

BEFORE THE IOWA UTILITIES BOARD  
DEPARTMENT OF COMMERCE  
STATE OF IOWA

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IN RE:	)	
	)	
INTERSTATE POWER	)	
AND LIGHT	)	DOCKET NO. GCU-07-01
COMPANY	)	
	)	
	)	

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**MOTION TO DISMISS APPLICATION FOR GENERATING FACILITY CERTIFICATE**

COME NOW Community Energy Solutions, Iowa Environmental Council, Iowa Farmers Union, Iowa Physicians for Social Responsibility, and Iowa Renewable Energy Association (the Coalition) with this motion to dismiss the Application for a Generating Facility Certificate for Sutherland Generating Station Unit 4 (SGS4), filed herein by Interstate Power and Light Company (IPL), or for other sanctions in the alternative, because of Applicant’s discovery misconduct, due process violations, and scheduling order violations, and in support thereof state:

**BACKGROUND**

1. On July 2, 2007, IPL filed with the Utilities Board (Board) an application pursuant to Iowa Code § 476A for a generating facility certificate to construct and operate the SGS 4 630 MW coal-fired electric generating unit located at Marshalltown, Iowa.
2. On August 16, 2007, the Board issued an order finding the application in substantial compliance with the Board’s filing requirements contained in 199 IAC 24, and setting a procedural schedule.
3. The Board’s August 16, 2007 order required IPL to submit, within 30 days of the order, certain additional information including a “quantitative analysis of the potential impact on

the proposed SGS 4 coal plant if federal legislation ... regarding carbon taxes or a carbon-trading program is implemented.”

4. Throughout the discovery period and during the hearings conducted January 14-18, 2008, the Office of the Consumer Advocate (OCA), the Coalition and even members of the Board repeatedly requested any evidence in Applicant’s possession that might support Applicant’s claims that it can successfully mitigate CO<sub>2</sub> emissions at SGS4. See, e.g., OCA Data Requests 126, 134, 190, and 191; Hearing Transcript at 423-424, 478, 528-29, 1662-63, 1762-64, and 1819-20.
5. In rebuttal testimony, in response to data requests and under cross-examination, Applicant’s witnesses claimed that IPL has implemented all cost-effective energy efficiency measures known to IPL. Applicant also either denied the existence of or refused to disclose, even in response to direct questions on the subject, details of IPL’s vaguely stated intent to shut down or reduce output at existing IPL coal plants, referring to “potential” or “possible” shutdowns rather than making firm commitments that could have been probed by other parties. See, e.g., OCA Data Requests 126, 134, 190 and 191; Holmes Rebuttal Testimony at 2; Transcript at 1523, 1819. In addition, IPL offered testimony under cross-examination that CO<sub>2</sub> emissions would be decreased by using SGS4 to displace purchased power agreements, although it was not clear from the testimony whether it would be natural gas fired power or coal-fired power that would be displaced, an important fact from an emissions perspective. See, e.g., Hearing Transcript at 424, 528-29. This testimony casts further doubt on the credibility of IPL’s CO<sub>2</sub> mitigation plans.
6. On February 8, 2008, Applicant held a press conference in Des Moines to announce an expanded CO<sub>2</sub> mitigation proposal (February 8 Proposal) that Applicant claims will offset

all CO<sub>2</sub> emissions for Applicant's share of SGS4. A copy of the press release is attached. The statements of material fact contained in this press release, including assertions regarding increased energy efficiency and the retirement or conversion of existing IPL coal-fired facilities, directly contradict or substantially call into question the accuracy of the above-referenced discovery responses and testimony offered by IPL.

7. The Coalition received neither formal notice of, nor details about, the February 8 Proposal from IPL. IPL did not supplement prior discovery responses to include the details of the February 8 Proposal, and the Coalition is not aware of any amended filing that has been made to the Board.
8. IPL refers directly to the February 8 Proposal at three points in its Initial Post-Hearing Brief filed February 11, 2008 (Brief), in support of its contentions of fact and law. Brief at 14, 46, 65.
9. At no time during the discovery process or hearing did IPL disclose the revised expansion plan unveiled via press release in the February 8 Proposal, in spite of multiple relevant data requests and direct questions on the matter by other parties and Board members. Having had every opportunity, as well as a legal obligation incurred by relevant data requests and direct questions under cross-examination, to submit its full CO<sub>2</sub> mitigation strategy and updated resource plan as part of the formal record for analysis and review by the Board, OCA and the Coalition, Applicant first announced the February 8 Proposal in a press conference three days prior to the initial briefing deadline.
10. Without formally notifying other parties or making any late amended filing, IPL then relied on the February 8 Proposal, the precise details of which are not part of the formal record in this matter and which are available only to IPL, in its briefing. IPL's actions work an

extreme injustice on the Coalition, including the inability to analyze any underlying data relative to the accuracy of IPL's unsupported carbon mitigation claims; the inability to analyze as part of this docket the revised expanded resource plan that IPL apparently intends to submit as part of the ratemaking proceeding; the inability to file testimony, conduct discovery, and cross-examine witnesses on the accuracy of IPL's carbon mitigation claims and the alleged impacts of the expanded resource plan; and the necessity of devoting attorney and staff hours during the briefing process to responding to IPL's discovery misconduct.

11. The Board has also been prejudiced by IPL's actions. The Board cannot analyze information relevant to this docket included in the February 8 Proposal, as required by its statutory mandate. Even if the Board were to strike any reference to the February 8 Proposal from the record, this is a bell that cannot be unrung. IPL is attempting to supplement its case, after the hearing, in such a way that the Board cannot possibly analyze the credibility of IPL's statements.

#### **APPLICABLE LAW**

12. The Board's administrative rules set a seven day time limit for response to data requests or interrogatories served by any party. 199 IAC 7.15(2).
13. The Board's administrative rules with regard to discovery are limited, but the rules state that discovery procedures applicable in civil actions are available to parties in contested cases. 199 IAC 7.15(1).
14. Iowa Rule of Civil Procedure 1.501(2) states: "Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request."

15. Iowa Rule of Civil Procedure 1.503(4)(a) states in part: “A party who has responded to a request for discovery is under a duty to supplement or amend the response to include information thereafter acquired as follows: (a) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to any of the following:...(3) Any matter that bears materially upon a claim or defense asserted by any party to the action.”
16. Iowa Rule of Civil Procedure 1.503(4)(b) states: “A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which: (1) The party knows that the response was incorrect when made. (2) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.”
17. The purpose of Iowa R. Civ. P. 1.503(4), requiring supplementation of discovery responses in certain circumstances, “is to avoid surprise and permit the issues to become both defined and refined before trial.” Hariri v. Morse Rubber Prods. Co., 465 N.W.2d 546, 550 (Iowa Ct. App. 1990)(citing White v. Citizens Nat’l Bank of Boone, 262 N.W.2d 812, 816 (Iowa 1978). “Discovery should expedite the disposition of litigation, by educating the parties in advance of trial of the real value of their claims and defenses, which may encourage settlements, and assure that judgments rest upon the real merits of causes. . . .” Barks v. White, 365 N.W.2d 640, 643 (Iowa 1985) (citation omitted).
18. In our system of justice the opportunity to be heard is a litigant’s most precious right and should be sparingly denied. Simon v. Miller, 1983 Iowa App. LEXIS 1830 (quoting Edgar v. Slaughter, 548 F.2d 770, 773 (8<sup>th</sup> Cir. 1977)).
19. The Iowa Supreme Court has long maintained the standard that dismissal is appropriate

where the party at fault is guilty of “willfulness, bad faith or fault for refusal to comply” with a relevant discovery rule. Aquadrill, Inc. v. Environmental Compliance Consulting Servs., 558 N.W.2d 391, 396 (Iowa 1997)(“Aquadrill”)(citing Smiley v. Twin City Beef Co., 236 N.W.2d 356 (Iowa 1975)).

20. The Supreme Court of Iowa has found “willful” discovery misconduct and upheld a default judgment where a party failed to supplement discovery with additional relevant information at his disposal. Aquadrill, *supra*, at 396.
21. The U.S. Supreme Court supports dismissal as a sanction for discovery misconduct because of its deterrent effect on future misconduct. Degen v. United States, 517 U.S. 820, 827 (1996) (citing National Hockey League et al. v. Metropolitan Hockey Club, Inc., et al., 427 U.S. 639, 643 (1976)).
22. The U.S. Court of Appeals for the 8<sup>th</sup> Circuit provides expanded discussion of the use of dismissal as a sanction for willful discovery violations. Willful failure to answer interrogatories may be the basis for a dismissal. General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204, 1211 (8<sup>th</sup> Cir. 1973); Mangano v. American Radiator and Standard Sanitary Corp., 438 F.2d 1187, 1188 (3d Cir. 1971). A direct order by the court as provided in (Fed. R. Civ. P.) 37(a) and (b) is not a prerequisite to imposition of sanctions under Rule 37(d). The rule permits immediate sanctions against parties for willful failure to comply with discovery rules. Robison v. Transamerica Ins. Co., 368 F.2d 37, 39 (10<sup>th</sup> Cir. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure, § 851 (Wright ed. 1961).
23. The Iowa Court of Appeals recently upheld exclusion of evidence as a sanction for disclosure made only three days *before* trial. Wade v. Grunden, No. 7-693/06-1948 (2007

Iowa App. LEXIS 1291).

## **ARGUMENT**

### **A. The Coalition's Due Process Rights Have Been Violated**

24. Because Applicant failed to disclose requested and relevant information regarding its full CO<sub>2</sub> mitigation strategy for SGS4 and system-wide resource plan for all existing IPL facilities, the Coalition's right to rebut, refute, or reply to all evidence in opposition to the intervenors' stated position, as guaranteed in the Board's August 16, 2007 order, has been denied. Due to IPL's discovery misconduct, the Coalition has been denied its due process rights in a contested case hearing under the Iowa Administrative Procedure Act. Iowa Code § 17A.12(4), (6) and (8).
25. Applicant's public statements and references in the Brief, which consist of assertions of material fact that are not part of the formal record in this docket, constitute an attempt to introduce unsupported factual assertions into the record without any opportunity for the Board or other parties to subject IPL's claims to independent verification. This is the antithesis of due process and a violation of IUB procedural rules, the Rules of Civil Procedure and the Iowa Administrative Procedure Act, as cited *supra*.
26. In the press conference and in the Brief, Applicant expressed its intent to submit its expanded resource plan, including the February 8 Proposal, in the ratemaking proceeding. Doing so excludes the Coalition from providing relevant evidence and argument on an issue relevant to the generating certificate ruling, an additional due process violation.<sup>1</sup>

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<sup>1</sup> The Coalition notes that other permitting proceedings for SGS Unit 4 are ongoing at the Department of Natural Resources and other agencies, making it all the more important that Applicants submit formal filings to all relevant state agencies in support of any new material facts announced publicly with regard to this proposal.

**B. The Board's Ability to Review a Correct and Complete Record**

**in This Docket Has Been Prejudiced**

27. The Board is required to evaluate, among other statutory criteria, “whether ... the proposed facility will be consistent with reasonable land use and environmental policies” and “(w)hether all adverse impacts ... have been reduced to a reasonably acceptable level”. IAC 199-24.10(b). Applicant’s public statements and references in the Brief regarding the February 8 Proposal are material and relevant, according to Applicant’s own briefing, to evaluation of these criteria and to the case made to date by the Coalition.
28. Applicant bears the full burden of proof in this proceeding and has access to privileged and confidential information, vitally important to expert analysis of the Application by the Board and opponents. Other parties and the Board itself cannot obtain such information by any means other than the Application and discovery process. Applicant should therefore be held to a high standard in discovery.
29. If Applicant wished to present a settlement proposal to the Board, the correct procedures are delineated at 199 IAC 7.18. Applicant did not observe correct procedure for submitting a settlement proposal to the Board, if such was the intent of the February 8 Proposal.

**C. IPL's Discovery Misconduct Is Ongoing, Willful, and in Bad Faith**

30. These discovery issues cannot be resolved with the opposing party, as directed by 199 IAC 7.15(5), because the formal hearing in this matter is already complete and there is no way at the current stage in the contested case process that this violation of the Coalition’s due process rights can be remedied, aside from the relief requested in this Motion.

31. Applicant has had ample time and opportunity to correct and supplement the evidentiary record if new information became available after the July 2, 2007 filing of the original Application. The egregious timing of Applicant's extrajudicial introduction of new material evidence, post-hearing and three days prior to the initial briefing deadline, supports the case for dismissal of the Application as a sanction.
32. Applicant has acted in bad faith. There is no evidence to suggest that Applicant could not have included the elements of the February 8 Proposal in the original Application or provided such details regarding proposed changes at existing coal plants in response to discovery requests and cross-examination. Applicant has exhibited bad faith by withholding an amendment to its original Application, highly relevant to the case developed by the Coalition in this docket. Any contention that a corporation the size of Alliant Energy made this kind of high-level (and highly convenient) decision about its generation strategy within the last three weeks defies credibility.
33. If Applicant had wished on February 8, 2008, to amend the Application to include an expanded carbon mitigation strategy and expanded resource plan after the hearing, the only available procedural step would have been to withdraw the Application and refile at a later date.
34. IPL's misconduct works an extreme injustice on the Coalition by requiring the latter to respond to new claims by IPL intended directly to counter and discredit the Coalition's case without benefit of discovery with regard to the merits of those claims.
35. This willful misconduct merits dismissal. See Aquadrill, Inc. v. Environmental Compliance Consulting Servs., 558 N.W.2d 391, 396 (Iowa 1997)("Aquadrill") (citing Smiley v. Twin City Beef Co., 236 N.W.2d 356 (Iowa 1975)); Degen v. United States, 517 U.S. 820, 827

(1996) (citing National Hockey League et al. v. Metropolitan Hockey Club, Inc., et al., 427 U.S. 639, 643 (1976)).

**WHEREFORE**, the Coalition moves for a Board Order to Dismiss the Application. If the Board will not grant the Order to Dismiss, the Coalition moves for an Order imposing the following sanctions, to protect the Coalition's due process rights in some measure:

1. An Order requiring IPL to submit an amended application reflecting its updated resource plan and full CO<sub>2</sub> mitigation proposal in detail, including an order requiring submission of expanded evidence as to the full system CO<sub>2</sub> impacts both of SGS 4 and any forms of CO<sub>2</sub> mitigation proposed as part of the resource plan.
2. An Order Compelling Discovery under Iowa R. Civ. P. 1.517(1), directing IPL to disclose to the Coalition all documentation relevant to its plans to mitigate CO<sub>2</sub> emissions from SGS Unit 4 and to supplement and/or correct responses to OCA Data Requests 126, 134, 190, and 191, and any other relevant data requests made to IPL by any party.
3. An Order setting a new procedural schedule, to allow for discovery, testimony filing, cross examination of IPL witnesses, and briefing based on the amended application, as provided for at 199 IAC 7.23(6).
4. An Order requiring IPL to pay reasonable expenses and fees necessary for the Board, the Office of the Consumer Advocate, and all intervenors to conduct the additional proceedings necessitated by IPL's misconduct. Iowa R. Civ. P. 1.517(1)(d).

Respectfully submitted,

PLAINS JUSTICE

By:

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ATTORNEYS FOR INTERVENORS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing instrument were served upon each of the parties of record to the above entitled cause, or their attorneys of record, by enclosing the same in an envelope addressed to each such party and hand delivered or, with postage fully paid, by depositing said envelope in a United States Post Office depository in Cedar Rapids, Iowa on the \_\_\_\_\_ day of February, 2008.

By: \_\_\_\_\_  
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