BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

CITY OF BENTON FIRE DEPARTMENT, Petitioner,	)	
v.	)	PCB 2017-001
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
Illinois Pollution Control Board
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, Petitioner's Motion for Exertion of Time to File Response to Motion for Summary Judgment Instanter, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 28th of July, 2017. The number of pages in the e-mail transmission is 9 pages.

Respectfully submitted,

CITY OF BENTON FIRE DEPARTMENT,
Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF BENTON FIRE DEPARTMENT, Petitioner,	)	
v.	)	PCB 2017-001 (LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT INSTANTER

NOW COMES Petitioner, CITY OF BENTON FIRE DEPARTMENT, pursuant to Section 101.516 of the Pollution Control Board's procedural regulations (35 Ill. Adm. Code § 101.516), and hereby moves the Hearing Officer, for leave to file Petitioner's Response to Respondent's Motion for Summary Judgment Instanter, stating as follows:

1. On July 12, 2017, Respondent filed Illinois EPA's Motion for Summary Judgment and Response to Petitioner's Motion for Summary Judgment.

2. Pursuant to the Board's procedural rules, Petitioner was given 14 days to file a response to said motion (July 26, 2017), unless the Hearing Officer extends the deadline by written motion. (35 Ill. Adm. Code § 101.516(a))

3. From July 20th to July 24th, Petitioner's attorney was on family vacation and planned to file a response on returning.

4. This week, however, Petitioner's attorney has had the flu, and was unable to complete the response by Wednesday. In addition, he had to prioritize the filing of a new LUST appeal on July 26, 2017, which was the statutory deadline for the appeal. J.D. Streett & Company, Inc. v. IEPA, PCB 2018-003.

5. Undersigned counsel is not aware of any prejudice that would result from a delay of two days, and certainly did not intend to cause any inconvenience.

6. A copy of the response is filed herewith today.

WHEREFORE, Petitioner, prays for an order authorizing the filing of the attached response instanter, or for such other and further relief the Hearing Officer deems meet and just.

CITY OF BENTON FIRE DEPARTMENT,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, CITY OF BENTON FIRE DEPARTMENT, pursuant to Section 101.516 of the Pollution Control Board's procedural regulations (35 Ill. Adm. Code § 101.516), and hereby responds to the Illinois EPA's Motion for Summary Judgment, stating as follows:

I. THE ILLINOIS EPA FAILS TO RECONCILE ITS STANDARD OF REVIEW WITH ITS POSITION HEREIN.

The Illinois EPA restates the traditional standard of review given in these proceedings as requiring the Board to decide "whether the application as submitted, demonstrates compliance with the Act and the Board regulations." (Mot., at p. 3 (quoting Rantoul Township High School Dist. No. 193 v. IEPA, PCB 03-42, at p. 3 (April 17, 2003)) However, the basis of the Illinois EPA decision is not "the application as submitted," but the alleged failure to answer to its satisfaction numerous information requests made a few days before the expiration of the 120-day decision deadline. In the two cases closest to addressing this issue, the Board found that the application could be denied for failure to submit documentation expressly referenced in the Board's regulations, namely "invoices" required by 35 Ill. Adm. Code § 734.605(b)(9). T-Town

Drive Thru v. IEPA, PCB 07-85 (April 3, 2008); Friends of the Environment v. IEPA, PCB 16-102 (July 21, 2016). The Board specifically found the invoices requested were required for a "complete" application under the Board's regulations. T-Town at p. 27. That is to say, those applications were incomplete as submitted, a decision consistent with the traditional Board standard of review.

Here, the Agency did not ask for an existing document similar to an invoice:

> **[P]lease provide a mathematical financial derivation for how the unit rate for the item was determined. Include such variables (as applicable) as purchase costs (including receipts), operation & maintenance costs, estimated product usage, and estimated product life.**
>
> **. . .**
>
> **Please discuss if it is appropriate for the item to be charged as a direct project cost (versus as an indirect cost of doing business).**

(R.018)

In legal parlance, the Agency promulgated a series of interrogatories, not a request to produce. This is an information request that seeks the creation of a information, not "supporting documentation."

II. THE ILLINOIS EPA DOES NOT EXPLAIN HOW THE INFORMATION WAS "RELIED UPON" IN DEVELOPING THE BUDGET.

The Illinois EPA emphasizes that it "may review any or all technical or financial information, or both, relied upon . . . in developing any plan, budget, or report selected for review." (Mot. at p. 6 (quoting 35 Ill. Adm. Code § 734.505(a)) (emphasis in original)) Having emphasized the importance of reliance, the Illinois EPA offers no explanation of how the

information requested was "relied upon" by anyone. Without such an explanation, the Agency's motion for summary judgment must be denied for failure to address this critical point emphasized in its own argument.

III. THE ILLINOIS EPA DOES NOT NEED A MATHEMATICAL FINANCIAL DERIVATION TO REVIEW REASONABLENESS OF COSTS.

The Illinois EPA testifies that it "simply . . . cannot" determine if any of the costs listed are reasonable without the requested information. (Mot. at p. 6) This claim is not based on the record, and would require testimony from the project manager explaining, *inter alia* how did he do his job previously? How do other project managers?

Traditionally, the Agency reviewed the reasonableness of rate requests by identifying outliers among the numerous applications it received and reducing reimbursement to reflect rates consistent with those charged in the industry. See City of Roohouse v. IEPA, PCB 92-31, at p. 8 (Sept. 17, 1992) (Agency relies on comparisons with similar job sites derived from audits over the last two years involving hundreds of reimbursements). For example, under the pre-Title XVI LUST Program, when reimbursement was sought for the use of a photoionization machine at a rate of $310 per day, the Agency appropriately reduced the reimbursement rate to $142 per day, which was consistent with observed market prices. Malkey v. IEPA, PCB 92-104, at p. 5 (March 11, 1993).[1] Later, the Agency sought to standardize this approach by creating rate sheets based upon samples of industry charges in its files, which were used to ascertain the average rate, and any rate that exceeded one standard deviation from that average was deemed unreasonable. Cf.

[1] The subject appeal involves a request for a $135 per day rate for such a machine. (R.075)

Illinois Ayers v. IEPA, PCB 03-214, at p. 7 (April 1, 2004). Without undergoing rulemaking, however, the secret rate sheets were without legal authority. Id. at p. 16. Nothing in Illinois Ayers, however, precluded the Agency from relying upon its internal files to identify costs that are unreasonable because they exceed the standard range of charges in the industry. Nor is the Agency precluded from relying upon other sources of information, such as the internet to identify standard charges in the industry. However, the Agency is required in such circumstances to disclose on appeal any "information the Agency relied upon in making its final decision." (35 Ill. Adm. Code § 105.410 (emphasis added); see also IEPA v. PCB, 138 Ill. App. 3d 550, 551 (3rd Dist. 1985) (explaining the purpose of the appeal is to allow Petitioner the opportunity to challenge the basis for the Agency's decision).

However, the Agency does not have any authority to establish rates for specific consultants, which appears to be the purported purpose of asking the consultant to create a mathematical financial derivation based upon the particular consultant's usage. If, for example, one consultant uses the same equipment twice as many times a year as another consultant, it appears the mathematical financial derivation invented by Mr. Piggush would result in the first consultant only being allowed to charge half the rate as the second consultant. In any event, any such formula used to determine reasonable cost is itself a rule that must be adopted under the requirements of the Administrative Procedure Act. Senn Park Nursing Center v. Miller, 104 Ill.2d 169, 178 (1984).

There is, of course, another option available to the Agency. It can propose new rulemaking to the Board creating standards of general applicability for everyone, not consultant-based standards. In any event, the Agency's motion for summary judgment should be denied to

the extent it is based upon testimony not in the record as to the project manager's utter inability to evaluate reasonableness of costs without the mathematical financial derivation.

IV. THE CONSULTANT DID NOT REFUSE OR FAIL TO RESPOND TO THE E-MAILS.

Petitioner objects to the repeated characterization of the consultant as refusing to cooperate or provide information. Mr. Piggush had the application for 116 days when he made a lengthy demand for additional information to be provided immediately for his convenience, and not just information at issue in this appeal. (R.018) Furthermore, the demanded mathematical financial derivation and discussion of direct versus indirect costs pertained to each of eleven separate items in the Consultant's Materials Costs form. Responses were given to each request, including the results from contacting a rental company to ascertain how its rental price is determined. These responses were adequate to the time and consideration Mr. Piggush gave the application, and frankly were all that could be provided within the time remaining.

Therefore, in this case, the question can be characterized in practical terms as to whether the consultant had a duty once the information was requested even at such a late date to extend the decision deadline to provide whatever a mathematical financial derivation might mean for $2.75 in plastic bags and to obtain legal opinions on direct versus indirect costs. Moreover, if this information is necessary for a complete application, then the cost of preparing it is a reimbursable cost under the LUST Program.

The more reasonable conclusion is that the Agency can ask any question it wants of the consultant – and these communications should be encouraged to avoid confusion or unnecessary appeals. However, any alleged insufficiency in the response does not automatically convert the

issue into a lack of supporting documentation for the application. "The Agency's authority to seek documentation cannot be unlimited." Friends of the Environment v. IEPA, PCB 16-102, at p. 7 (July 21, 2016).

WHEREFORE, Petitioner, CITY OF BENTON FIRE DEPARTMENT, prays for summary judgment restoring all of the consultant materials' costs to the budget, an order directing Petitioner to submit proof of its legal costs, and such other and further relief as the Board deems meet and just.

CITY OF BENTON FIRE DEPARTMENT,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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