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APR 17 2002

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS  
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
v.	)	PCB 99-134
	)	
PEABODY COAL COMPANY, a Delaware	)	
corporation,	)	
Respondent.	)	

**NOTICE OF FILING AND PROOF OF SERVICE**

To:	Jane E. McBride (via hand delivery)	Steven C. Langhoff (via hand delivery)
	Environmental Bureau	Hearing Officer
	Attorney General's Office	Illinois Pollution Control Board
	500 S. Second St.	600 South Second Street, Suite 402
	Springfield, IL 62706	Springfield, IL 62704

Pollution Control Board, Attn: Clerk (via U.S. mail)	David Joest (via U.S. mail)
100 West Randolph Street	Peabody Coal Company
James R. Thompson Center	1951 Barrett Court
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Chicago, IL 60601-3218	Henderson, KY 42419-1990

W.C. Blanton (via U.S. mail)  
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PLEASE TAKE NOTICE that on the 16th day of April, 2002, we sent to the Clerk of the Pollution Control Board the original and nine copies of the Motion to Strike for filing in the above entitled cause.

The undersigned certifies that a true and correct copy of the above-described document were served upon the above-identified individuals via U.S. mail or hand delivery (as noted above), by enclosing the same in envelopes properly addressed, with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mail box, on the 16th day of April, 2002.

  
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, )  
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 Complainant, )  
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 v. )  
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 PEABODY COAL COMPANY, a Delaware )  
 corporation, )  
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 Respondent. )

PCB 99-134

STATE OF ILLINOIS  
Pollution Control Board

**MOTION TO STRIKE**

NOW COMES Respondent, PEABODY COAL COMPANY (hereinafter "PCC"), through its undersigned attorneys, and pursuant to Board procedural rule 101.500, 35 Ill. Adm. Code 101.500, moves this Board to strike paragraphs 10, 11 and 12 of the Complainant's "Response to Respondent's Motion for Leave to File Reply to Complainant's Response to Respondent's Motion for Leave to File Instanter Respondent's Motion to Dismiss or Strike." In support of this Motion to Strike, PCC states as follows:

1. Currently before this Board are PCC's Motion for Leave to File Instanter, with attached proposed Motion to Dismiss or Strike Complaint, the response to that motion for leave to file instanter filed by the Complainant, PCC's motion for leave to file a reply to Complainant's response, along with the supplemental filing of the proposed reply (being submitted at the same time as with this pleading), and Complainant's response to PCC's motion for leave to file the reply, which included its own motion to strike PCC's Motion for Leave to File Reply. Today PCC is submitting its response to the motion to strike PCC's Motion for Leave to File Reply, and with this instant pleading, PCC moves to strike paragraphs 10, 11 and 12 of Complainant's response to PCC's motion for leave to file the reply, on the grounds that

these paragraphs contain improper argument of the underlying issues as opposed to addressing the motion for leave to file the reply.

2. In paragraph 10 of its response to PCC's Motion for Leave to File Reply, Complainant re-argues issues purportedly raised in its response objecting to PCC's motion for leave to file instanter. Of course, the reargument is improper; even more improper, though, is Complainant's assertion that its response objecting to PCC's motion for leave to file instanter was premised on the requirements of Section 101.522 of this Board's procedural rules, 35 Ill. Adm. Code 101.522. In point of fact, Section 101.522 is never mentioned in Complainant's response to PCC's motion for leave to file instanter, nor is any argument based on that regulation ever articulated. It is clear, therefore, that Complainant is improperly utilizing this purported response as a means to clarify and elaborate upon and add to arguments and authorities made in its original response to PCC's motion for leave to file instanter. For this reason, paragraph 10 should be stricken.

3. In paragraph 11 of Complainant's response to PCC's motion for leave to file a reply, Complainant again elaborates on arguments raised or which purportedly were raised in Complainant's own response to PCC's motion to file instanter. According to Complainant, its position was "that the Respondent was aware of the filing deadline but chose to ignore the relevant filing requirements...." However, neither this language, nor anything like it, is found in Complainant's response to PCC's motion for leave to file instanter. Again, Complainant is therefore utilizing this purported response as a means to elaborate upon, clarify, or add to the arguments which were, could have been or should have been raised in its response to the underlying motion for leave to file instanter.

4. Again in paragraph 12(a) of its response to PCC's Motion for Leave to File Reply, Complainant primarily addresses the merits of the underlying proposed reply, and not the basis for obtaining leave to file the reply. This is argument, and not mere response to PCC's Motion for Leave to File Reply. Complainant contends that its argument should be interpreted as being that PCC had three counsel at its disposal, and so has no excuse for the late filing of the proposed Motion to Dismiss or Strike Complaint. It is bad enough that Complainant improperly utilizes a purported response to PCC's Motion for Leave to File Reply to argue substantive points addressed by the proposed reply, but Complainant compounds the problem by mischaracterizing its own earlier arguments, in this case by claiming that its earlier argument was something that it was not. Again, both of these are grounds to strike this portion of the response.

5. In paragraph 12(b) of its response to PCC's Motion for Leave to File Reply, Complainant addresses PCC's explanation of the twenty and one half month lapse between the filing of Complainant's motion for leave to file the Amended Complaint and the Hearing Officer's allowance of that motion and the consequent filing of the Amended Complaint. In its response to PCC's motion for leave to file the Motion to Dismiss or Strike Complaint instanter, Complainant argued, among other things, that PCC should be denied the opportunity because the proposed Amended Complaint had been in PCC's possession for twenty and one half months. In proposed reply, PCC would like to inform this Board that the twenty and one half month delay was spent in settlement negotiations, not in active litigation activities such as drafting a motion to strike or dismiss; Complainant's paragraph 12(b) of its response to the motion for leave to file a reply is, in reality, a surreply to PCC's proposed reply, setting forth Complainant's position with respect to the stay for settlement negotiations. If Complainant wishes to file a surreply, it should

request leave to do so, and should not camouflage a surreply in the garb of a response to PCC's Motion for Leave to File Reply. Nothing in paragraph 12(b) constitutes an objection to the grounds for PCC obtaining leave to file a reply, but rather Complainant utilizes paragraph 12(b) to dispute PCC's interpretation of the stay for settlement discussions (and, ironically, there really is no dispute, for Complainant agrees with PCC that the twenty and one half month period was largely taken up with a lack of any litigation activities; the dispute apparently is that Complainant feels that PCC should have been actively engaging in litigation activities while Complainant did other things). This is not proper for a purported response to PCC's motion for leave to file reply.

6. In paragraph 12(c) of its response to PCC's Motion for Leave to File Reply, Complainant again addresses the merits of PCC's proposed reply, and not the basis for obtaining leave to file the reply. Specifically, this sub-paragraph deals with PCC's proposed reply to Complainant's own response that argued that allowance of the motion for leave to file instanter would prejudice Complainant merely by virtue of the fact that a different procedural route had been taken than the one Complainant approves of--"Grant of Respondent's Motion for Leave to File Instanter will prejudice Complainant because, in that there was a failure to meet the filing deadline and no effort to obtain an extension of time pursuant to proper procedure, Respondent's approach amounts to failure to abide by, and misuse of, procedural rules." (Response to Respondent's Motion for Leave to File Instanter Respondent's Motion to Dismiss or Strike Complaint, at 3, paragraph 11). PCC has requested leave to meet this argument by pointing out that Complainant's assertions of prejudice are disingenuous, in light of the fact that Complainant itself has obtained leave to file its verifications of its answers to PCC's requests to admit five days late pursuant to its very own motion for leave to file instanter. In the current response to

PCC's motion for leave to file a reply, again Complainant fails to address the basis for PCC's request to file the reply, but instead focuses on the underlying argument to be raised in the reply, claiming that it "defies logic" and so should be rejected in favor of Complainant's own argument. Again, this tactic of characterizing its pleading as a response to the motion for leave to file a reply when in reality Complainant is making a surreply should be rejected, and paragraph 12(c), like the other paragraphs addressed in this motion, should be stricken.

7. Finally, in paragraph 12(d) Complainant addresses PCC's position that denial of the motion for leave to file instanter would materially prejudice PCC. In its response to that position, Complainant complained that, "[i]f indeed there are any inconsistencies or 'facial inaccuracies' in the Amended Complaint, such will very soon become apparent in the course of litigation. If any of Respondent's allegations are true, Complainant is in a position to amend the Amended Complaint on its own motion. Given its approach, Respondent has already filed its Motion to Dismiss, thereby putting the Complainant on notice as to what it submits are inconsistencies and inaccuracies." (Response to Respondent's Motion for Leave to File Instanter Respondent's Motion to Dismiss or Strike Complaint, at 3, paragraph 12). In proposed reply to this response argument, PCC has sought this Board's leave to point out that, to the extent Complainant is intending to file yet another amended complaint, it should come out and say that is its intent and request this Board's leave to do so; conversely, to the extent Complainant is suggesting that it can be trusted itself to fix any deficiencies in its Amended Complaint, such a position is unprecedented and contrary to any rule of practice before any adjudicatory body in the State of Illinois. In its response to PCC's request to make that argument in reply, Complainant again engages in surreply by restating, refining, and in fact re-inventing its original argument: "Complainant's argument is that, in that Respondent chose to file the motion with

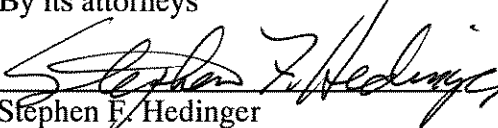
Motion to File Instanter, its allegations are readily available and now known to Complainant *if* they are at all valid. Further, Respondent contends that Complainant's filing of a Motion for Leave to Amend on its own initiative is novel and unprecedented. It certainly is not. Complainant did just that in this case once already." Clearly, these are arguments in surreply to the proposed reply, and are not arguments addressed to PCC's request for leave to file the reply in the first place. Again, this sub-paragraph of Complainant's response to PCC's Motion for Leave to File Reply should be stricken from this document, and if Complainant feels it necessary to file a surreply, it should seek leave to do so and make these arguments in the appropriate context.

8. Because each of the above-identified and discussed paragraphs and sub-paragraphs of Complainant's response to PCC's motion to leave to file a reply do not address the Motion for Leave to File Reply, but instead address the underlying proposed reply itself (or, even worse, raise wholly new arguments not even contained in Complainant's response to which the proposed reply would be directed), they are raised improperly and should be stricken.

WHEREFORE, Respondent, PEABODY COAL COMPANY, requests that this Board strike paragraphs 10, 11 and 12 from the Complainant's "Response to Respondent's Motion for Leave to File Reply to Complainant's Response to Respondent's Motion for Leave to File Instanter Respondent's Motion to Dismiss or Strike."

Respectfully submitted,

PEABODY COAL COMPANY,  
Respondent  
By its attorneys

  
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