

HARKINS CUNNINGHAM

ATTORNEYS AT LAW

SUITE 600

801 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20004-2615

202 973-7600

FACSIMILE 202 973-7610

2800 ONE COMMERCE SQUARE
2005 MARKET STREET
PHILADELPHIA, PA 19103-7042
215 851-6700
FACSIMILE 215 851-6710

WRITER'S DIRECT DIAL
(202) 973-7606



10 ROCKEFELLER PLAZA
SUITE 1250
NEW YORK, NY 10020-1903
212 218-1990
FACSIMILE 212 218-1999

205805

July 9, 2002

ENTERED
Office of Proceedings

JUL 09 2002

Part of
Public Record

Office of the Secretary
Attn: Rini Ghosh, Environmental Review
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

**Re: *Midwest Generation, LLC – Exemption from 49 U.S.C. 10901 – For
Construction in Will County, Illinois, STB Finance Docket No. 34060***

Dear Ms. Ghosh:

In its comments on the Environmental Assessment ("EA") filed May 10, 2002 ("Midwest Comments"), and in its May 21, 2002 letter, Midwest Generation, LLC ("Midwest") makes a number of remarkable claims and new arguments that are wrong or misleading. Similarly flawed claims and arguments are made by Midwest in a June 26, 2002 letter from Mr. R. Michael Bales to Ms. Jo Carole Dawkins purporting to respond to questions and requests for information by SEA in a June 12, 2002 letter to Mr. Bales ("June 26, 2002 letter"). This June 26, 2002 letter, and also a letter from Ms. Dawkins to the Illinois Historic Preservation Agency ("IHPA"), concerning the historic UP culvert over Sugar Run, were recently added to the public docket and were just obtained by counsel for Illinois Central Railroad Company ("IC") last week.¹ In order to assist the Board so that it may complete a legally sufficient and supportable environmental review of Midwest's proposal, IC addresses the most significant of the new claims and arguments in these documents.²

¹ IC has not yet been able to obtain a copy of the referenced June 12, 2002 letter itself.

² Given that the SEA's environmental review process is informal, IC does not object to Midwest's May 21, 2002 letter or its subsequent submissions of materials, which raise new

HARKINS CUNNINGHAM

Office of the Secretary

July 9, 2002

Page 2

Midwest made two broad claims in its Comments, both of which were erroneous. First, it argued that EA incorrectly states that "Midwest cannot begin construction of the proposed rail line until also obtaining authority from the Board to cross IC's track." Midwest Comments at 2 (citing EA at iii and I-2). The EA's statement was correct, however, because the only rail line proposed by Midwest was so-called Route A, which includes a crossing of IC's lines requiring Board authority. Far from proposing Route B, Midwest had argued even after its petition for exemption that Route B did not represent a feasible alternative.³ Midwest's claim that Route B was not a feasible alternative was later rejected by SEA.⁴

Midwest's second argument was that the EA adequately addressed all environmental issues raised by IC. Midwest Comments at 2-4. It is evident from Midwest's May 21, 2002 letter that even Midwest no longer believes this.⁵

In that letter, Midwest acknowledged that there are significant remaining environmental issues, but it argued that those issues relate only to Route A. In a stark about face, Midwest stated that it now wishes initially to construct Route B alone, followed later by an extension over the remainder of Route A. It urged the Board to take the apparently unprecedented step of expediting approval of initial construction of Route B by issuing a separate environmental approval for Route B, followed by a final analysis of Route A.

Midwest's request should be denied.

First, Midwest's March 21, 2002 letter introduces a third alternative that SEA will now be required to consider. That alternative is the construction of two separate, sequential projects.⁶

arguments and issues, so long as responses from IC are similarly considered. If SEA or the Board believes leave is required to file this letter, IC so requests.

³ M. McBride & J. Collins letter to V. Rutson, dated August 2, 2001 (requesting SEA to determine that the longer route requiring a crossing of IC is the only "feasible route that will accomplish the objectives of the Project").

⁴ V. Rutson letter to J. Collins, dated Sept. 12, 2001.

⁵ Indeed, Midwest's claim in its comments was undermined by the report of its own consultants, Natural Resources Consulting, Inc. ("NRC"), which was attached to those comments. NRC's report (at page 2) echoes IC's argument that additional review by the Illinois Historic Preservation Agency is required of the historic UP culvert that Midwest would significantly modify (*see* IC comments on EA, dated May 10, 2002, at 2-3 ("IC Comments")). Midwest did not discuss this aspect of its consultant's report.

⁶ Midwest has made clear that it views the construction of Route B merely as a stopgap measure until it can construct "the remainder of Route A." Midwest May 21, 2002 letter at 2.

HARKINS CUNNINGHAM

Office of the Secretary

July 9, 2002

Page 3

Midwest never proposed such an alternative previously, and SEA has had no opportunity to consider its implications for environmental impacts. Midwest may have assumed that its new proposal is indistinguishable from the construction of Route A as a single project, so that no separate environmental analysis of the alternative would be necessary. That assumption is unfounded, however, because the proposed two-stage construction project may create new and different environmental hazards and impacts. These include, for example, potential differences in construction stages and possibly in construction itself due to the need to complete Route B as a self-contained working connection, then possibly to stop construction, and then to begin construction again of additional track to complete Route A.⁷ Assessment of the potential environmental impacts of Midwest's new proposal requires investigation; a legally sufficient assessment cannot be based on unsupported assertion.

Second, Midwest's suggestion that SEA separately review the proposed construction of Route B and the proposed construction of Route A ignores the fact that one of the fundamental purposes of SEA's environmental review is to determine if a feasible alternative exists that is environmentally preferable such that the Board should limit its construction authority. That

⁷ IC had emphasized the need for conditions concerning the order of construction and construction staging as important environmental issues even before Midwest proposed its new alternative. See IC Comments at 6-8. Determining the applicability of such conditions to Midwest's new proposal is one example of the environmental issues raised by Midwest's new proposed alternative. Others are discussed in text below.

Mr. Bales's discussion of these issues in his June 26, 2002 letter (at page 4-5) only underscores the need for conditions concerning the order of construction and construction staging. Regarding the order of construction, Mr. Bales states frankly (at page 4) that Midwest wants "to have the flexibility, given time constraints, to do various things at the same time or even out of order if need be to speed up completion of the project, provided that doing so would have no adverse environmental impact." Regarding the environmental threats that would arise from construction staging outside the right-of-way, Mr. Bales states (at page 4) that it is "possible to have staging areas outside the right-of-way without causing any environmental or congestion problems, and Midwest would commit that any staging area would not cause any environmental problem, such as erosion or congestion." Notably, Mr. Bales's comments on the order of construction fail to address the safety concerns raised by IC, and his comments on construction staging do not even mention the threat of direct pollution. Neither can be adequately avoided. More generally, Mr. Bales's answers would leave entirely to Midwest the determination of whether and when its activities will have an "adverse environmental impact" or cause "any environmental problem." SEA cannot and should not delegate that decision to Midwest, especially inasmuch as it has already shown itself to be incapable of objectively identifying such impacts (see footnote 13, below).

HARKINS CUNNINGHAM

Office of the Secretary

July 9, 2002

Page 4

analysis can only be done on an integrated basis considering all of the feasible alternatives together.⁸

Third, Midwest is incorrect in its central assertion that little or no additional environmental review is required for so-called Route B. Many of the environmental issues identified in the IC Comments and in SEA's questions and request for information in its June 12, 2002 letter to Midwest relate directly to Route B. One obvious example is the wetland issue identified by IC concerning the drainage ditch lying between the existing BNSF track and the proposed construction site (EA at II-5 to II-6; IC May 10, 2002 Comments at 3-4). The area at issue is common both to Routes A and B. If no agency is required to issue a wetlands permit with regard to this area, as suggested by Mr. Bales in the June 26, 2002 Letter (at page 4), then, under the National Environmental Policy Act ("NEPA"), it is the responsibility of the Board to determine whether a wetland exists at this site and to assess the proposed project's potential impacts on it.⁹

A second environmental issue arises from the fact that Midwest has proposed the construction of Route B apparently because it believes (contrary to IC's view) that use of Route B will provide for more efficient delivery of coal than the *status quo*. As IC pointed out in its Comments, Midwest made clear in its petition for exemption that more efficient delivery of coal is likely to result in increased generation at its plant. IC Comments at 1-2. Accordingly, SEA must consider increased pollution from such increased generation as a reasonably foreseeable consequence of Midwest's proposal.¹⁰ *Id.*

⁸ Although the EA tentatively concluded that there would be no significant impacts from either Route A or Route B, IC's comments on the EA pointed out a number of deficiencies in that analysis that could result in a finding of significant impact. Moreover, as discussed next in text, Midwest has now introduced a third alternative for consideration. The final environmental analysis itself is necessary for the Board to address the issue of which alternative may be environmentally preferable.

⁹ Although Mr. Bales states that the Will County Land Use Department ruled that no additional permitting was required for the ditch (June 26, 2002 Letter at 6), he does not claim that this ruling was based on a determination that no wetlands were present.

¹⁰ Mr. Bales seems to argue in the June 26, 2002 Letter that no increase in electric output may be attributed to the proposed project. He states (at page 1) that "Midwest expects coal usage at Joliet will grow over time to meet the demand for electricity in the Northern Illinois market, regardless of approval or disapproval of either or both Routes." However, he fails to address either the level of growth or the likelihood or the rate of growth, which, according to Midwest's own logic and prior statements, are each likely to increase with use of the new routes.

HARKINS CUNNINGHAM

Office of the Secretary

July 9, 2002

Page 5

In its Comments, Midwest did not disagree that the Board must address potential increases in air emissions from its plant. Indeed, it suggested the Board ought to do so. Midwest Comments at 3. It argued, however, that

[A]n increase in use of the Joliet Generating Station will either simply displace electricity generated by other coal-fired generating stations, leading to no net increase in emissions (or a net decrease due to use at Joliet of lower-sulfur Powder River Basin coal), or will not displace any other generation if demand is very high. As such, the anticipated increase in coal usage at the Joliet Generating Station will involve no net increase in emissions, and might produce a net reduction in emission, from the generation of electricity.

Id. As SEA knows, however, issues such as air, water, and noise pollution are not simply matters of overall (e.g., state or national) net environmental impacts. They are first and foremost local issues. The overall net impact approach suggested by Midwest could entirely mask profoundly different environmental impacts caused by differences in concentrations of pollutants and other environmental impacts and by differences in local environments themselves. SEA's obligation under NEPA includes assessing the environmental impacts of increased generation at the Joliet Generating Station in the project area itself, which is a foreseeable consequence of the project.

Mr. Bales's June 26, 2002 Letter (at page 2) may be seen as an attempt to address this issue. He relates the "no net increase in air emissions" to a "region," based on his argument that "[t]he demand for electricity is a given that must be met by generating units in the region." *Id.* This argument fails for two reasons. First, the "region" Mr. Bales is referring to is the entire "Midwest,"¹¹ which is far too broad. Second, Mr. Bales never supports his critical assertion that the Midwest is somehow a self-contained electric market to which and from which electric power cannot be wheeled.

Environmental issues concerning the order of construction and construction staging (*see* footnote 7, above), the potential that increased train traffic will interfere with freight and commuter operations beyond the South Joliet Yard,¹² and the need for SEA to perform a more

¹¹ *See id.* ("In the Midwest, as in most regions . . .").

¹² Mr. Bales addresses the operational interference issue in his June 26, 2002 Letter (at page 3). Whatever qualifications Mr. Bales may have to address railroad operations, however, is not apparent from his letter. His title – Director, Fuels, at Midwest – does not suggest adequate railroad operations expertise. Absent such expertise, SEA should not rely on his response, which, for example, is largely based on judgments concerning the adequacy of the existing "railroad dispatch and signal systems" to avoid congestion. His testimony does suggest, however, that, at

HARKINS CUNNINGHAM

Office of the Secretary

July 9, 2002

Page 6

systematic investigation and evaluation of biological resources in and near the project area (*see* IC Comments at 5) are additional examples of outstanding environmental issues regarding Route B.

Finally, Midwest has never supported its underlying claim that special or expedited treatment of its petition is necessary. Midwest has not shown that it is threatened with inadequate service from IC or that there is any threat of a cessation of service if it does not complete its project by a date certain. Contrary to Midwest's suggestion, the Board should not in this case vary from its established practices of performing a single, integrated environmental analysis including all feasible alternatives. Neither can it relax its environmental standards merely because of Midwest's last-minute change in position. Midwest has from the outset of this project denied the existence of even the most obvious environmental impacts of its proposal,¹³ and it has now offered a new alternative for SEA's and the Board's consideration. Responsibility for any resulting delays in completing the environmental review of Midwest's proposed project may be laid squarely at Midwest's own feet.

a minimum, the Board should impose conditions that will ensure that Midwest's coal trains do not move through this area during the periods of commuter windows (4:30 a.m. – 8:00 a.m. and 4:30 p.m. – 8:00 p.m.), since he relies heavily on that fact. *See id.*

¹³ In its June 28, 2001 letter to SEA requesting preparation of an EA rather than an Environmental Impact Statement, Midwest represented (at page 2), among other things, that no wetlands were present, that the project site was not near any residential areas, and that the project is not expected to have any effect on architectural resources. Each of these statements has proven to be false or unfounded.

Even now, one year later, Midwest has continued its pattern of denial. For example, Mr. Bales, in his June 26, 2002 Letter (at page 5), and Ms. Dawkins, in her one-page June 25, 2002 letter to Mr. Wright of the IHPA, argue, in effect, that the construction proposal will not affect the historic culvert over Sugar Run because "the older portion of the culvert" will not be "harmed" (Mr. Bales) or "dismantled" (Mr. Bales and Ms. Dawkins). But Mr. Bales never defines the open and subjective term "harm," which Ms. Dawkins in any event declines to use, and neither Mr. Bales nor Ms. Dawkins indicates what exactly short of dismantling will be the fate of the newer portion of the culvert. Further, neither indicates the age of the portions of the culvert that would be modified (which may itself be historic), or why it should be acceptable to segment the culvert for historic analysis, when the culvert is constructed and operated as an integrated whole. SEA should reject the hollow assertions of Mr. Bales and Ms. Dawkins as inadequate, and it should require Ms. Dawkins to provide clearer and more detailed information to the IHPA for its consideration.

For other examples of Midwest's continued pattern of denying environmental impacts, see the several discussions of the June 26, 2002 Letter, above.

HARKINS CUNNINGHAM

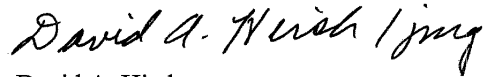
Office of the Secretary

July 9, 2002

Page 7

We hope that these comments assist SEA in its consideration of these important issues.

Very truly yours,

A handwritten signature in cursive script that reads "David A. Hirsh / jmg".

David A. Hirsh

Counsel for Illinois Central Railroad Company

cc: Michael F. McBride, Esquire
(counsel for Midwest Generation, LLC)