

ILLINOIS POLLUTION CONTROL BOARD
April 17, 2008

IN THE MATTER OF:)
)
PETITION OF MIDWEST GENERATION,) AS 07-3
L.L.C., WAUKEGAN GENERATING) (Adjusted Standard – Air)
STATION FOR AN ADJUSTED)
STANDARD FROM 35 ILL. ADM. CODE)
225.230)

ORDER OF THE BOARD (by G.T. Girard):

On January 22, 2008, Environmental Law & Policy Center (ELPC) filed a motion (Mot.) to intervene in this adjusted standard proceeding¹. On February 11, 2008, the Illinois Environmental Protection Agency (Agency) timely filed a response (IEPA Resp.) to ELPC's motion. On March 6, 2008, Midwest Generation, L.L.C. (Midwest Generation) timely filed a response to the ELPC's motion (MG Resp.). On March 3, 2008 and March 18, 2008, ELPC filed motions for leave to file replies; the Board grants the March 18 motion for leave to file a reply and denies the March 3 motion as moot. For the reasons articulated below, the Board denies the motion to intervene.

The Board will first set forth the regulatory provisions concerning intervention, then summarize ELPC's arguments. The Board will follow with the arguments of the Agency and Midwest Generation. The Board will then discuss the Board's findings.

REGULATORY BACKGROUND

Section 101.402 sets forth the rules on intervention and provides:

- a) The Board may permit any person to intervene in any adjudicatory proceeding. If a person seeks to intervene in an adjudicatory proceeding, the person must file a motion to do so with the Clerk and serve a copy of the motion on all parties to the proceeding. The motion must set forth the grounds for intervention.
- b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.
- c) Subject to subsection (b) of this Section, the Board will permit any person to intervene in any adjudicatory proceeding if:

¹ On February 21, 2008, the Board ruled on several motions in this proceeding that allowed ELPC to renew the motion to intervene and set deadlines for filing responses, but not replies.

- 1) The person has an unconditional statutory right to intervene in the proceeding; or
 - 2) It may be necessary for the Board to impose a condition on the person.
- d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:
- 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.
- e) An intervenor will have all the rights of an original party to the adjudicatory proceeding, except that the Board may limit the rights of the intervenor as justice may require. The limits may include providing that: the intervenor is bound by Board and hearing officer orders already issued or by evidence already admitted; that the intervenor does not control any decision deadline; and that the intervenor cannot raise issues that were raised or might more properly have been raised at an earlier stage of the proceeding. 35 Ill. Adm. Code 101.402.

MOTION TO INTERVENE

ELPC seeks to intervene in this adjusted standard proceeding based on ELPC's involvement in Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury), R06-25 and Proposed New Clean Air Interstate Rules (CAIR) SO₂, NO_x Annual and NO_x Ozone Season Trading Programs, 35 Ill. Adm. Code 225, Subparts A, C, D, E, and F, R06-26. Mot. at 1. ELPC asserts that members of ELPC will be directly and materially affected by the outcome of this proceeding. *Id.* ELPC maintains that mercury emissions from coal combustion deposits affect air quality, bodies of water, and fish. Reply at 2. ELPC asserts that ELPC members live both in the local vicinity of the Midwest Generation plant and in the region. Reply at 3.

ELPC argues that the Board has "regularly" allowed intervention by individuals or citizens groups where the proposed intervenors would be impacted by the emissions from the facility at issue. Reply at 3. More specifically, ELPC asserts that intervention has been allowed "where, as is highly possible here, the proposed intervenor" and the Agency take different positions on the issue before the Board. Reply at 3, citing Commonwealth Edison Co. v. IEPA, PCB 91-29 (Nov. 21, 1991); Village of Round Lake Beach v. IEPA, PCB 86-59 (Sept. 11, 1986); Proposed Determination of No Significant Ecological Damage for the Joliet Generating Station,

PCB 87-93 (Nov. 15, 1989). ELPC also asserts that intervention has been granted by the Board under circumstances relevant to this proceeding. Reply at 4, citing Citizens Utility Co. v. IEPA, PCB 85-95 (Apr. 10, 1986); Gallatin Nat'l Co. v. IEPA, PCB 90-184 (Jan. 18, 1991); We Shred It v. IEPA, PCB 92-180 (Mar. 25, 1993); Caterpillar, Inc. V. IEPA, PCB 94-198 (Sept. 1, 1994).

ELPC opines that Midwest Generation and the Agency offer two arguments against allowing intervention. The first is that opportunities for participation short of intervention give sufficient opportunities to avoid material prejudice and that the Agency will sufficiently ensure that ELPC's interests are not adversely affected. Reply at 4. ELPC urges the Board to reject these arguments because ELPC may be materially prejudiced absent intervention. *Id.* ELPC argues that the rights of a party are significant with respect to this case. *Id.* ELPC points out that only a party to an adjusted standard may appeal the Board's decision and only parties can "file briefs and take part in telephone status conferences." Reply at 4-5. ELPC maintains that failure to admit ELPC would mean that ELPC could not seek judicial review or participate in compilation of a complete record for judicial review. Reply at 5.

ELPC also expresses concerns that the Agency will not necessarily represent the best interests of a select group of citizens living within the area that will be impacted by the emissions from Midwest Generation's plant. Reply at 5. ELPC argues that the Agency must consider "the precedent of the recommendation over the range of facilities for which it has regulatory responsibility" and this position may cause the Agency to advocate for a lesser degree of clean-up than ELPC might advocate. *Id.* ELPC notes that the Agency has not yet filed the recommendation in this adjusted standard and "it is presumptuous to assume" that the Agency will advocate the same position as ELPC. *Id.*

ELPC argues in reply that the cases relied upon by the Agency and Midwest Generation in opposing this motion are distinguishable from the bases on which ELPC seeks intervention in this proceeding. Reply at 7. ELPC alleges harm to the health and well-being of ELPC's membership and ELPC cannot file a compliant in this adjusted standard proceeding. *Id.* ELPC further alleges that ELPC has a direct interest in the core issue at stake in this proceeding and the Agency may not advance the same resolutions that ELPC would advocate. *Id.*

ELPC also disagrees with arguments that the allowed intervention would result in undue delay or inefficiency. Reply at 7. ELPC notes that the Board has the discretion to allow intervention at all times and the Board can distinguish between a casual observer and an active participant in the rulemaking proceeding such as ELPC. *Id.* Further, ELPC asserts that the Board's rules do not specifically disallow intervention simply because a large number of entities might qualify for intervention. *Id.* ELPC argues that allowing a single organization representing a large number of potentially affected persons, such as ELPC, could alleviate some of these concerns. Reply at 8.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE

The Agency argues that there is no statutory right to intervene and the only manner for intervention is for the Board to find intervention appropriate under the Board's rules at 35 Ill. Adm. Code 101.402(d). IEPA Resp. at 3. The Agency asserts that ELPC has not met the criteria

of Section 101.402(d). *Id.* Specifically, the Agency argues that ELPC has failed to acknowledge the other avenues by which ELPC can participate in this adjusted standard proceeding. *Id.* The Agency notes that non-parties may file comments, provide oral comments “and ask questions of witnesses.” *Id.* The Agency maintains that these avenues provide more than sufficient opportunity to present arguments to the Board and these options prevent material prejudice. IEPA Resp. at 3-4.

The Agency further notes that in the motion to intervene, ELPC never states that ELPC will be adversely affected by the Board’s order. IEPA Resp. at 4. Rather, the Agency contends, ELPC merely states that because of the involvement of ELPC in the R06-25 and R06-26 its members have an interest and will be affected. *Id.* The Agency opines that ELPC has not provided any argument or facts on how the members of ELPC are situated any differently than other citizens of Illinois. *Id.*

The Agency asserts that the Environmental Protection Act (Act) (415 ILCS 5/1 *et. seq.* (2006)) requires the Board and the Agency to protect all citizens from harmful air pollution through the proposal and adoption of rules for control of air emissions. IEPA Resp. at 4. The Agency notes that the Agency is also responsible for implementation and enforcement of regulations and the evaluation of requests for adjusting the rules. *Id.* The Agency is charged with making recommendations on requests for adjusted standards and as a part of that evaluation, the Agency evaluates whether the requested adjustment is protective of the environment. IEPA Resp. at 4-5.

The Agency expresses concern that if every individual who participates in a rulemaking is allowed to intervene in subsequent adjusted standard proceedings there could be numerous entities seeking to intervene. IEPA Resp. at 5. The Agency opines that participation in a rulemaking process should not be sufficient justification for intervention. *Id.*

The Agency maintains that the Board’s prior decisions on intervention do not support intervention in this proceeding. IEPA Resp. at 5. The Agency notes that the Board has not viewed intervention with favor. *Id.* The Agency opines that the standard for intervention should not be easily met, as intervention is a significant act with implications to the parties. *Id.* The Agency cites to two prior Board decisions in which the Board denied motions for intervention. Reply at 6, citing 2222 Elston LLC v. Purex Industries, PCB 03-55 (Jan. 23, 2003) and Midwest Generation EME, LLC v. IEPA, PCB 04-185 (Nov. 4, 2004). The Agency asserts that based on these decisions, the Board clearly considers the standard of whether or not to grant intervention a strict one. IEPA Resp. at 6. Based on the facts presented here, the Agency maintains that ELPC has not demonstrated that intervention should be allowed. *Id.*

MIDWEST GENERATION’S RESPONSE

Midwest Generation joins in the Agency’s arguments and advances additional arguments. MG Resp. at 2-5. Midwest Generation asserts that ELPC has not cited any authority in support of the motion to intervene and ELPC has not demonstrated that under Section 101.402(d) intervention should be allowed. MG Resp. at 2-3. Midwest Generation also maintains that

ELPC had not demonstrated that there would be material prejudice absent intervention. MG Resp. at 3

Midwest Generation offers that in a review of Board cases on intervention since 2001, there are only two instances where the Board found material prejudice. MG Resp. at 3, citing Saline County Landfill, Inc. v. IEPA, PCB 02-108 (Apr. 18, 2002) and Saline County Landfill, Inc. v. IEPA, PCB 04-117 (Feb. 19, 2004). Midwest Generation asserts that more often the Board has found that the non-party would not be materially prejudiced absent intervention and cites several cases in support of this assertion. MG Resp. at 3-4 (citations omitted).

Midwest Generation opines that like the non-parties to whom the Board denied intervention, ELPC has not established that the Agency does not adequately represent ELPC's interests. MG Resp. at 4. In addition, Midwest Generation claims that ELPC has not demonstrated that ELPC would be adversely affected by any final Board order. *Id.* Midwest Generation maintains that nothing in Section 101.402 indicates that prior involvement in a rulemaking entitles a participant to non-party intervenor status. MG Resp. at 5. Midwest Generation asserts that even if the Board were to find discretionary intervention is permissible, the Board must consider whether intervention would cause undue delay or materially prejudice the proceedings. *Id.* Midwest Generation argues that allowing intervention "could open the floodgates to all those who participated" in a rulemaking. *Id.*

DISCUSSION

The Board may allow a person to intervene in an adjudicatory proceeding if the person seeking to intervene establishes that he may be "materially prejudiced absent intervention" or that he is so situated that he may be "adversely affected by a final Board order." *See* 35 Ill. Adm. Code 101.402(d)(2), (3). For the reasons below, the Board denies ELPC's motion to intervene. The Board finds that ELPC has not established that ELPC may be materially prejudiced absent intervention and has not sufficiently articulated how ELPC's members' interests will not be adequately represented in this proceeding by the Agency.

Pursuant to the Section 28.1 of the Act (415 ILCS 5/28.1 (2006)), the Board may grant an adjusted standard to persons who justify such an adjustment consistent with Section 27(a) of the Act (415 ILCS 5/27(a) (2006)). Section 28.1(c) of the Act (415 ILCS 5/28.1(c) (2006)) provides a level of justification that must be met, if the rule of general applicability does not contain a level of justification. Those factors include:

1. factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
2. the existence of those factors justifies an adjusted standard;
3. the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and

4. the adjusted standard is consistent with any applicable federal law. 415 ILCS 5.28.1(c) (2006).

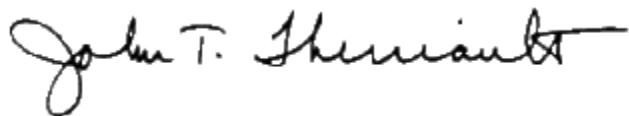
In addition, prior to ruling on a request for an adjusted standard, the Agency must file a recommendation that addresses the level of justification and efforts required by the petitioner to comply with the rule of general applicability. *See* 35 Ill. Adm. Code 104.416(b) and 104.406. Thus, both the statute and the Board's rules require evidence to support the requested adjusted standard.

In this proceeding, a hearing will be held (*see* Petition of Midwest Generation, L.L.C., Waukegan Generating Station For An Adjusted Standard From 35 Ill. Adm. Code 225.230, AS 07-3 (Feb. 15, 2007)). At that hearing, participants will be allowed to make oral statements under oath and subject to cross-examination. *See* 35 Ill. Adm. Code 101.628. The Board may also grant leave to file an *amicus curiae* brief pursuant to Section 101.110(c). These are opportunities for participation, short of intervention.

ELPC has alleged that members of ELPC will be materially prejudiced if not allowed to intervene because mercury emissions from coal combustion deposits affect air quality, bodies of water, and fish. Reply at 2. However, ELPC admits that until the Agency files the recommendation, ELPC cannot say that their position will be at odds with the Agency. Given the statutory and regulatory requirements for the Agency's recommendation, the Board is unconvinced by ELPC's arguments that the Agency may not represent the position of ELPC. Furthermore, the Board finds that participation by ELPC through oral comments at the hearing and the filing of an *amicus curiae* brief will address any potential prejudice suffered by ELPC and the membership of ELPC. Therefore, the Board denies the motion to intervene.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 17, 2008, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board