

ILLINOIS POLLUTION CONTROL BOARD  
May 6, 2004

IN THE MATTER OF: )  
)  
PROPOSED SITE SPECIFIC REGULATION ) R04-11  
APPLICABLE TO AMEREN ENERGY ) (Site-Specific Rulemaking – Noise)  
GENERATING COMPANY, ELGIN, )  
AMENDING 35 ILL. ADM. CODE PART 901 )

ORDER OF THE BOARD (by T.E. Johnson):

On October 28, 2003, Ameren Energy Generating Company (Ameren) filed a rulemaking proposal under Section 28 of the Environmental Protection Act (Act) (415 ILCS 5/28 (2002)), to change regulations governing noise emission limitations found in the Board's rules at 35 Ill. Adm. Code 901. In the petition, Ameren seeks site-specific noise emission limitations with respect to the operation of Ameren's electric generating facility in Elgin, Cook County. A hearing was held on January 22, 2004, at 100 West Randolph Street, Chicago, Cook County. The hearing was held, in part, on the economic impact of the proposal.

Today, the Board addresses a number of post-hearing motions that have been filed by Ameren and the Illinois Attorney General's Office (AGO). On March 22, 2004, Ameren filed a motion for leave to file a response, accompanied by a response, to the AGO's public comment, as well as a motion to supplement the record. On April 2, 2004, the AGO filed a motion to deny the motion for leave to file, a motion to deny the motion to supplement the record, and motions to strike the response and the documents intended to supplement the record. On April 12, 2004, Ameren filed a response to the AGO's motions to dismiss. On April 27, 2004, the AGO filed a motion for leave to file a reply, accompanied by a reply to Ameren's response.

For the reasons espoused below, the Board grants Ameren's motion for leave to file a response and its motion to supplement the record. The Board grants the AGO's motion for leave to file a reply, and accepts its reply. The AGO's other motions are denied, but the AGO is given leave to file a response or otherwise provide additional information.

**AMEREN'S MARCH 22, 2004 MOTIONS**

Ameren filed two motions on March 22, 2004: a motion for leave to file a response to the public comments of the AGO; and a motion to supplement the record.

**Motion for Leave to File**

In its motion for leave to file, Ameren asserts that the public comment filed by the AGO raises issues and questions the answers provided by Ameren at the January 22, 2004 public hearing, and that the comments often take Ameren's answers and information out of context resulting in misleading conclusions. Mot. for Leave at 1. Ameren asserts that it seeks to clarify the record to ensure the Board is presented a full and complete discussion of the issues raised,

and that no party will be prejudiced if the motion is granted. because the only new information provided is that omitted by the AGO in its comment concerning the facility cited by its witness for the purpose of recommending noise abatement measures. *Id.*

Ameren argues that it bears the burden of proof in this matter and should be afforded the opportunity to respond to the AGO's objections, and that no law governing the rulemaking would preclude the Board from granting this relief. Mot. for Leave at 1.

### **Motion to Supplement the Record**

Ameren asserts that two documents are necessary to fully apprise the Board about the complaint attached to and the easement referenced in paragraph 27 of the AGO's public comment. Mot. to Supp. at 1. The documents are (1) the agreed order entered by the circuit court in Ameren Energy Development Company, et al. v. Village of Bartlett, 03 CH 11307; and (2) the "Noise Easement and Restrictive Covenant Agreement" between Ameren Energy Development Company and Realen Holmes L.P. *Id.*

Ameren contends that it provided the AGO a copy of the easement and an explanation that the complaint had been settled and the easement filed with the recorder of deeds, when it learned that the AGO was reviewing a copy of the complaint subsequently attached to the AGO's public comment. Mot. to Supp. at 1. Ameren asserts that it did not raise the issue of the lawsuit or the settlement in the rulemaking and is only doing so now to remove any questions raised by the AGO comment. Mot. to Supp. at 2.

Ameren requests that the motion be granted in order to fully apprise the Board of the information shared with the AGO and the subject matter of paragraph 27 of the AGO comment. Mot. to Supp. at 2. Ameren argues that no prejudice will result as the AGO had both documents before it filed its public comment, the comment raised the issue and both documents are a matter of public record. *Id.*

### **AGO MOTIONS**

In its motions, the AGO argues that Ameren is seeking to introduce new evidence into the record that it did not include with its petition, pre-filed testimony, hearing testimony or post-hearing public comments. AGO mot. at 1. The AGO asserts that the Board did not give permission to Ameren to file its motion. AGO mot. at 2. The AGO argues that Ameren's pleadings are an attempt to put its case in a more favorable light by misrepresenting the facts and discrediting the public comments submitted by the AGO through Howard Chinn. *Id.*

The AGO asserts that allowing Ameren's March 22 pleadings into the record would prejudice the AGO, because Ameren would have nine more days than the AGO to submit post-hearing public comments and testimony; and would also have the chance to respond to the AGO's post-hearing comments without the AGO having the in-kind opportunity to respond to Ameren's post-hearing comments. AGO mot. at 2.

The AGO asks that Ameren's motions for leave to file and to supplement the record be denied. The AGO also asks the Board to strike Ameren's response and the documents attached to the motion to supplement the record.

### **AMEREN RESPONSE**

Ameren asserts that the AGO will not be prejudiced if the motions to supplement the record and for leave to file a response are granted. Resp. at 1. Ameren argues that the purpose of developing a record in this rulemaking is to provide a complete, accurate and clear record for the Board to consider. Ameren contends the AGO comment added new information into the record and demonstrated that the AGO has misunderstood or misinterpreted much of the record presented at hearing. *Id.* Ameren argues that it only seeks to address the new information submitted with the comment and to file a response to clarify questions raised by the AGO's omission of critical facts. *Id.*

Ameren contends that the granting of the AGO's motions would result in a record that is not complete and accurate, and would materially prejudice Ameren and others relying upon that record for clarity and completeness. Resp. at 2. Ameren asserts that the documents it has offered are not offered in support of the rule, but rather to remove any question the Board may now have due to the AGO comment about the circuit court proceeding raised by the AGO. *Id.*

### **AGO REPLY**

In its motion for leave to file a reply, the AGO contends that it will suffer material prejudice if the Board does not grant it leave to file a reply. In its reply, the AGO asserts that Ameren has no right to criticize any new information in the AGO's post-hearing comments when Ameren included new information in its own comments. Reply at 1.

The AGO argues that Ameren's March 22, 2004 pleadings clearly violated the hearing officer's March 10, 2004 deadline for submission of post-hearing comments. Reply at 2. The AGO reiterates that Ameren is getting an additional opportunity to add to the record that was denied the AGO because the AGO adhered to the deadline, and that if the Board allows Ameren's pleadings into the record the AGO will be prejudiced. *Id.*

The AGO asserts that the only ways to remedy the potential prejudice to the AGO and to ensure that the Board treats both parties fairly is to strike the March 22, 2004 pleadings or to allow the AGO the right to respond to Ameren's post-hearing comments. Reply at 2.

### **DISCUSSION**

Initially, the Board grants the AGO's motion for leave to file a reply, and accepts the AGO's reply. Although the AGO merely states that it would be materially prejudiced, and does not offer any specific ways in which prejudice would result if its motion were not granted, the Board is generally more liberal in adding to the record in a regulatory context than in an adjudicatory context. A Board regulatory proceeding is a quasi-legislative proceeding. In considering admission of materials into the record of its regulatory proceedings, the Board has

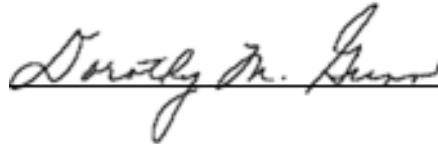
historically taken a liberal stance parallel to the stance employed by full legislative bodies. *See Proposed Amendments to 35 Ill. Adm. Code 215.204, 215.211, AND 215.212: Heavy Off-Highway Vehicle Products, R86-36 (June 25, 1987).*

Utilizing that long standing rationale, the Board grants Ameren's motion to file a response to the AGO public comment and the motion to supplement the record. The response is accepted and the two attached documents will be incorporated into the record in this proceeding. The AGO's motions to deny leave to file and to supplement the record are denied. Also denied are the AGO's motions to strike Ameren's response and the documents attached to the motion to supplement the record.

However, in order to avoid any possible prejudice to the AGO, the Board will grant the AGO leave to submit any additional information regarding these issues or a response to Ameren's post-hearing comments. In light of a previously granted motion to expedite consideration in this rulemaking, the AGO must file any such information or response on or before May 14, 2004. The mailbox rule will not apply.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 6, 2004, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board