

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: INTERSTATE POWER AND LIGHT COMPANY	DOCKET NO. GCU-07-1
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**ORDER DENYING MOTION TO DISMISS AND
STRIKING PART OF APPLICANT'S BRIEF**

(Issued March 21, 2008)

BACKGROUND

On July 2, 2007, Interstate Power and Light Company (IPL) filed with the Utilities Board (Board) an application pursuant to Iowa Code chapter 476A for a generating facility certificate to construct and operate a 630 MW coal-fired electric generating unit. The proposed unit is called the Sutherland Generating Station Unit Number 4 (SGS Unit 4) and is to be located in Marshalltown, Marshall County, Iowa. A hearing was held in this docket beginning on January 14 and ending on January 18, 2008.

On February 8, 2008, IPL issued a press release which stated, in relevant part:

As part of its greenhouse gas emissions reduction proposal, IPL will retire Lansing Generating Station's coal-fired units 2 and 3. In addition, the company will permanently switch the fuel source of its Dubuque Generating Station Units from coal to natural gas. This will reduce these units' maximum potential to emit CO₂ by more than 800,000 tons per year. These potential changes in IPL's generating fleet are contingent upon the

company receiving all applicable regulatory approvals related to Sutherland Generating Station Unit 4's site certification and ratemaking principles application.

On February 11, 2008, IPL submitted its initial brief in this docket to the Board. On pages 14, 46, and 65, IPL refers to its February 8, 2008 press release.

THE COALITION'S MOTION TO DISMISS

On February 20, 2008, Community Energy Solutions, Iowa Environmental Counsel, Iowa Farmers Union, Iowa Physicians for Social Responsibility, and Iowa Renewable Energy Association (collectively the Coalition) filed a motion to dismiss IPL's application for a new generation siting certificate. The Coalition stated that throughout the discovery period and during the hearings the Consumer Advocate Division of the Department of Justice (Consumer Advocate), the Coalition, and members of the Board repeatedly requested any evidence in IPL's possession that might support IPL's claims that SGS Unit 4 could successfully mitigate CO₂ emissions. Furthermore, the Coalition stated that IPL's witnesses claimed that it had implemented all cost-effective energy efficiency measures known to IPL and also that IPL either denied the existence of or refused to disclose details of its intent to shut down or reduce output at existing IPL coal plants.

The Coalition stated that it did not receive formal notice or details about IPL's February 8, 2008, press release and IPL did not supplement its prior discovery responses to include the details of the press release.

The Coalition further stated that IPL's actions work an injustice on the Coalition, including the Coalition's inability to analyze any underlying data relative to the accuracy of IPL's CO₂ mitigation claims; the inability to analyze the revised expanded resource plan that IPL intends to submit, and the inability of the Coalition to file testimony, conduct discovery, and cross-examine witnesses on the accuracy of IPL's CO₂ mitigation claims and the alleged impacts of the expanded resource plan.

The Coalition submits three arguments in favor of dismissal of IPL's application for a generating facility certificate. First, the Coalition argued that because IPL failed to disclose requested and relevant information regarding its full CO₂ mitigation strategy for SGS Unit 4 and IPL's systemwide resource plan for all existing IPL facilities, the Coalition's right to rebut, refute, or reply to opposing evidence has been denied. The Coalition further stated that IPL's public statements and references in its brief 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.

The Coalition further stated that IPL's press conference and expressed intent to submit its expanded resource plan in a subsequent proceeding excluded from the Coalition providing relevant evidence and argument on issues relevant to the generating certificate ruling. The Coalition stated this is a due process violation.

Second, the Coalition argued that IPL's public statements and references in its brief regarding the February 8 press release have prejudiced the Board's ability to review a correct and complete record in this docket. The Coalition stated that the

information is material and relevant and the Board cannot obtain such information by any means other than the application, discovery, and hearing process.

Third, the Coalition argued that IPL's discovery misconduct is ongoing, willful, and in bad faith. The Coalition asserted that these discovery issues cannot be resolved with the opposing party and there is no way at the current stage of this proceeding that this violation of the Coalition's due process rights can be remedied. The Coalition further argued that the timing of IPL's extrajudicial introduction of new material evidence, after the hearing and three days prior to the initial briefing deadline supports the case for dismissal of the application as a sanction. Moreover, the Coalition stated that there is no evidence to suggest that IPL could not have included the elements of the February 8 press release in its original application or its testimony and that IPL has exhibited bad faith by withholding a highly relevant amendment to its application.

The Coalition requests that the Board, in order to protect the Coalition's due process rights in some measure, order IPL to submit an amended application reflecting its updated resource plan and full CO₂ mitigation proposal in detail, including an order requiring submission of expanded evidence as to the full system CO₂ impacts. Also, the Coalition requests that the Board issue an order compelling discovery under Iowa Rules of Civil Procedure 1.517(1) and directing IPL to disclose to the Coalition all documentation relevant to IPL's plans to mitigate CO₂ emissions from the proposed SGS Unit 4 and to supplement or correct its responses to Consumer Advocate's Data Request Nos. 126, 134, 190, and 191 and any other

relevant data request made to IPL by any party. The Coalition also requests that the Board issue an order setting a new procedural schedule to allow for discovery, prefiled testimony, cross-examination of IPL witnesses, and briefing based on the amended application, as provided for at 199 IAC 7.23(6). Finally, the Coalition requests the Board issue an order requiring IPL to pay reasonable expenses and fees necessary for the Board, Consumer Advocate, and all intervenors to conduct additional proceedings.

IPL'S RESISTANCE TO MOTION TO DISMISS

On February 27, 2008, IPL filed a resistance to the Coalition's motion to dismiss. IPL stated that Coalition's motion to dismiss inappropriately and inaccurately accuses IPL of withholding data from the Board and other parties. IPL further stated that the Coalition misconstrues the facts and timelines in order to make its accusations. IPL examined the Coalition's assertions that the data requests would have revealed the information regarding specific coal plant closures.

IPL stated that in regard to Consumer Advocate's Data Request Nos. 126, 134, 190, and 191, IPL's press release regarding potential plant closures and fuel switching would not have changed its response to these data requests.

IPL further stated that the fact that it was contemplating a potential fuel switching or closure of plants was widely known throughout the course of the proceeding. However, IPL did not make a decision regarding the retirement and the switching of fuel for specific plants until after the evidentiary record was closed for

this proceeding. IPL stated that this analysis regarding retirement and fuel switching post-dates the data requests and the hearing. Consequently, the evidence that the Coalition is claiming IPL withheld was not available until after the conclusion of the evidentiary hearing.

IPL also stated that at the time the Board issued the order requesting additional information, IPL had not yet undertaken the necessary analyses to provide any specific plant closure or fuel-switching information and therefore could not provide this information to the Board. Furthermore, IPL stated that the Board did not ask for an ongoing analysis and never requested that IPL or its witnesses provide information that might be examined in the future in contemplation of a separate proceeding after the completion or acceptance of evidence into the record of this docket.

Last, IPL addresses the Coalition's allegations that IPL witnesses Bennington, Arnold, Vesperman, Friedman, Guelker, and Holmes made or failed to make specific statements on the stand during the hearing held in this docket regarding plant closures or fuel switching. IPL stated that witness Bennington answered the questions fully and appropriately based on the facts at the time of the hearing, as IPL had not made a determination as to which IPL-owned plants would be closed as the result of SGS Unit 4 being constructed. IPL stated that witness Arnold is an employee of IPL, but is not a corporate officer and therefore is unable to make commitments on behalf of IPL regarding plant closures and fuel switching. IPL stated that witness Vesperman appropriately answered the questions the Coalition identified

in its motion to dismiss and he also is unable to make corporate commitments. Also, IPL stated, that witness Vesperman's testimony was referring to units and Midwest Independent Transmission System Organization, Inc. (MISO), generation sources generally and not to any specific unit. IPL stated that witness Friedman did not address the names of specific plant closures, but only scenarios where the power was instead re-directed into the MISO market. IPL stated that witness Guelker is not able to make commitments on behalf of IPL regarding plant closures and fuel switching and he also specifically testified that he was only referring to the general increase in flexibility when assessing plant retirements and fuel switching. IPL stated that in regard to the questions posed to witness Holmes that the Coalition cites in its motion, there was no relationship between the discussion of energy efficiency and the proposed plant retirements and fuel switching. IPL concluded that the Board should uphold IPL's resistance and deny the Coalition's motion to dismiss.

CONSUMER ADVOCATE'S MOTION TO DISMISS

On February 27, 2008, Consumer Advocate filed a joinder in the Coalition's motion to dismiss. Consumer Advocate stated the Board should, at a minimum, and if the Coalition's requested relief is not granted, make IPL's February 8, 2008, press release part of the evidentiary record in this proceeding because IPL's press release makes a material change to IPL's application and the evidence filed in this proceeding.

CIPCO/CORN BELT'S RESISTANCE TO MOTION TO DISMISS

On February 28, 2008, Central Iowa Power Cooperative and Corn Belt Power Cooperative (CIPCO) filed a resistance to the Coalition's and Consumer Advocate's motions to dismiss.

CIPCO stated that IPL's press release specifically states that the proposed changes to IPL's generating fleet will be filed with the Board as part of IPL's application for ratemaking principles for the proposed SGS Unit 4. CIPCO also stated that the Coalition offers no evidence to support a finding that the details of the February 8, 2008, press release were finalized at the time IPL filed its initial application on July 2, 2007, or at any other time prior to the conclusion of the evidentiary hearing. Moreover, all evidence provided at the hearing and during discovery indicated that IPL had not yet determined which IPL-owned coal plant might be closed as a result of SGS Unit 4 being constructed or whether any plants would be closed.

CIPCO further stated that the Coalition's argument regarding IPL's alleged violation of its due process rights is unfounded and that on page 30 of the Coalition's brief it engages in the very same conduct it finds so egregious on the part of IPL.

COALITION'S REPLY TO IPL'S RESISTANCE TO MOTION TO DISMISS

On March 5, 2008, the Coalition filed a reply to IPL's resistance to the Coalition's motion to dismiss. The Coalition stated that it has no way, other than reading IPL's statements to the press, of knowing precisely what measures IPL plans

to take to mitigate greenhouse gases from the proposed SGS Unit 4 and that IPL has made explicit representations to the media that its greenhouse gas mitigation plan will entirely offset its share of emissions from SGS Unit 4. Furthermore, the Coalition stated that without explicit information about IPL's mitigation plan, the Coalition is severely injured in its ability to bring clear and convincing evidence to contradict IPL's claims and that IPL's introduction of new, material evidence in this docket via the media works an irreparable injury to the Coalition which cannot be remedied at this point in the procedural process of this docket.

The Coalition also stated that IPL does not claim that deliberations on the decision regarding potential coal plant retirements and fuel switching commenced after completion of the hearing, yet IPL failed to disclose the existence of these deliberations in response to data requests and cross examination on the subject. The Coalition also asserted that if IPL really believed that the information in the February 8, 2008, press release was only relevant to the ratemaking proceeding, it could have avoided misconduct in the current docket by refraining from introducing this new evidence after the close of the hearing.

The Coalition further asserted that IPL's characterization of appropriate response to the data requests at issue relies on an evasive reading of the data requests and IPL failed to supplement or correct its response with new information regarding CO₂ mitigation. The Coalition stated that Consumer Advocate Data Request No. 190 explicitly inquires about the potential for reduction of CO₂ emissions

over the life of the plant and IPL's response to Data Request No. 190 specifically refers to displacing energy from other, less efficient coal-fired generation.

DISCUSSION

The Board finds that IPL's reliance on extra-record evidence in its brief is improper. However, dismissal is not the correct remedy in this situation. The primary issue is whether the new evidence announced by IPL after the closing of the evidentiary record is properly available for the Board to consider in connection with IPL's application for a new generation siting certificate. Here, the Board finds the evidence is not admissible for that purpose at this late date and will therefore strike IPL's references to the February 8, 2008, press release found in its initial brief on pages 14, 46, and 65.

The Board finds that IPL had reason to know that other parties and the Board had inquired about any plans IPL might have to close any plants in connection with bringing SGS Unit 4 on line. The issue was clearly raised through discovery and at hearing. However, at the time of the hearing IPL's studies on the matter were "speculative," so IPL did not disclose the information at that time. In this respect, IPL may not have been as forthcoming as it should have been.

If IPL wants to rely upon its plant retirement or fuel-switching plans in support of its application in this docket, IPL will have to file an appropriate motion to re-open the record to hear new evidence that will require allowing adequate time for discovery, prefiled testimony, potentially an additional hearing in Marshalltown, along

with a period of time for supplemental briefing. In the absence of those measures, the announced plant retirements and fuel-switching plans are not evidence in this record that can be relied upon to support IPL's application.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The "Motion to Dismiss Application for Generating Facility Certificate" filed on February 20, 2008, by Community Energy Solutions, Iowa Environmental Council, Iowa Farmers Union, Iowa Physicians for Social Responsibility, and Iowa Renewable Energy Association (the Coalition) is denied as discussed in the order.

2. Interstate Power and Light Company's references in its initial brief and any subsequent filings to its February 8, 2008, press release and its plans for retirement and fuel switching of certain power plants are stricken from the record.

UTILITIES BOARD

/s/ John R. Norris

/s/ Krista K. Tanner

ATTEST:

/s/ Margaret Munson
Executive Secretary, Deputy

/s/ Darrell Hanson

Dated at Des Moines, Iowa, this 21st day of March, 2008.