

Electronic Filing - Received, Clerk's Office, March 6, 2008

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PETITION OF MIDWEST GENERATION, LLC,) **AS 07-03**
WAUKEGAN GENERATING STATION) **(Adjusted Standard – Air)**
FOR AN ADJUSTED STANDARD FROM)
35 ILL.ADM.CODE 225.230.)

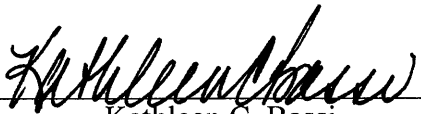
NOTICE OF FILING

To:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Persons included on the
ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that we have today electronically filed with the Office of the Clerk of the Pollution Control Board **RESPONSE TO THE ENVIRONMENTAL LAW & POLICY CENTER'S RENEWED MOTION TO INTERVENE**, copies of which are herewith electronically served upon you.



Kathleen C. Bassi

Dated: March 6, 2008

Kathleen C. Bassi
Stephen J. Bonebrake
Sheldon A. Zabel
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
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RESPONSE TO THE ENVIRONMENTAL LAW & POLICY CENTER'S
RENEWED MOTION TO INTERVENE

NOW COMES Petitioner, MIDWEST GENERATION, LLC, WAUKEGAN GENERATING STATION, by and through its attorneys, SCHIFF HARDIN LLP, and, pursuant to 35 Ill.Adm.Code § 101.500(d), requests that the Board deny the Environmental Law & Policy Center's (hereinafter, "ELPC") "Renewed Motion to Intervene." In support of its request, Petitioner states as follows:

1. On January 10, 2007, Petitioner filed a Petition for Adjusted Standard from the requirements of 35 Ill.Adm.Code Part 225, Subpart B.
2. On December 6, 2007, ELPC filed a Motion to Intervene.
3. Petitioner first became aware of ELPC's motion through attendance at the regular Board meeting held on December 20, 2007. Subsequent investigation, which included phone calls to Faith Bugel, the attorney at ELPC who signed the Motion to Intervene, and talks with the other counsel of record at Schiff Hardin, revealed that Schiff Hardin had not been served with ELPC's Motion to Intervene.
4. On January 3, 2008, Mr. Stephen J. Bonebrake, one of the counsel of record at Schiff Hardin, sent a letter to Ms. Bugel stating that Schiff Hardin had not been served and that

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according to the Board's rules, the time for response does not begin until service has been completed. That letter has since been added to the Board's website docket for this matter.

5. On January 14, 2008, Petitioner filed a Motion to Strike ELPC's Motion to Intervene for failure to properly serve counsel of record as required by 35 Ill. Adm. Code §§ 104.100(b), 104.400(b), and 101.304, and 101.402(a).

6. On January 23, 2008, ELPC filed a Motion to Withdraw and Refile Motion to Intervene, in Response to Petitioner's Motion to Strike and a Renewed Motion to Intervene.

7. Petitioner replied on February 7, 2008, requesting that the Board first address Petitioner's outstanding Motion to Strike.

8. On February 11, 2008, the Illinois Environmental Protection Agency (hereinafter, the "Agency") filed its response, opposing ELPC's Motion to Intervene (hereinafter, "Agency Response").

9. On February 21, 2008, the Board granted ELPC's Motion to Withdraw its Motion to Intervene and denied Petitioner's Motion to Strike. The Board granted Petitioner's Motion to File a Reply and directed it to be filed by March 6.

10. Petitioner joins the Agency in opposing ELPC's Renewed Motion to Intervene. Specifically, Petitioner agrees with paragraphs 6 through 17 of the Agency Response.

11. ELPC does not cite to any authority in support of its petition for intervenor status; however, the Board's procedural rules provide the Board with discretion to grant intervenor status to a non-party when one of the criteria set forth in 35 Ill. Adm. Code § 101.402(d) is met.

12. Section 101.402(d) provides:

Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:

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- 1) The person has a conditional statutory right to intervene in the proceeding;
- 2) The person may be materially prejudiced absent intervention; or
- 3) The person is so situated that the person may be adversely affected by a final Board order.

13. ELPC has not met any of the requirements of Section 101.402(d).

14. First, ELPC has not cited a statutory right to intervene and, as the Agency points out, there is no statutory right to intervene applicable in this matter. *See Agency Response*, par. 8.

15. Second, ELPC has not demonstrated that it will be materially prejudiced absent intervention. 35 Ill. Adm. Code § 101.402(d)(2). The Board has rarely found that a non-party would be materially prejudiced absent intervention. According to a review of the Board's prior cases, of the 11 motions to intervene that have been before the Board since 2001, there are only two instances where the Board found that a non-party may be materially prejudiced absent intervention and granted the motion to intervene. *See Saline County Landfill, Inc. v. IEPA*, PCB-02-108 (April 18, 2002), (finding that the citizens of the County may be materially prejudiced absent intervention in the land permit appeal since the Agency relied on the County Board's 2001 resolution in denying the permit) and *Saline County Landfill v. IEPA*, PCB-04-117 (Feb. 19, 2004) (finding Saline County may be materially prejudiced if not permitted to intervene because the issue underlying the appeal was whether the County had granted siting to the area that was the subject of the permit application in dispute).

16. More often, the Board has found that a non-party would not be materially prejudiced absent intervention. *See, e.g., Illinois v. Alloy Engineering and Casting Company*, PCB 01-155 (Sept. 6, 2001) (denying motion for leave to intervene by 45 movants who reside, or did reside, near respondent's facility, finding that movants will not be materially prejudiced if

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not allowed to intervene because “the attorney general will adequately represent the concerns of all of the People of the State of Illinois in this matter” at p. 3); *2222 Elston LLC v. Purex Industries, Inc.*, PCB 03-55 (Jan. 23, 2003) (denying the City’s motion for leave to intervene, finding the City had not provided sufficient facts to show that it may be materially prejudiced and finding the City’s assertion that the Board could find a separate complaint by the City duplicative and unpersuasive). *See also Midwest Generation EME, LLC v. IEPA*, PCB 04-185 (Nov. 4, 2004); *Commonwealth Edison Company v. IEPA*, PCB 04-215 (Aug. 18, 2005); and *Midwest Generation EME, LLC v. IEPA*, PCB 04-216 (Aug. 18, 2005) (all denying Sierra Club’s motions to intervene in a trade secret appeal because Sierra Club did not establish that it may be materially prejudiced absent intervention and did not articulate how its interests will not be adequately represented by IEPA).

17. Like the non-parties whose motions to intervene were denied, ELPC has not established that the Agency does not adequately represent its interests nor that the ways it can participate in this proceeding without intervening are insufficient. As the Agency pointed out, ELPC has several other avenues for participation as a non-party to the adjusted standard including filing comments and providing oral comments and questioning witnesses at a hearing. *See Agency Response*, par. 9.

18. Third, ELPC has not demonstrated that it would be adversely affected by the final Board order. 35 Ill. Adm. Code § 101.402(d)(3). In at least one instance, the Board was critical of a non-party’s claim that it would be adversely affected by the Board’s final order. *See Stuart v. Fisher*, PCB 02-164 (Jan. 23, 2003) (denying the County’s motion to intervene, finding the possibility that the Board’s order could conflict with Will County’s noise ordinance was not a convincing argument that County would be adversely affected by the Board’s decision; permitted County to file *amicus curiae* brief instead).

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19. Here, ELPC has asserted even more generally that “ELPC and its members will be directly and materially affected by the outcome of this proceeding.” Renewed Motion to Intervene, par. 3. While Midwest Generation, as a permit holder, holds an obvious and direct interest in the outcome of its adjusted standard petition, ELPC has asserted no fact suggesting if or how it will be affected by the outcome of this proceeding.

20. Finally, ELPC asserts that its interest and prior involvement in the CAIR (R06-25) and Mercury (R06-26) Rulemakings entitle it to non-party intervenor status. However, there is nothing in Section 101.104(d) to indicate that interest or prior rulemaking involvement entitle one to non-party intervenor status.

21. Even if the Board were to find discretionary intervention is permissible in this matter, the Board must consider “whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.” 35 Ill. Adm. Code § 101.402(b). As the Agency stated “the rationale that ELPC and its members will be affected by the rulemaking given the scope and content of the Illinois mercury rule is an argument that could be made by literally thousands and thousands of people.” Agency Response, par. 12. Allowing ELPC to intervene on the basis of its participation in the rulemaking could open the floodgates to all those who participated and would thereby threaten the efficiency of this proceeding.


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WHEREFORE, for the reasons set forth above, Petitioner Midwest Generation, LLC, Waukegan Generating Station, requests that the Board deny ELPC's Renewed Motion to Intervene .

Respectfully submitted,

MIDWEST GENERATION, LLC,
WAUKEGAN GENERATING STATION

by:



One of Its Attorneys

Dated: March 6, 2008

Sheldon A. Zabel
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 6th day of March, 2008, I have served electronically the attached **RESPONSE TO THE ENVIRONMENTAL LAW & POLICY CENTER'S RENEWED MOTION TO INTERVENE**, upon the following persons:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

and electronically and by first class mail, postage affixed, to the persons listed on the **ATTACHED SERVICE LIST**.



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Courtesy copy to Meleah Geertsma at ELPC