BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN THE MATTER OF:	)	
	)	PSD APPEAL NO. 09-04
POWER HOLDINGS OF ILLINOIS, LLC	)	

Notice

To:

Eurika Durr
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W. Suite 600
Washington, D.C. 20005

David C. Bender
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PLEASE TAKE NOTICE that I have today filed electronically with the Clerk of the Environmental Appeals Board an original of Permittee's Response to Petitioner's Motion for Leave to Reply on behalf of the Permittee, POWER HOLDINGS OF ILLINOIS, LLC, a copy of which is herewith served upon you.

Respectfully submitted by,

Patricia F. Sharkey
On Behalf of Power Holdings of Illinois, LLC

Dated: March 15, 2010

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Illinois Attorney No. 6181113

Certificate of Service

I hereby certify that on the 15th day of March, 2010, I did send the following document entitled **Permittee's Response to Petitioner's Motion for Leave to Reply**, electronically to the Clerk of the Board, and to the following persons as shown below:

Eurika Durr
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W. Suite 600
Washington, D.C. 20005
(Courtesy Hard Copy Via U.S. Mail)

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In the Matter of:	)	
	)	**PSD Appeal No. 09-04**
Power Holdings of Illinois, LLC	)	

PERMITTEE'S RESPONSE TO PETITIONER'S MOTION FOR LEAVE TO REPLY

Power Holdings of Illinois, LLC ("Permittee") respectfully objects to the granting of the Motion of Petitioner for Leave to File Reply filed in this matter on March 10, 2010.

In support thereof, Permittee states:

1. **Pursuant to the Part 124 regulations governing PSD permit appeals, there is no right to Reply. The EAB Practice Manual requires that a Petitioner demonstrate that a Reply is *necessary*.**

The Part 124 regulations governing PSD appeals make no provision for Reply briefs and the Board does not automatically grant motions to Reply. Rather, Reply briefing is an exception to the Board's normal practice to be granted only upon a demonstration that a Reply is *necessary:*

> "After the permitting authority's response has been filed, the EAB normally does not require further briefing before issuing a decision whether to grant review. On occasion, however, petitioners who believe that the permitting authority's response requires a reply may, upon motion explaining why a reply brief is *necessary*, be granted leave to file a reply brief." EAB Practice Manual, p.36 [emphasis added]

Reply briefs are not necessary to ensure that the Board has an "accurate briefing on the relevant law." *In re BP Cherry Point*, 12 E.A.D. 209, 215-16 n.18 (EAB 2005). This is because the Board conducts its own independent legal research and examination of the administrative record. *Id.* Where the Board has granted motions for Reply briefs, it has done so for its own benefit, i.e. where it *needs* additional information or argument – not simply to allow Petitioner to express its view on the law or facts referenced in the Response briefs. See *In Re Northern Michigan University, Ripley Heating Plant* where the Board granted a motion for leave to Reply, but did so on the basis of a finding that the Board "would benefit from additional illumination of the issues." *In re N. Mich. U., Ripley Heating Plant*, PSD Appeal No. 08-02 (EAB, Aug. 14, 2008) (unpublished order) In that case, the Board required that the Reply be filed within two weeks "consistent with the principle of timely adjudication for PSD permitting appeals." *Id.*

Where there is no *necessity* for a Reply brief shown in a Motion for Leave to File Reply, the Board has not and should not grant such a Motion. The Part 124 procedures are designed to ensure that the Board's administrative review process proceeds efficiently. A petitioner should not be allowed to delay these proceedings simply to get a "second bite of the apple."

2. Petitioner has raised no legitimate grounds for the granting of its Motion for Leave to Reply.

Petitioner's Motion makes only broad, undocumented allegations and points to no facts or law demonstrating the necessity of a Reply. It is not enough for Petitioner to simply state that it "believes that the Board would benefit from Sierra Club's further briefing on these issues." Petitioner carries a burden in making this Motion, particularly in a PSD case, and it has failed to carry that burden.

Petitioner states that the Responses "misapprehend or mischaracterize the basis for the Petition," but provides not a single example of such misapprehension or mischaracterization that would allow the Board to determine if this contention necessitates a Reply. Even if Petitioner's allegation is true, the documents speak for themselves and the Board is fully capable of reviewing the Petition and the Responses and determining if there has been a mischaracterization. Petitioner's further elaboration on what its Petition says is an attempt to get a "second bite" at making its arguments – this is neither necessary nor allowed under the Part 124 rules.

Petitioner next states that the Response Briefs "incorrectly argue that Sierra Club failed to preserve issues for review." The Motion doesn't tell us what these issues are. Moreover, Petitioner had a duty to specify *in the Petition* -- not in a Reply -- where in the record each issue was preserved. See 40 C.F.R. 124.13, 124.19(a), *In re ConocoPhillips Co.*, 13 E.A.D.___, PSD Appeal No. 07-02, slip op. at 44 -45 (EAB, June 2, 2008); *In re Christian County Generation, LLC*, 13 E.A.D. ___, PSD Appeal No. 07-01, slip op. at 11-19 (EAB, Jan. 28, 2008); *In re BP Cherry Point*, 12 E.A.D. 209, 218-20 (EAB 2005); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999).

To the extent the Petition did not state where in the record such issue was raised and preserved, Petitioner cannot now be allowed to re-write its Petition and try to characterize something in the record as supporting its position. To allow Petitioner to restate the basis of their Petition at this late date is not only prohibited under Part 124, it would also be highly prejudicial to the Permittee and the Respondent who have expended extensive resources to respond to the allegations made in the Petition.

If the Petition did point to where an issue was raised in the administrative record, the Board is fully capable of reading the Petition and has no need for a Reply to determine whether the Response Briefs make an incorrect argument. *In re BP Cherry Point*, 12 E.A.D. 209, 215-16 n.18 (EAB 2005) However, neither the EAB nor the Respondents are required to ferret out evidence supporting the Petition. *In re BP Cherry Point*, 12 E.A.D. 209, 218-20 (EAB 2005); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250, n.10 (EAB 1999) ("It is not incumbent on the Board to scour the record to determine whether an issue was properly raised below.")

Petitioner also states it would like to Reply because the Responses "introduce new evidence regarding, inter alia, Administrator Jackson's recent statements regarding greenhouse gas regulation." However, Petitioner's desire to give its interpretation of Administrator Jackson's recent statements does not justify additional briefing and delay in this proceeding. The simple fact that a public document, such as Administrator Jackson's February 22, 2010 letter, was submitted with the Respondent's brief does not create a new ground for appeal, nor does it necessitate a Reply. The document speaks for itself. The Board is permitted to take notice of it and is fully capable of discerning its meaning and significance without Petitioner's interpretation.

As the Board can discern on the face of the February 22nd letter, it is not a formal administrative action affecting the validity of the Johnson Memo. Before a right to Reply is granted on an issue not raised in the administrative record, Petitioner minimally must bear the burden of explaining why the February 22nd letter is significant to the outcome of this case. See *In re Christian County Generation, LLC*, PSD Appeal No. 07-01 (Denying review of CO2 BACT claim based on the Supreme Court's intervening decision in

Massachusetts v. EPA, 549 U.S. 497 (2007) because the issue was not raised in the administrative record and because the *Massachusetts* decision did not compel a different outcome in that case.) The Petitioner has not provided such an explanation. A PSD appeal is not a forum for public debate and should not be delayed simply to allow a party to give its opinion of a public document which is not critical to the outcome of the proceeding. *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126-27 (EAB 1999); *In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999).

3. Petitioner is inappropriately seeking to re-brief this case.

Petitioner's amazing suggestion that this case be reopened for new briefing is entirely unnecessary and without precedent. (See Motion, p. 2, "... in the alternative, if the Board grants review and seeks further briefing, Petitioner believes that process would also provide an opportunity to address the arguments raised in the responses. See 40 C.F.R. 124.19(c) (providing that the Board may grant review and establish a briefing schedule).)

Contrary to Petitioner's contention, a second round of briefing is not provided for by the Part 124 rules governing PSD appeals. Section 124.19 (40 C.F.R. 124.19) does provide that the Board's "[p]ublic notice shall set forth a briefing schedule for the appeal," and the Board provided the required notice in this case on December 2, 2009. Petitioner has pointed to no authority for its contention that Section 124.19 (c) anticipates re-briefing a case that is already fully briefed. On the contrary, Section 124.19(a) mandates that a complete petition be filed within 30 days and Section 124.19(c) requires that the Board "act within a reasonable time following the filing of the petition [to either] grant or deny the petition."

Furthermore, Section 124.19(a) requires that the petition include a demonstration that any alleged error was raised before permitting authority and point to facts and law demonstrating it was clearly erroneous. Section 124.1 states:

> "The petition *shall* include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period...and a showing that the condition in question is based on (1) A finding of fact or conclusion or law which is clearly erroneous..."

The Board has strictly construed these requirements. *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126-27 (EAB 1999); *In re Sutter Power Plant*, 8 E.A.D. 680, 686-688 (EAB 1999).

4. Granting of this Motion Would Be Prejudicial to Power Holdings.

In a case, such as this, in which the Permittee is prevented from commencing construction by virtue of the pending EAB appeal, the Permittee must be presumed to be prejudiced by any unwarranted delay. As the Board "assigns a high priority" to PSD appeals, Petitioner bears a significant burden in this case of demonstrating both a legal basis *necessitating* a Reply and facts justifying the requested delay in this proceeding. Petitioner has not made this demonstration.

Moreover, to allow Petitioner to reargue its case, including pointing to something new in the record allegedly supporting its claim of error, would be highly prejudicial to the Permittee which has expended significant resources responding to the Petition as filed.

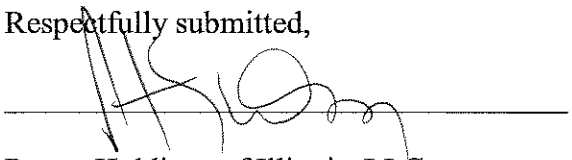
5. Request that a Sur-Reply be allowed if Petitioner's Motion is granted.

If the Board does allow Petitioner to file a Reply, Permittee requests, for the sake of expediency, that the Board in the same order allow Permittee to file a Sur-Reply, as it

has allowed in other cases. See, e.g., *In re Seminole Elec. Coop.*, PSD Appeal No. 08-09, slip op. at 14 n.17 (EAB, Sept. 22, 2009); *In re Sumas Energy 2 Gen. Fac.,* PSD Appeal No. 05-03 (EAB May 26, 2005) (Order Denying Review) (unpublished order); *In re Sutter Power Plant*, 8 E.A.D. 680, 685 (EAB 1999). In such case, Permittee requests that it be allowed 10 business days after the Reply is posted on the Board's online docket to file its Sur-reply. Counsel for Respondent has stated that it does not object to Permittee being allowed to Sur-Reply. Permittee has contacted, but been unable to reach counsel for Petitioner.

WHEREFORE, Permittee respectfully requests that the Motion of Petitioner for Leave to File Reply be denied. Permittee further requests that if such Motion is granted that the Reply be required within 10 days and that Permittee be permitted to file a Sur-Reply within 10 days thereafter.

Respectfully submitted,



Power Holdings of Illinois, LLC

By One of Its Attorneys

Date: March 15, 2010

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