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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JUN 17 2004

MIDWEST GENERATION EME, LLC)
)
 Petitioner,)
)
 v.)
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

STATE OF ILLINOIS
Pollution Control Board

PCB No. 4-185
(Trade Secret Appeal)

**OBJECTION TO SIERRA CLUB'S MOTION FOR
INTERVENTION AND APPEARANCE**

The Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorney, Robb Layman, respectfully submits this Objection to Sierra Club's Motion for Intervention pursuant to 35 Ill. Adm. Code 101.500 and, in support thereof, states as follows:

The Illinois EPA denied trade secret protection for certain information submitted by the Petitioner, MIDWEST GENERATION EME, LLC, ("Midwest Generation") on November 6, 2003, concerning capital projects at its coal-fired electric generating units and the net generation, the coal heat content, and the net heat rate for its coal fired units. These articles had previously been submitted in response to an information request made by the United States Environmental Protection Agency ("U.S. EPA") consistent with the requirements of Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). Pursuant to the same provision, Midwest Generation sent a copy of the response to the Illinois EPA.

On April 19, 2004, Petitioner filed a petition before the Pollution Control Board ("Board") appealing the Illinois EPA's trade secret determination of March 10, 2004, and on or about May 20, 2004, the Illinois EPA timely filed the Administrative Record consisting of approximately 2,700 pages.

On May 27, 2004, Sierra Club filed a Motion for Intervention and Appearance asserting it would be adversely affected by a final Board order and it would be materially prejudiced absent intervention in the instant action. The Illinois EPA received Sierra Club's Motion for Intervention and Appearance on June 1, 2004.

The Board may allow a person to intervene in an 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.

See, 35 Ill. Adm. Code 101.402(d). While the Board's decision to grant or deny intervention is discretionary, the Board is to "consider the timeliness of the motion and whether the intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding." 35 Ill. Adm. Code 101.402(b). See also, *Prairie Rivers Network v. Illinois Environmental Protection Agency*, PCB 01-112 (April 19, 2001).

Sierra Club does not contend that it possesses a statutory right to intervene but, rather, that it will be adversely affected by a final order to the extent that the Board denies the release of some or all of the contested information. Motion at ¶ 13. Specifically, Sierra Club asserts that it may be materially prejudiced if the Board does not grant its request to intervene. Motion at ¶ 15. Sierra Club's motion fails to articulate grounds that warrant the Board's exercise of discretion in this instance.

To the extent that the Board denies the release of some or all of the disputed documents, Sierra Club will, admittedly, be denied the right to view this information. In the absence of intervention, however, it cannot be said that the movant will be materially prejudiced. Sierra Club claims that both the Illinois EPA and Midwest Generation seek to determine whether the disputed records are protected from disclosure to Sierra Club because they constitute trade secrets. Meanwhile, Sierra Club's interest or focus in this

matter purportedly involves establishing a record of the public's interest in access to information consistent with applicable law. See, Motion at ¶ 17 and ¶ 18. This distinction is semantical. In actuality, the Illinois EPA determined that the disputed records did not constitute trade secrets and thus, in accordance with state and federal law, the public was entitled to view the documents. Midwest Generation subsequently sought this review of the Illinois EPA's determination.

Even assuming that Sierra Club's distinction is not illusory, the Illinois EPA is statutorily obligated to ensure that the public's access to information is in accordance with the applicable laws. Section 7(a) of the Illinois Environmental Protection Act ("Act") requires the Illinois EPA to have all files, records and data open, for reasonable public inspection with the exception of certain documents that constitute trade secrets. Meanwhile, Section 7(c) of the Act provides that all emission data reported to the Illinois EPA shall be made available to the public to the extent required by the federal Clean Air Act. These requirements are facilitated by Section 4(b) of Act, which requires the Illinois EPA to collect and disseminate information as necessary to carry out the Act's purposes. Accordingly, the Illinois EPA is required to not only collect and disseminate information, but to affirmatively ensure that the public is afforded access to files, records and data. Because the Sierra Club and the Illinois EPA both seek to protect the same interest, the movant will not be materially prejudiced if prohibited from intervening.

While the Sierra Club asserts that it is not seeking to gain access to the disputed information, it appears to concede that intervention would possibly disclose the very information sought by Sierra Club in the Freedom of Information ("FOIA") request. Motion at ¶ 18. A review of Illinois case authority is not instructive on this issue. Third party intervention in trade secret matters have been allowed by federal courts in some circumstances. For instance, the Ninth Circuit in *Formulabs, Inc. v. Hartley Pen Company et al.*, 275 F. 2d 52 (9th Cir.), cert. denied, 363 U.S. 830 (1960), allowed a third

party to intervene solely in the discovery stage of the case to argue against defendant's disclosure of trade secrets in which the intervenors claimed an interest. *Id.* at 56. The court found that the intervenors would be adversely affected by disclosure of their secret formula and secret testing procedures at issue in discovery. *Id.* see also, *Formulabs, Inc. v. Hartley Pen Company et al.*, 318 F. 2d 485 (9th Cir.) (1963) (third party allowed to intervene to assert their own trade secret rights and to protect against their disclosure); see also, *Save the Dolphins v. United States Department of Commerce, et al.*, 404 F. Supp. 407 (N. D. California) (1975) (third party intervened to protect against disclosure of tuna fishing trade secrets); see also, *Northwest Coalition for Alternatives to Pesticides, et al., v. Browner*, 941 F. Supp. 197 (District of Columbia) (1996) (third party allowed to intervene to protect common names and chemical abstract numbers for inert ingredients in pesticides). This federal case law suggests that third party intervention is permissible where the intervenor shows a property interest in the disputed information.

If the Board were to allow the motion to intervene and appropriately limited Sierra Club's access to the disputed information, the movant would arguably contribute little to the substance of the proceeding. Instead, Sierra Club could likely complicate and unnecessarily delay the instant action. Such an outcome is undesirable and is especially unnecessary given that formal intervention in this proceeding is not required to protect the interests of Sierra Club's membership. Instead, the interests of Sierra Club's membership, if any, may be addressed through oral or written statements at hearing, public comments and/ or the filing of an amicus curiae brief. See, 35 Ill. Adm. Code 101.110(c) and 101.628; see also, *Prairie Rivers Network v. Illinois Environmental Protection Agency*, PCB 01-112 (April 19, 2001) ("When time, facilities, and concerns for a clear and concise record allow, the hearing officer may permit participants to make oral or written statements, provided that they are under oath and are subject to cross-examination."). Accordingly, the Illinois EPA respectfully requests that any involvement

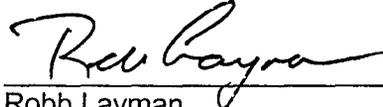
of the Sierra Club be limited to oral or written statements at hearing, public comments or the filing an amicus curiae brief.

If the event that the Board grants Sierra Club's motion to intervene, the interests of justice dictate that the participation of the movant be limited to avoid unnecessary complication and delay of this proceeding. Specifically, the Illinois EPA requests that Sierra Club (1): not be allowed to control any decision deadline; (2) be barred from serving discovery, interrogatories, and requests to admit; (3) be barred from conducting any depositions; (4) be bound by all Board and hearing officer orders issued to date; and (5) not be allowed to raise any issues that were raised or might have been raised earlier in this proceeding. See, 35 Ill. Adm. Code 101.402(e). Due to the Sierra Club's and the Illinois EPA's alignment of the interests, the Sierra Club will not be prejudiced by such limitations.

WHEREFORE, the Illinois EPA respectfully requests that the Illinois Pollution Control Board deny Sierra Club's Motion for Intervention and related leave for its attorneys to enter their Appearances.

Respectfully submitted,

ILLINIOS ENVIRONMENTAL
PROTECTION AGENCY



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This Filing Submitted on Recycled Paper

CERTIFICATE OF SERVICE

I hereby certify that I did on the 15th day of June 2004, send by First Class Mail, with postage thereon fully paid and deposited into the possession of the United States Postal Service, one (1) original and nine (9) copies of the following instruments entitled NOTICE and OBJECTION TO SIERRA CLUB'S MOTION FOR INTERVENTION AND APPEARANCE to:

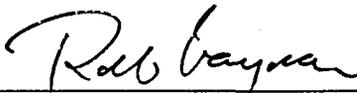
Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

and a true and correct copy of the same foregoing instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

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