





BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUN 14 2004

STATE OF ILLINOIS  
Pollution Control Board

Midwest Generation EME, LLC,

Petitioner

v.

Illinois Environmental Protection Agency,

Respondent.

Case No. PCB 04-185

**RESPONSE TO SIERRA CLUB'S MOTION FOR INTERVENTION**

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Pursuant to 35 Ill. Adm. Code 101.402, Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Response to Sierra Club's Motion for Intervention ("MOI").

1. Pursuant to a United States Environmental Protection Agency Request for Information under Section 114 of the Clean Air Act, Midwest Generation submitted documents to the Illinois Environmental Protection Agency ("IEPA"). Midwest Generation has asserted that some information in those documents is trade secret and confidential business information. That information relates to Midwest Generation's six coal-fired power stations, all of which are located in the State of Illinois.

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

3. On April 19, 2004, Midwest Generation filed a Petition for Review of Illinois Environmental Protection Agency's Denial of Trade Secret Protection ("Petition for Review").

4. On May 27, 2004, Sierra Club filed the MOI "on the basis that the final order of the IPCB may adversely affect and materially prejudice its interests." Pursuant to 35 Ill. Adm. Code 101.402(d)(2) and (3), the Illinois Pollution Control Board (the "Board") "may permit" Sierra Club to intervene if Sierra Club may be "materially prejudiced absent intervention" or "adversely affected by a final Board order." Sierra Club failed to establish that it would be materially prejudiced absent intervention or adversely affected by a final Board order.

5. In Paragraph 15(a) of the MOI, Sierra Club asserts that denial of the MOI may materially prejudice Sierra Club by preventing it "from making an adequate record of its interests" if it "decides to appeal any adverse decision regarding the release of requested records." In Paragraph 18, Sierra Club states that its interest "involves creating a record of the public's interests in having access to information consistent with Illinois and federal law." While Sierra Club would like to make a record of its interests, Sierra Club, in fact, has no interest in the issues that are currently before the Board. Midwest Generation's Petition for Review is based on a narrow question of whether IEPA correctly determined whether information submitted to IEPA constitutes trade secret information. That determination requires a factual analysis concerning the nature of the information submitted to the Board, and the manner in which Midwest Generation has treated that information; the determination does not involve an analysis of Sierra Club's or the general public's interest in the information. Trade secret information is protected from disclosure pursuant to 415 ILCS 5/7(a) and 5/7.1(a), and the following sections of the Illinois Administrative Code: 2 Ill. Adm. Code 1828.401; 35 Ill. Adm. Code 130. IEPA may not release trade secret information even if the public has an interest in access to the information. Because the Board will not need to consider, and properly should not consider, the public's interest in this information during this proceeding, Sierra Club will not be

materially prejudiced if it cannot make a record of Sierra Club's or the public's interest in this information.

6. In Paragraph 15(b) of the MOI, Sierra Club asserts that denial of the MOI may materially prejudice the Sierra Club by "preventing it from adequately representing the interests of its members and the public at large in having access to information compiled by the IEPA." As stated in Paragraph 5 of this Response, Sierra Club's and the public's interest in having access to this information is not an issue that the Board will address to make a decision concerning Midwest Generation's Petition for Review. On the contrary, IEPA may not release trade secret information even if Sierra Club or the public has an interest in access to the information. Thus, Sierra Club will not be materially prejudiced if it cannot represent its interests, the interests of its members or of the public at large in having access to the information.

7. In Paragraph 15(c) of the MOI, Sierra Club asserts that denial of the MOI may materially prejudice Sierra Club by preventing it and the public "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." Sierra Club fails to explain, however, how *intervening* in the proceeding could assist Sierra Club in gaining a better understanding of how IEPA enforces laws and regulations relating to air and water pollution. One can surmise that Sierra Club believes it would gain this understanding by (a) learning what type of information is afforded trade secret protection, and (b) gaining access to information related to air pollution. Sierra Club's intervention in this proceeding, however, will not accomplish either goal. As Sierra Club admits in Paragraph 18 of the MOI, it is not attempting to gain access to the disputed documents during this proceeding; thus, intervening in this proceeding will not enable Sierra Club to learn more about the type of information IEPA

affords trade secret protection. Further, since Sierra Club only seeks to intervene in order to represent its and the public's interest in the information, which, for the reasons stated in Paragraph 5 of this Response, is not relevant to, and should not even be admissible on, the issue before the Board, Sierra Club's intervention will not further Sierra Club's goal of gaining access to this information. Thus, Sierra Club will not be materially prejudiced absent intervention.

8. In Paragraph 15(d) of the MOI, Sierra Club asserts that denial of the MOI may materially prejudice Sierra Club by preventing it and the public "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." Presumably, Sierra Club would like to intervene to improve its chance of obtaining access to information that Midwest Generation submitted to IEPA, and Sierra Club believes that that information would help Sierra Club understand Midwest Generation's compliance status. As explained in Paragraphs 5 through 7 of this Response, however, Sierra Club seeks to intervene only to represent its and the public's interest in the information. Sierra Club's and the public's interest in the information is not relevant to the Board's determination of whether the information constitutes trade secret information and, thus, Sierra Club's intervention for the reason advanced can have no impact on Sierra Club's chance of obtaining access to the information. Thus, Sierra Club will not be materially prejudiced absent intervention.

9. In Paragraph 13 of the MOI, Sierra Club asserts that, "[b]ecause 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 Illinois Pollution Control Board prohibits releasing some or all of the information to it." Sierra Club fails to establish, however, how it will be adversely affected by a final Board order. Sierra Club has no legal right to these documents to

the extent that they contain Midwest Generation's trade secret information. Midwest Generation, through this proceeding, has asked the Board to determine whether the documents contain trade secret information. If the Board determines that these documents contain trade secret information, then Sierra Club has no legal interest in this information and cannot be adversely affected by not receiving the documents. That Sierra Club may claim it is interested in these documents, that the documents may even, in fact, contain information of interest to Sierra Club is simply irrelevant to the question of whether IEPA can release the documents.

10. Because Sierra Club failed to establish that it would be materially prejudiced absent intervention or adversely affected by a final Board order, it has not asserted any grounds on which the Board may permit its intervention. 35 Ill. Adm. Code 101.402.

11. Even if the Board determines that Sierra Club has established grounds for intervention pursuant to 35 Ill. Adm. Code 101.402(d), that section states that the Board "may permit" the intervention, subject to Section 101.402(b). Pursuant to Section 101.402(b), however, "the Board will consider ... whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding."

12. Sierra Club's intervention would unduly delay, materially prejudice and otherwise interfere with an orderly and efficient proceeding.

13. Sierra Club admits that it has no interest in the issue that is before the Board. In Paragraph 17 of the MOI, Sierra Club states, "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." In Paragraph 18, Sierra Club asserts, "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.” Sierra Club goes on to state that it will not seek access, during the proceeding, to the information that is the subject of the proceeding. Through Paragraphs 17 and 18, Sierra Club attempts to establish how its interest is not currently represented in the proceeding. Sierra Club ignores, however, that its interest is not and need not be represented because it is irrelevant to the issue before the Board. Sierra Club is correct that the current parties’ focus is to determine whether certain documents are protected from disclosure because they contain trade secret information. Sierra Club overlooks that the parties are focused on this issue because it is the only issue before the Board. IEPA may not disclose Midwest Generation’s trade secrets to the public without Midwest Generation’s consent. Trade secrets do not cease being trade secrets merely because someone contends the public has an interest in seeing them. On the contrary, demonstrating that the public (especially Midwest Generation’s competitors and suppliers) has an interest in this information would only strengthen Midwest Generation’s claims. Because Sierra Club has indicated its desire to obtain these documents, it clearly has not filed a motion to intervene in order to present extra evidence of the competitive value of this information.

14. As Sierra Club admits, it seeks to intervene in order to pursue its own agenda. As explained in Paragraph 13 of this Response, Sierra Club’s intervention would, in no way, assist the Board in determining whether Midwest Generation’s documents contain trade secret information and, therefore, may not be disclosed to the public. Sierra Club’s intervention, by definition, would “unduly delay” the proceeding. By attempting to bring irrelevant issues and politics into this proceeding in a manner that is completely unrelated to the only issue the Board is called upon to decide, Sierra Club’s intervention would “materially prejudice” and “interfere” with an orderly and efficient proceeding.

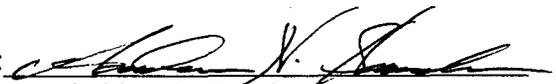
15. If the Board, nonetheless, determines to grant Sierra Club's MOI, the Board should "limit the rights" of Sierra Club pursuant to 35 Ill. Adm. Code 101.402(e). For example, the Board should ensure that Sierra Club would "not control any decision deadline." *Id.* Moreover, the Board should not permit Sierra Club to gain access to the disputed documents prior to the Board's final decision on trade secret protection issue. Release of this information to Sierra Club, whether written or verbal, permanent or temporary, would irreparably harm Midwest Generation.

WHEREFORE, Midwest Generation respectfully requests that the Illinois Pollution Control Board enter its order denying Sierra Club to intervene and denying leave for its attorneys to file their Appearances.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served the attached Appearance and Response to Sierra Club's Motion for Intervention by U.S. Mail and Facsimile, upon the following persons:

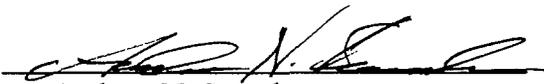
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