BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Commonwealth Edison Company Petitioner, v. Illinois Environmental Protection Agency, Respondent.	)	PCB 04-215 Trade Secret Appeal
Midwest Generation EME, LLC, Petitioner, v. Illinois Environmental Protection Agency, Respondent.	)	PCB 04-216 Trade Secret Appeal (Not Consolidated)

NOTICE OF FILING

To: see attached service list

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Sierra Club's Motion For Leave To File the attached Reply to Midwest Generation's Response to Sierra Club's Motion For Intervention in PCB 04-216, a copy of which is herewith served upon you.

Keith Harley

Dated: August 26, 2004

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MOTION FOR LEAVE TO FILE SIERRA CLUB'S REPLY TO COMMONWEALTH EDISON'S RESPONSE TO SIERRA CLUB'S MOTION FOR INTERVENTION

Pursuant to 35 Ill. Adm. Code 101.500(E), Sierra Club respectfully submits this Motion For Leave to Reply to Midwest Generation's Response to Sierra Club's Motion for Intervention. In support of this Motion, the Sierra Club asserts the following:

1. On August 3, 2004, Sierra Club filed a Motion for Intervention ("MOI") in the above captioned proceeding (PCB 04-216)on the basis that the final order of the Board may adversely affect and materially prejudice its interests.

2. On August 17, 2004, Midwest Generation filed its Response to Sierra Club's Motion for Intervention, raising several detailed arguments in opposition to Sierra Club's Motion For Intervention.

3. In order to provide a more complete argument to respond to Midwest Generation's detailed objections, Sierra Club now formally requests leave to file its Reply as attached.

4. Granting leave to file the Reply will not unduly delay nor materially prejudice or interfere with an orderly and efficient proceeding, and will provide a full, fair and complete opportunity for Sierra Club to respond to Midwest Generation's objections, thus aiding the Board's deliberative process. In the absence of an opportunity to Reply to Midwest Generation's detailed objections, Sierra Club will be materially prejudiced.

WHEREFORE, for the reasons stated above, the Sierra Club respectfully requests that the Illinois Pollution Control Board enter an Order giving leave for the Sierra Club to file its Reply.

Respectfully submitted,

Keith Harley, One of Sierra Club's Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Commonwealth Edison Company Petitioner, v. Illinois Environmental Protection Agency, Respondent.	)	PCB 04-215 Trade Secret Appeal
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REPLY TO MIDWEST GENERATION'S RESPONSE TO SIERRA CLUB'S MOTION FOR INTERVENTION

Pursuant to 35 Ill. Adm. Code 101.500(E), Sierra Club respectfully submits this Reply to Midwest Generation's Response to Sierra Club's Motion for Intervention. In support of this Reply, the Sierra Club asserts the following:

1. On or about February 12, 2004, the Sierra Club submitted an Electronic Freedom of Information Act request to the Illinois Environmental Protection Agency ("IEPA") seeking all documents submitted to the IEPA by Commonwealth Edison EME, LLC ("Commonwealth Edison") in response to an information request under Section 114 of the Clean Air Act, 42 U.S.C. § 7414(c).

2. The Sierra Club is a not-for-profit environmental group with 26,000 members in Illinois. It works on behalf of its members and the general public to restore clean and healthy air to Illinois and to protect Illinois lakes, rivers and streams from pollutants.

3. Pursuant to the United States Environmental Protection Agency Request for Information under Section 114 of the Clean Air Act, Commonwealth Edison submitted documents to the IEPA. Commonwealth Edison has asserted that some information in those documents is trade secret and confidential business information. That information relates to coal-fired power stations formerly owned and operated by Commonwealth Edison, all of which are located in the State of Illinois.

4. On or about April 23, 2004, the IEPA granted Commonwealth Edison's request for trade secret protection and denied it in part. In its April 23, 2004 letter, IEPA indicated it would cease protecting information not subject to trade secret protection unless IEPA was served with notice of filing of a Petition for review. A copy of this letter was sent to Sierra Club because of its pending Freedom of Information Act request.

5. On June 2, 2004, Commonwealth Edison filed a Petition for Review of Illinois Environmental Protection Agency's Denial of Trade Secret Protection ("Petition for Review"), and this Petition was assigned docket number 04-215. On June 3, 2004, Midwest Generation filed a Petition for Review of Illinois Environmental Protection Agency's Denial of Trade Secret Protection, assigned docket number 04-216. As of the filing of this Reply, these Petitions have not been consolidated.

6. On June 17, 2004, the Illinois Pollution Control Board (the "Board") accepted Commonwealth Edison's Petition for Review.

7. On August 3, 2004, Sierra Club filed a Motion for Intervention ("MOI") in PCB 04-216 on the basis that the final order of the Board may adversely affect and materially prejudice its interests. Pursuant to 35 Ill. Adm. Code 101.402(d)(2) and (3), intervention will be allowed if Sierra Club may be "materially prejudiced absent intervention" or "adversely affected by a final Board order." In its MOI, the Sierra Club has adequately established that it would be materially prejudiced absent intervention or adversely affected by a final Board order, and provides further support in this Reply.

8. The IEPA 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 IEPA to have all files, records and data open, for reasonable public inspection with the exception of certain documents that constitute trade secrets. Section 7(c) of the Act provides that all emission data reported to the IEPA 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 the Act, which requires the IEPA to collect and disseminate information as necessary to carry out the Act's purposes. Accordingly, the IEPA is required to not only collect and disseminate information, but to affirmatively ensure that the public is afforded access to files, records and data.

9. Section 1 of the Illinois Freedom of Information Act, 5 ILCS 140/1, enumerates the public policy and Legislative intent of the statute:

> Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely,

> making informed political judgments and monitoring government to ensure that it is being conducted in the public interest. 5 ILCS 140/1.

Furthermore, "restraints on information access should be seen as limited exceptions to the general rule that the people have a right to know the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. The provisions of this Act shall be construed to this end." 5 ILCS 140/1.

10. Section 114(a) of the federal Clean Air Act provides the following:

> (1) the Administrator may require any person who owns or operates any emission source, who manufactures emission control equipment or process equipment, who the Administrator believes may have information necessary for the purposes set forth in this subsection, or who is subject to any requirement of this chapter, on a one-time, periodic or continuous basis to:
>
> a. establish and maintain such records;
> b. make such reports;
> c. install, use, and maintain such monitoring equipment, and use such audit procedures, or methods;
> d. sample such emissions;
> e. keep records on control equipment parameters, production variables or other indirect data when direct monitoring of emissions is impractical;
> f. submit compliance certifications in accordance with subsection (a)(3) of this section; and
> g. provide such other information as the Administrator may reasonably require.

Furthermore, Section 114(c) of the Clean Air Act provides that "any records, reports or information obtained under subsection (a) of this section shall be available to the public." 42 U.S.C. 7414(a) and (c).

11. Sierra Club's interest in the matter before the Board involves establishing a record of the public's interest in having access to information consistent with Illinois and federal law as described above.

12. Because it has a pending Freedom of Information Act ("FOIA") request for the information that is subject of this proceeding, denial of the MOI will adversely affect Sierra Club by preventing it from making an adequate record of its interests in the hearing before the Board in the event that Sierra Club decides to appeal any adverse decision regarding the release of requested records by the Board as authorized by Illinois statute, 415 ILCS 4/41 and Ill. Adm. Code 130.201(b). Pursuant to Section 130.214(b) of the Illinois Administrative Code, "an owner or *requester* who is adversely affected by a final determination of the Board pursuant to this Subpart may obtain judicial review from the appellate court by filing a petition for review pursuant to Section 41 of the Act." 35 Ill. Adm. Code 130.214(b) (emphasis added). Therefore, *as the FOIA requester*, Sierra Club is entitled by law the right to appeal any adverse decision regarding the release of requested records by the Board. Simply it is inconsistent that the Sierra Club is entitled the right to appeal but *not* the right to intervene in order to create an adequate record of its interests in the hearing before the Board. Denial of Sierra Club's MOI will most certainly adversely affect Sierra Club by preventing it from making an adequate record of its interests in the hearing in the event Sierra Club decides to appeal any adverse decision regarding the release of requested records.

13. In Paragraphs 10-14 of the Response, Midwest Generation asserts the Sierra Club's will not be materially prejudiced if it is not allowed to intervene in this proceeding. However, pursuant to 5 ILCS 140/1, "it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government," and that "such access is necessary to enable the people to fulfill their duties of discussing public issues freely, making informed political judgments

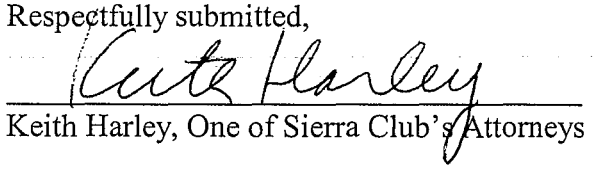
and *monitoring government to ensure that it is being conducted in the public interest.*" (emphasis added). Moreover, Section 114(c) of the Clean Air Act states "any records, reports or information obtained under subsection (a) of this section shall be available to the public." 42 U.S.C. § 7414. Therefore, according to both Illinois and federal law, the Board's final determination indeed involves an analysis of Sierra Club's and the general public's interest in the requested information. Because the Board will need to consider, and properly should consider, Sierra Club's and the public's interest in this information during this proceeding, Sierra Club will be materially prejudiced if its MOI is denied by the Board, thus rendering it unable to establish a valid record of Sierra Club's or the public's interest in this information.

14. In Paragraph 17 of the Response, Midwest Generation asserts that Sierra Club's intervention would "unduly delay, materially prejudice and otherwise interfere with an orderly and efficient proceeding." The Sierra Club is not seeking to participate in order to gain access to the disputed documents prior to a final Board decision on the trade secret protection issue. Moreover, the Sierra Club is not seeking to control any decision deadline nor partake in conducting discovery, interrogatories, depositions, or requests to admit. Rather, the Sierra Club's focus in this hearing involves creating a record of the public's interest in having access to information consistent with Illinois and federal law. Allowing the Sierra Club to intervene will not unduly delay these proceedings nor materially prejudice either Midwest Generation or the IEPA in light of the timeliness of the MOI and the disparate interests of the Sierra Club and the original parties to the appeal.

15. Midwest Generation asserts that Sierra Club's intervention is unnecessary because the only arguments it would raise are legal arguments that can be raised by the IEPA. However, the IEPA stipulates to Sierra Club's intervention under certain restrictions that Sierra Club accepts. Further, legal arguments related to the public right to access to information under the circumstances presented in this case are critical to the Board's deliberative process. The issue Sierra Club is bringing into this proceeding regards the public's inherent right to access the records of the IEPA. This can hardly be considered completely unrelated to the issue before the Board, considering these proceedings were initiated by a FOIA request on behalf of the Sierra Club, consistent with Section 114(c) of the Clean Air Act. One of the stated goals of the Illinois General Assembly in enacting the Illinois Environmental Protection Act is to increase public participation in protecting the environment. 415 ILCS § 5/2(a)(v). This goal is facilitated in part by allowing the public access to the records of the IEPA, with certain well-known exceptions. The public's right to have access to these records is underscored by the Illinois Freedom of Information Act, 5 ILCS 140/1, Section 114(c) of the Clean Air Act and Section 7 of the Illinois Environmental Protection Act, all of which are intended to allow the free flow of information to the general public, including the Sierra Club. Again, the Sierra Club seeks to create a record of the public's interests in having access to information consistent with Illinois and federal law, and intervening in the proceedings before the Board would not unduly delay nor materially prejudice or interfere with an orderly and efficient proceeding.

WHEREFORE, for the reasons stated above, the Sierra Club respectfully requests that the Illinois Pollution Control Board enter an Order allowing the Sierra Club to intervene and for leave for its attorneys to file their Appearances.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, KEITH HARLEY, an attorney, certify that a true copy of the foregoing Motion For Leave to File Reply was mailed by First Class Mail, by depositing the same in the U.S. Mail depository located at 220 West Monroe, Chicago, Illinois, in an envelope with sufficient postage prepaid on August 26, 2004, to the following:

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