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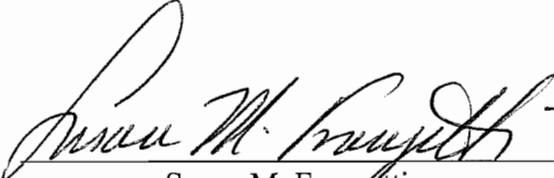
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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation's Motion for Temporary Suspension of Subdocket D Hearings was filed electronically on June 14, 2011 with the following:

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and that true copies were mailed by First Class Mail, postage prepaid, on June 14, 2011 to the parties listed on the foregoing Service List.


Susan M. Franzetti

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
WATER QUALITY STANDARDS AND) R08-9 (Subdockets C and D)
EFFLUENT LIMITATIONS FOR THE) (Rulemaking – Water)
CHICAGO AREA WATERWAY SYSTEM)
AND LOWER DES PLAINES RIVER)
PROPOSED AMENDMENTS TO 35 ILL.)
ADM. CODE 301, 302, 303, and 304)

**MIDWEST GENERATION'S MOTION
FOR TEMPORARY SUSPENSION OF SUBDOCKET D HEARINGS**

Midwest Generation, L.L.C. (“MWGen”), by its counsel, Nijman Franzetti LLP, hereby moves to suspend temporarily the commencement of the Subdocket D Hearings until after the Board issues the First Notice on the Proposed Aquatic Life Use Designations under Subdocket C. In support of this motion, MWGen states:

1. On March 18, 2010, the Illinois Pollution Control Board (the “Board”) decided to sever this rulemaking into four Subdockets. *In the Matter of: Water Quality Standards and Effluent Limitations For the Chicago Area Waterway System and Lower Des Plaines River, R08-09, Order, March 18, 2010.* Subdockets A and B consist of the proposed recreational uses and standards, respectively. Subdockets C and D consist of the proposed aquatic life uses and water quality standards, respectively. The Board has completed hearings in Subdockets A and B and, as of June 2, 2011, has proceeded to a Proposed Second Notice in Subdocket A. The hearings in Subdocket C are scheduled to be completed in August 2011.

2. During the May 31, 2011 prehearing conference in Subdockets C and D, several participants expressed concern about proceeding with Subdocket D hearings before the Board proceeds to First Notice in Subdocket C. (See Hearing Officer Order, June 1, 2011, R08-09 (Subdocket C and D). Accordingly, the Hearing Officer directed that this issue should be

addressed by filing a motion with the Board. (*Id.*) In the interim, the Hearing Officer tentatively scheduled Subdocket D hearings and associated dates for the pre-filing of testimony and questions pending the Board's ruling on the motions filed by the participants. (*Id.*) For the reasons set forth below, by this motion, Midwest Generation is requesting that the Board suspend the Subdocket D hearings until it has proceeded to First Notice in Subdocket C.

3. When it severed this rulemaking into four subdockets, the Board stated that its purpose was to allow the Board and participants to make better use of resources. (*In the Matter of: Water Quality Standards and Effluent Limitations, R08-09, Order, March 18, 2010, p. 18*). Midwest Generation submits that if the Board proceeds to require all of the witness testimony to be filed and presented in the Subdocket D hearings before proceeding to First Notice in Subdocket C, this purpose will not be achieved. Proceeding with the Subdocket D hearings will cause participants like Midwest Generation to expend far more resources than if the Subdocket D hearings were suspended temporarily to allow the Board to proceed to First Notice in Subdocket C.

4. The purpose of Subdocket C is to adopt aquatic life use designations for the Chicago Area Waterway System ("CAWS") and portions of the Lower Des Plaines River. As the Board stated in its March 18, 2010 Order, the purpose of Subdocket D is to "address the issues dealing with water quality standards and criteria which are necessary to meet the aquatic life use designations." (*Id.* at p. 18). Hence, until the Board proposes the aquatic life use designations to be adopted in Subdocket C, the participants in this rulemaking should not be compelled to address and present testimony on the issues dealing with the water quality standards and criteria to meet those proposed aquatic life use designations. Proceeding with Subdocket D hearings puts the proverbial "cart before the horse." The Board would be forcing

the participants to provide testimony without adequate notice of what the breadth or level of the aquatic life use is that the subject water quality standards and criteria are proposed to “protect.”

5. Proceeding with Subdockets C and D on the parallel course now proposed is distinctly different from the situation presented by doing so in Subdockets A and B. Subdocket B presented the single issue of whether or not the adoption of a bacteria effluent standard was necessary. This issue was unavoidably intertwined with the recreational use designation in Subdocket A. If a participant favored a recreational use for a water segment that allowed human contact, then it automatically followed that there should be a bacterial standard adopted in Subdocket B. Conversely, if a participant opposed such a recreational use designation, then its Subdocket B position was clearly and simply to oppose the adoption of the proposed bacteria effluent standard. In contrast, the interrelationship between the issues in Subdockets C and D is far more complex. As the record in Subdocket C now stands, there are multiple and varied positions presented regarding the appropriate use designation for several, if not all, of the UAA segments. The Illinois EPA has presented its proposed aquatic life use designations, the Metropolitan Water Reclamation District of Greater Chicago has presented a completely different aquatic life use classification for all of the CAWS segments, Midwest Generation (among others) has presented extensive testimony in support of its position regarding the appropriate aquatic life uses that can be attained in several of the UAA segments, particularly its challenge to the Illinois EPA’s proposed Upper Dresden Island Pool aquatic life use designation, and there is also a Citgo Petroleum Corporation, and PDV Midwest, LLC testimony regarding an alternative proposed use for one segment of the Chicago Sanitary Shipping Canal (“CSSC”), which could impact one or more of MWGen’s facilities. Clearly, there are multiple aquatic life uses proposed by the participants for the CAWS and the Lower Des Plaines River. Moreover,

until the final comments are submitted in Subdocket C, it is unknown precisely how many different, proposed aquatic life use designations will be presented for the Board's consideration.

6. MWGen would be severely prejudiced if it is forced to proceed with testimony when it does not know which among many proposed aquatic life use designations will be selected by the Board for the several UAA segments in which one or more of the subject five MWGen electric generating stations has an interest at stake. MWGen will have to consider all possible use outcomes for all of these reaches and present expert and other testimony on numeric water quality standards that addresses each such alternative. This will require considerable extra effort and cost both in the number of witnesses to be presented and in the expanded scope of the various potential use alternatives that witnesses will have to address in their testimony concerning what numeric water quality standards are necessary or, alternatively, are unnecessary to protect each of those proposed uses.

7. The complete state of uncertainty associated with the alternative designated aquatic life uses in Subdocket C is particularly prejudicial to MWGen regarding the issue of the appropriate thermal water quality standards to protect the designated use. As the Board heard in the testimony of the Illinois EPA's witness Chris Yoder, the determination of an appropriate thermal water quality standard depended upon the level of aquatic life use designated for the particular water segment. This is because the Illinois EPA's proposed thermal water quality standard was developed based on the creation of a list of the Representative Aquatic Species ("RAS") associated with the designated aquatic life use. The RAS will vary depending on the use that is established. (See Pre-Filed Testimony of Chris O. Yoder, Ex. 13, at pp. 4-5). Hence, without notice of the proposed aquatic life use designation for a particular UAA waters segment, MWGen's witnesses will have to try to develop multiple RAS lists of fish species to go along

with what it can surmise are the various aquatic life use designations to be presented by the participants for the Board's consideration in Subdocket C and then proceed to develop what they believe are the appropriate thermal water quality standards to protect each of these alternative use designations. If instead the Board proceeds to First Notice in Subdocket C, the burdens and uncertainties are significantly diminished. MWGen's witnesses can use the proposed aquatic life use designation from the Board's First Notice opinion to identify an applicable RAS list and to determine the thermal water quality standards to present to the Board that is protective of the proposed aquatic life use. Most importantly, the prejudice caused by not having notice of what aquatic life use designation may be applied to a given UAA segment will be eliminated.

8. Accordingly, until the Board proposes in its First Notice what the designated aquatic life uses are going to be, MWGen has an unreasonable burden of having to address in Subdocket D the various, alternative proposed uses and what the protected thermal standards should be for each of those proposed alternatives. Addressing potential thermal standards based upon multiple proposed aquatic life uses also may cause the record to become much more difficult, if not impossible to follow, which is exactly the opposite outcome of the Board's original decision to sever this rulemaking into subdockets.

9. MWGen has a substantial interest in these proceedings because of the potentially significant compliance costs associated with the Illinois EPA's proposed thermal water quality standards. The proposed Subdocket D thermal water quality standards would affect five of the MWGen electric generating stations – Fisk, Crawford, Will County and the two Joliet Stations. MWGen has shown through the expert testimony of Ray E. Henry, Principal Consultant with Sargent & Lundy, LLC, along with an extensive compliance costs study prepared by Sargent & Lundy, that if the Board were to adopt the Agency's proposed thermal standards, the compliance

costs for MWGen would reach almost \$1 billion. (See Ex. 440 February 1, 2011 Pre-Filed Testimony of Ray E. Henry and attached Ex. B (Sargent & Lundy Report) thereto and March 9, 2011 Hearing Transcript at pp. 97-98). Mr. Henry testified that the estimated capital cost of converting all of the MWGen facilities to closed cycle cooling systems in order to maintain compliance with the Agency's proposed thermal water quality standards was approximately \$976,000,000, with additional, annual estimated operation & maintenance costs of approximately \$23.5 million. (Ex. 440, R. Henry Pre-Filed Testimony at pp. 14-15 & 18). Given the enormous stake for MWGen in the Subdocket D proceedings, its ability to protect its interests in this rulemaking should not be impaired and burdened in favor of potentially reducing the duration of the Subdocket D rulemaking by a few months.

10. MWGen has actively participated in this UAA rulemaking since its inception. It has not previously requested any extension of time in the scheduled hearing dates. MWGen has consistently been ready, willing and able to comply with the Hearing Officer's scheduling concerning the presentation of witness testimony. MWGen's strong record of cooperation and diligence in moving these proceedings forward demonstrates that this request for a temporary suspension of the proposed Subdocket D hearings is not submitted for purposes of delay.

11. MWGen further submits that the recent Subdocket A events in May and June concerning the filing of both the U.S. EPA's May 11, 2011 Determination Letter (see Public Comment #584) and the Illinois EPA's May 16, 2011 Motion for Stay concerning recreational use designations also warrant that certain additional actions should be completed before either the Subdocket D hearings are commenced or deadlines are set for the pre-filing of Subdocket D witness testimony. The U.S. EPA's Determination Letter and the Agency's Motion for Stay have resulted in certain significant changes to the proposed recreational uses in the Board's

Proposed Second Notice in Subdocket A. There is a threat that the same course of events could occur in regard to Subdocket D based on the January 29, 2010 comments letter by the U.S. EPA, filed in this proceeding by Illinois EPA on March 26, 2010. (See Public Comment #286, filed in Subdocket D on March 26, 2010). Appropriate and reasonable steps can and should be taken to minimize a repetition of the Subdocket A situation where significant changes to the First Notice are made near the end of the one-year deadline within which Second Notice must issue.

12. The U.S. EPA January 29, 2010 Letter (PC#286) contains extensive comments and questions concerning the Illinois EPA proposed water quality standards in Subdocket D. With respect to thermal water quality standards, the U.S. EPA requests that the Illinois EPA provide additional information and justification regarding numerous aspects of those proposed standards, including but not limited to: the information used and additional analysis of the maximum and period average criteria; the identification of the thermal input parameters the summer temperature criteria is based on; justification for the year-round application of the acute thermal criterion; potential consideration of seasonally-based daily maximum criteria; re-consideration of certain period average criteria; the justification for the selection of the background location for temperature criteria; recommended revisions to certain upstream segments non-summer criteria; clarification of the period average limits rule language; questions concerning the excursion hours provisions of the proposed rules. (PC#286, USEPA Comments at pp. 1-3). The U.S. EPA Letter also comments on water quality standards for dissolved oxygen, unnatural sludge, ammonia, cadmium, chloride, lead, silver, fluoride, manganese, selenium, mercury and benzene. (PC#286, USEPA Comments at pp. 3-7). The U.S. EPA Letter expressly states: "We would like Illinois to consider our comments prior to the Illinois Pollution Control Board's taking final action on the proposed WQS." (PC#286, Letter at p. 1, 1st para.).

The Agency has not filed any response to these comments in this rulemaking and Midwest Generation is not aware of the existence of any response.

13. MWGen submits that before the participants in Subdocket D are required to begin filing and presenting testimony in Subdocket D, the Illinois EPA should file its response to the issues raised in the U.S. EPA Letter (PC#286). Depending upon its content, the Illinois EPA's response may result in further revisions to its proposed water quality standards, provide further relevant information to the participants regarding its justifications for those standards, and/or lead to further comments by the U.S. EPA. Any and all of this information should be available to the participants before they are required to present testimony on the proposed standards in Subdocket D. While the chain of events that lead to the significant changes in the Board's Proposed Second Notice in Subdocket A was not foreseeable, now that it has occurred, the appropriate steps should be taken to minimize the risk that similar significant changes are made in any Second Notice to be issued in Subdocket D. Such a situation wastes the resources of all participants who provided testimony and comment on uses that were ultimately rejected based on the U.S. EPA's May 2011 Determination Letter. It also severely prejudices their interests by eliminating the opportunity to present testimony concerning the uses that were ultimately presented in Second Notice without having to persuade the Board to re-open the rulemaking proceeding to allow them such an opportunity.

14. If the commencement of the Subdocket D hearings, and its associated witness testimony deadlines, is temporarily suspended, the Board can and should request that the Illinois EPA use this opportunity to respond to the U.S. EPA's Letter (PC#286) regarding Subdocket D issues while the Board proceeds to First Notice on Subdocket C. For the above stated reasons, the Illinois EPA's response is critically important information which should be available to

Subdocket D participants before the commencement of hearings in Subdocket D in order to avoid unfair prejudice.

15. MWGen understands the Board's strong desire to move forward with this rulemaking, and its concern that this proceeding has been ongoing for almost four years. However, Midwest Generation requests that the Board consider the time and resources spent to date in the context of the scope and nature of the original petition filed in this rulemaking. As the Board recognized in creating the four subdockets in this proceeding, the extensive scope of the Illinois EPA's rulemaking petition required separating it into what are effectively four, individual rulemakings. The original petition proposed an entirely new recreational and aquatic life use classification system, with accompanying new water quality standards for each of the six new proposed uses, that covered thirteen waterbodies, which were in turn subdivided into 17 individual reaches for both recreational and aquatic life use designation purposes. (Illinois EPA's Statement of Reasons, p. 27). The fact that three of these four rulemakings are likely to be completed in approximately four years time, demonstrates that reasonable and diligent progress has been made under the unique and difficult circumstances presented, particularly given the rest of the Board's workload.

16. The Illinois EPA's decision to file all of the proposed UAA rules in a combined, single rulemaking largely dictated the extensive amount of time and effort that it has taken the Board to conduct these proceedings. But the Agency's decision to so frame this rulemaking should not now cause the Board to impose unnecessary and prejudicial burdens upon its participants, particularly participants like Midwest Generation who have so much at stake in the outcome of Subdocket D. Beginning the Subdocket D hearings once First Notice on Subdocket C has issued should not result in a significant extension of time because Subdocket C's hearings

are scheduled to end in August 2011, just over two months from now. Thereafter, the Board can schedule a deadline for submission of final comments in Subdocket C and move towards First Notice in a matter of a months. Further, by proceeding to First Notice in Subdocket C before commencing hearings in Subdocket D, the scope of the relevant issues and the extent of the testimony presented will be narrowed, as explained above, thus reducing the amount of hearing days, time and resources of both the Board and the participants necessary to complete Subdocket D.

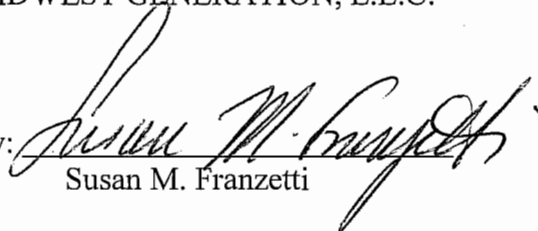
17. In sum, Midwest Generation submits that to avoid significant prejudice, to reduce the risk of expending significant, additional and unnecessary resources and to narrow the scope of the effort necessary to address Subdocket D water quality standards issues, all of which will result in a clearer and more concise record before the Board, its request for a suspension of Subdocket D hearings until the issuance of First Notice in Subdocket C should be granted. Further, Midwest Generation's request that the Illinois EPA respond in the interim to the U.S. EPA Letter comments concerning Subdocket D proposed rules will also complement and advance these same goals. The temporary suspension of Subdocket D hearings will not cause significant prejudice or harm to the Board, Agency or any interested parties.

WHEREFORE, for the foregoing reasons, Midwest Generation, L.L.C. respectfully requests that the Board grant its motion to temporarily suspend the Subdocket D hearings, and the associated filing deadlines set forth in the Hearing Officer's June 1, 2011 Order, until after the Board has issued its First Notice on the designated aquatic life uses under Subdocket C.

Respectfully submitted,

MIDWEST GENERATION, L.L.C.

By:


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Dated: June 14, 2011

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