

19. Allowing the SIERRA CLUB to intervene will not unduly delay these proceedings nor materially prejudice either Midwest Generation or the IEPA in light of the timeliness of this motion and the disparate interests of the SIERRA CLUB and the original parties to the appeal.

WHEREFORE, for the reasons stated above, the SIERRA CLUB prays that the Illinois Pollution Control Board enter its order allowing the SIERRA CLUB to intervene and for leave for its attorneys to file their Appearances.

A handwritten signature in black ink, reading "Keith Harley". The signature is written in a cursive, flowing style. The first name "Keith" is written with a large, prominent "K". The last name "Harley" is written with a large, prominent "H". The signature is written over a horizontal line.

Keith Harley, One of SIERRA CLUB'S Attorneys

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APPEARANCE

KEITH HARLEY and ANNIE PIKE, hereby enter the appearance of the SIERRA CLUB, and their appearance as Counsel for the SIERRA CLUB, in the above matter.



Keith Harley
One of the attorneys for SIERRA CLUB

Date: May 27, 2004

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CERTIFICATE OF SERVICE

I, KEITH HARLEY, an attorney, certify that true copies of the foregoing Motion to Intervene and Appearance were mailed by First Class Mail, by depositing the same in the U.S. Mail depository located at 220 West Monroe, Chicago, Illinois, in an envelope with sufficient postage prepaid on May 27, 2004, to the following:

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

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