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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JUL 12 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)

NOTICE OF FILING

TO: Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

**(VIA FACSIMILE TRANSMISSION
and FIRST CLASS MAIL)**

Brad Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

**(VIA FACSIMILE TRANSMISSION
and FIRST CLASS MAIL)**

(PERSONS ON ATTACHED SERVICE LIST VIA FIRST CLASS MAIL)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of the MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND APPEARANCE, ENTRY OF APPEARANCE, and AMICUS CURIAE BRIEF OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP, copies of which are herewith served upon you.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 

ROBERT A. MESSINA

Dated: July 6, 2004

Robert A. Messina
Illinois Environmental Regulatory Group
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MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF AND APPEARANCE

The Illinois Environmental Regulatory Group ("IERG"), an affiliate of the Illinois State Chamber of Commerce, moves the Illinois Pollution Control Board ("Board"), pursuant to 35 Ill. Admin. Code §§ 101.500 and 101.110(c), for leave to file an amicus curiae brief in the above-referenced matter. In support of this Motion, IERG states as follows:

1. This matter involves a trade secret appeal filed by the Petitioner following the partial denial of its request for trade secret protection by the Respondent. After a petition for the review of this decision was filed with the Board, the Sierra Club filed a Motion to Intervene on the grounds that the final order of the Board "may adversely affect and materially prejudice its interests." See Paragraph 11, Sierra Club's Motion to Intervene.

2. This matter presents an issue that is of significant concern to the member companies of IERG and to industry throughout the State.

3. IERG is a not-for-profit Illinois corporation comprised of 66 member companies engaged in industry, commerce, manufacturing, agriculture, trade, transportation or other related activity, and which persons, entities or businesses are

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regulated by governmental agencies which promulgate, administer or enforce environmental laws, regulations, rules or other policies. IERG was organized to promote and advance the interests of its members before governmental agencies, such as the Illinois Environmental Protection Agency and Illinois Pollution Control Board, and before judicial bodies, such as the Illinois Courts. Moreover, IERG is an affiliate of the Illinois State Chamber of Commerce ("ISCC"), which has more than 5,000 members in the State.

4. The Board has before granted IERG leave to participate as an amicus. Prairie Rivers Network v. Illinois Environmental Protection Agency, PCB 01-112 (April 19, 2001). The Supreme Court of Illinois has also granted IERG leave to participate as an amicus. CIPS v. Illinois Pollution Control Board, 116 Ill. 2d 397, 507 N.E.2d 819, 107 Ill. Dec. 666 (1987); Village of Carpentersville v. Illinois Pollution Control Board, (Cargill, Inc.) 135 Ill. 2d 463, 553 N.E.2d 362, 142 Ill. Dec. 848 (1990); People v. Brockman, 143 Ill. 2d 351, 574 N.E.2d 626, 158 Ill. Dec. 513 (1991); Grigoleit Company v. Illinois Pollution Control Board, 152 Ill. 2d 558, 622 N.E.2d 1205, 190 Ill. Dec. 888 (1993); Envirite Corporation v. Illinois Environmental Protection Agency, 158 Ill. 2d 210, 632 N.E.2d 1035, 198 Ill. Dec. 424 (1994). More recently, IERG has also participated as an amicus in cases before the Illinois appellate courts. States Land Improvement Corp. v. Illinois Environmental Protection Agency, 231 Ill. App. 3d 842, 596 N.E.2d 1164, 173 Ill. Dec. 285 (4th Dist. 1992), Color Communications, Inc. v. Illinois Pollution Control Board, 288 Ill. App. 3d 527, 680 N.E.2d 516, 223 Ill. Dec. 783 (4th Dist. 1997), International Union, United Automobile, Aerospace and Agricultural

Implementation Workers of America, and UAW Local 974, and Citizens for a Better Environment v. Caterpillar, No. 3-96-0931 (3d Dist. 1997) (unpublished opinion).

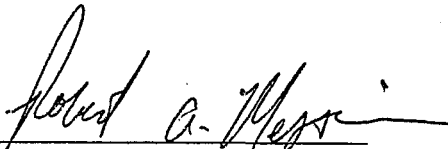
5. Having become aware of Sierra Club's motion to intervene in Petitioner's trade secret appeal permit, IERG requests the opportunity to file an amicus curiae brief because the issues presented in this matter are of vital importance to IERG's member companies and to industry throughout the State. Specifically, most of IERG's member companies submit information to the Illinois EPA which includes material claimed as trade secret; thus, IERG's members have an interest in the procedure by which appeals of such trade secret determinations take place.

6. Allowing IERG to file an amicus brief would assist the Board in considering this matter by presenting the viewpoint of Illinois industrial concerns on issues that are important to the regulated community.

WHEREFORE, the Illinois Environmental Regulatory Group respectfully requests that this Board grant it leave to file the attached Amicus Curiae Brief in this matter and leave for its attorney to enter his Appearance.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
Robert A. Messina

Dated: July 6, 2004

Robert A. Messina
General Counsel
ILLINOIS ENVIRONMENTAL REGULATORY GROUP
3150 Roland Avenue
Springfield, Illinois 62703

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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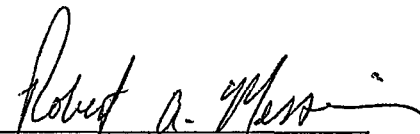
PCB No. 4-185
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ENTRY OF APPEARANCE OF ROBERT A. MESSINA

NOW COMES ROBERT A. MESSINA, of the Illinois Environmental Regulatory Group,
and hereby enters his appearance in this matter on behalf of the
Illinois Environmental Regulatory Group.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: 
ROBERT A. MESSINA

Dated: July 6, 2004

Robert A. Messina
Illinois Environmental Regulatory Group
3150 Roland Avenue
Springfield, Illinois 62703
(217) 523-4942

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AMICUS CURIAE BRIEF OF THE
ILLINOIS ENVIRONMENTAL REGULATORY GROUP

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by one of its attorneys, Robert A. Messina, and submits its Amicus Curiae Brief in the above-captioned matter to the Illinois Pollution Control Board ("Board"), stating as follows:

I. INTRODUCTION

As noted in IERG's Motion for Leave to File Amicus Curiae Brief, filed herewith, IERG is a not-for-profit Illinois corporation affiliated with the Illinois State Chamber of Commerce and comprised of 66 member companies regulated by governmental agencies which promulgate, administer or enforce environmental laws, regulations, rules or other policies. IERG has monitored this matter and has concerns with arguments advanced by the Sierra Club in its Motion to Intervene in this trade secret appeal. Most of IERG's member companies submit information to the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") that's claimed trade secret, and, thus, IERG's members have an interest in the procedure by which the appeals of such claims take place.

IERG has specific concerns regarding the ability of a third party to intervene in a trade secret appeal, where the resolution of that matter will clearly involve argument,

depositions, and details of those very documents. Allowing intervention to be granted would circumvent those protections for trade secrets put in place by the Illinois Environmental Protection Act ("Act"). IERG respectfully prays that the Board consider its concerns regarding these arguments when issuing its decision in this matter.¹

II. THE SIERRA CLUB HAS NOT ARTICULATED GROUNDS SUFFICIENT TO WARRANT INTERVENTION

Sierra Club does not contend that it possesses a statutory right to intervene but, rather, that the Board should grant it intervenor status pursuant to 35 Ill. Adm. Code §101.402(d)(3) because 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. *See* Paragraph 13, Sierra Club's Motion to Intervene. As was noted by the Illinois EPA before its objection was curiously withdrawn, Illinois case law is not instructive on this issue. A review of federal case law, however, suggests that third party intervention is permissible where the intervenor shows a property interest in the disputed information. 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

¹ IERG has responded in this Brief to certain issues that are of interest to its member companies. Neither the Board nor any party to this action should construe the fact that IERG has not addressed other arguments raised by other parties to this matter as an indication that IERG has any certain position as to those arguments.

rights and to protect against their disclosure); 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); Northwest Coalition for Alternatives to Pesticides, et al., v. Browner, 941 F. Supp. 197 (Dist. of Columbia) (1996) (third party allowed to intervene to protect common names and chemical abstract numbers for inert ingredients in pesticides). Here, in this matter before the Board, the Sierra Club possesses no such interest. It's interest, rather, is to see that the documents are disclosed, which the Illinois EPA has already determined to do.

Further, the Sierra Club argues, intervention is appropriate pursuant to 35 Ill. Adm. Code §101.402(d)(2) to prevent the material injustice that would be caused by 1) preventing it from making an adequate record of its interests in this matter, 2) preventing it from adequately representing the interests of its members, 3) preventing it from gaining a better understanding of how the legal process works, and 4) preventing it from gaining an understanding of the compliance status of the Petitioner. *See* Paragraph 15, Sierra Club's Motion to Intervene. A material injustice would not occur were the Board to deny Sierra Club's Motion to Intervene. In its motion, the Sierra Club suggests that failure to intervene would prohibit it from making an adequate record of its interests in the hearing before the Board in the event it decides to appeal the Board's decision. IERG cannot believe that the only way for a party to make a record of its interests is to intervene in each and every instance before the Board where such an interest arises. Such an interpretation would require dozens, or even hundreds, of precautionary "interventions" to ensure that a record of one's interests are made in the event that a Board decision would warrant appeal. Instead, IERG believes, an adequate record could be made

through oral or written statements at hearing, public comment, or, as IERG does here, the filing of an amicus curiae brief.

Sierra Club also need not be granted intervenor status to address its second and third points in support of its argument that it could be materially prejudiced, specifically that denying its request would prevent the Sierra Club from adequately representing the interests of its members and from gaining a better understanding of how the legal process works. *See* Paragraph 15(b) and (c), Sierra Club's Motion to Intervene. For the same reason as above, Sierra Club's membership could have its interests represented in either written comments or oral statements at hearing, or through the filing of an amicus curiae brief. Attendance at the hearing itself, as well as review of all of the filings currently available on the Board's website, would assist the Sierra Club in gaining a better understanding of how the Illinois EPA enforces laws and regulations.

Finally, Sierra Club's final argument, that denying its motion would prevent it from gaining an understanding of the compliance status of the Petitioner, really has nothing to do with the underlying cause of action. The matter before the Board is a trade secret appeal. In such cases, "[a]n article will be determined to represent a trade secret if . . . the statement of justification demonstrates that the article has not been published, disseminated, or otherwise become a matter of general public knowledge, and the article has competitive value." 35 Ill. Adm. Code 130.208. Compliance status is not a part of this test.

Given the limited circumstances in which third party intervention has been granted in trade secret claims, and the many other opportunities that exist for the Sierra

Club to raise the interests of its membership in this matter, IERG believes that granting the Sierra Club intervenor status is unnecessary.

III. THE ACCEPTED LIMITATIONS ARE NOT SUFFICIENT TO ENSURE THE SAFEGUARDS FOR TRADE SECRET CLAIMS ARE MET

While the Sierra Club asserts that it is not seeking to gain access to the disputed information, it concedes that that intervention would possibly disclose the very information at the heart of this trade secret appeal and sought by the Sierra Club. *See* Paragraph 18, Sierra Club's Motion to Intervene. In an attempt to address this concern, as indicated in the Respondent's second filing in response to the Sierra Club's request, the Sierra Club is apparently willing to abide by the following limitations: 1) it shall not be allowed to control any decision deadline; 2) it shall be barred from serving discovery, interrogatories, and requests to admit; 3) it shall be barred from conducting any depositions; 4) it shall be bound by all Board and hearing officer orders issued to date; 5) it shall not be allowed to raise any issues that were raised and decided, or might have been raised, earlier in the proceeding; and 6) the Sierra Club shall not be provided with the subject documents for which trade secret protection is claimed. *See* Paragraph 2, Respondent's Stipulation Withdrawing Respondent's Objection.

What advantage, then, would be conferred with intervenor status that would not accrue to the Sierra Club if it instead filed an amicus curiae brief? While the Sierra Club is barred from serving discovery, are they barred from reviewing it? Perhaps not. While it is barred from conducting depositions, would the Sierra Club be permitted to *attend* depositions? Even if the deposition were to address the substance of the documents that were claimed trade secrets by the Petitioner? Perhaps so. While the Sierra Club shall not

be provided the subject documents, may they discuss them with the other parties?

Maybe. Is the Attorney General's Office even bound by Part 130, given its absence as a named party from those regulations, and what effect will that have on the limitations accepted by the Sierra Club? These limitations are simply not sufficient to ensure that the safeguards provided within the Act for trade secret claimants are met.

Given the minimal contribution to the proceeding that Sierra Club will have due to the limitations it has apparently agreed upon and the potential for disclosing the information at the heart of this very matter surrounding trade secrecy, IERG believes that the risks that come with intervention in this type of case outweigh any potential benefit. Quite frankly, IERG cannot fathom how intervention could be in any way useful or productive unless the information at issue was disclosed to the intervenor. How can any party to this type of action add anything of value to a determination of whether "an article has not been published, disseminated, or otherwise become a matter of general public knowledge, and the article has competitive value," absent knowing what that article is? This would be analogous to seeking to intervene in the penalty setting phase of a trial while agreeing to not having any knowledge of the offense committed. As noted above, the appropriate way for the Sierra Club to achieve its stated goals is to attend the hearings and file appropriate oral or written comments, or to file an amicus curiae brief.

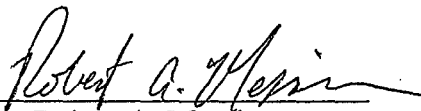
IV. CONCLUSION

WHEREFORE, the Illinois Environmental Regulatory Group respectfully requests that the Board consider the arguments set forth above in making its determination in this matter.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: July 6, 2004

By: 
Robert A. Messina

Robert A. Messina
General Counsel
ILLINOIS ENVIRONMENTAL REGULATORY GROUP
3150 Roland Avenue
Springfield, Illinois 62703

CERTIFICATE OF SERVICE

I, Robert A. Messina, the undersigned, certify that I have served a copy of the
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND APPEARANCE,
ENTRY OF APPEARANCE, and AMICUS CURIAE BRIEF OF THE ILLINOIS
ENVIRONMENTAL REGULATORY GROUP upon:

Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Brad Holloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

SEE ATTACHED SERVICE LIST.

by facsimile transmission to Dorothy M. Gunn, Clerk of the Board, and Brad Holloran,
Hearing Officer, and depositing said documents in the United States Mail in Springfield,
Illinois on July 6, 2004.



ROBERT A. MESSINA

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