ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION EME, LLC **Petitioner,**	)	**PCB 04-185** **(Trade Secret Appeal)**
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, **Respondent.**	)	

NOTICE OF FILING

To: Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, IL 60601

Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
Office of the Attorney General
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board Midwest Generation EME, LLC's Amended Petition for Review, a copy of which is herewith served upon you.

Andrew N. Sawula

Dated: May 29, 2007

Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5687

CH2\1863995.1

ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION EME, LLC **Petitioner,**	)	**PCB 04-185** **(Trade Secret Appeal)**
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, **Respondent.**	)	

MIDWEST GENERATION EME, LLC'S AMENDED PETITION FOR REVIEW

Pursuant to the Illinois Pollution Control Board Order of April 19, 2007, Midwest Generation EME, LLC ("Midwest Generation") hereby responds to the Illinois Environmental Protection Agency's ("IEPA's") November 30, 2004 Supplemental Trade Secret Determination (Attachment 1) as amended by the April 19, 2007 Board Order and hereby amends its Petition for Review in this matter.

1. As set forth in numerous pleadings in this matter, this appeal concerns information Midwest Generation originally submitted to the United States Environmental Protection Agency ("USEPA") in response to an Information Request under §114 of the Clean Air Act ("USEPA Information Request") covering Midwest Generation's six coal-fired generating stations in Illinois (the "Generating Stations"). At the suggestion of USEPA, Midwest Generation provided a courtesy copy of its Response to the USEPA Information Request to IEPA. The information at issue falls into two categories: first, information Midwest Generation compiled concerning capital projects at each of the generating stations (the "Project Chart") and *second, information* Midwest Generation compiled regarding generation, heat rate,

and coal characteristics of the Generating Stations (the "Generation Chart"). Collectively, this confidential business information will be referred to herein as the "CBI."

2. For the reasons set forth below, IEPA's denial of trade secret information is arbitrary and capricious, lacks support and is otherwise improper. The regulations governing the identification and protection of trade secrets provide that an article will be determined to represent a trade secret if the owner has complied with the procedures for making a claim and justification; if the information sought to be protected has not been published, disseminated, or otherwise become a matter of general public knowledge; and the article has competitive value. See 35 Ill. Adm. Code 130.208(a). IEPA does not dispute that Midwest Generation properly complied with the procedures for making a claim and justification, but IEPA claims the information has been publicly disseminated and that release of the information will not cause Midwest Generation competitive harm. IEPA also maintains that the information constitutes emission data.

I. THE CBI HAS NOT BEEN PUBLISHED, DISSEMINATED, OR OTHERWISE BECOME A MATTER OF GENERAL PUBLIC KNOWLEDGE.

A. IEPA Improperly Concluded That The Project Chart Was A Matter Of General Public Knowledge.

3. Midwest Generation spent over eight months and considerable expense compiling the Project Chart in order to respond to the USEPA Information Request. Numerous engineering and accounting employees at each of the generating stations were involved in gathering, assessing and describing the information contained in the Project Chart. Information in the chart describes every capital project that cost over $100,000 undertaken or planned to be undertaken at the coal-fired units at the Generating Stations by Midwest Generation as of February 13, 2003, identifies the work order number for each such project, identifies the date each project was undertaken or was planned to be undertaken, and states the cost of each project. The Project

Chart was compiled solely to respond to the USEPA Information Request and, as set forth in Midwest Generation's original Statement of Justification, the confidentiality of the Project Chart has been maintained. This information, compiled in this format, exists only in the submittals made to USEPA and copied to IEPA.

4. IEPA asserts that the information in the Project Chart could be found in publicly available permits or permit applications. But a review of those documents indicates that, while a terse description of a few of the projects, are mentioned, most are not. None of the other information on the Project Chart, including the cost or the timing of the projects is available in permits or permit applications, or are otherwise available to the public. Thus, contrary to the conclusion the IEPA may have reached, this information, and certainly this compilation, is not publicly available. The fact that certain terse descriptions of approximately 5% of the projects are available in permits is not a reasonable justification for releasing the entire Project Chart to the public.

5. IEPA also states its belief that similar details are found in "submissions made to other government entities, including, for example, the Illinois Commerce Commission" but, IEPA has identified no such instance. IEPA's unfounded belief is in fact mistaken. Midwest Generation is an Independent Power Producer (IPP), not a regulated utility. As an IPP, Midwest Generation does not have rate cases before the Illinois Commerce Commission and, therefore, does not file information about capital projects with the Illinois Commerce Commission. IEPA has acted arbitrarily in finding that the Project Chart is publicly available.

B. IEPA Improperly Concluded That The Generation Chart Was A Matter Of General Public Knowledge.

6. Similarly, Midwest Generation compiled the Generation Chart from numerous sources. It contains monthly and annual gross and net generation, average coal heat content and

gross and net heat rate for each of the Generating Stations for the period January 2000 through December 2002. Midwest Generation compiled this information into the Generation Chart solely for the purpose of responding to the USEPA Information Request. As set forth in Midwest Generation's Statement of Justification, Midwest Generation has not made this compilation available to the public.

7. In its Supplemental Determination, IEPA faults Midwest Generation's Statement of Justification for failing to address the submittal of generation data to "governmental authorities that regulate the generation of electricity. Supplemental Determination at 4. But, IEPA again failed to identify any governmental agency to which Midwest Generation submits any of the data on the Generation Chart. Even after the Board ordered IEPA to identify where it was able to locate this information, IEPA did not. See November 4, 2004 Board Order at 30.

8. If IEPA believes Midwest Generation submits this information to the National Electric Reliability Council ("NERC"), IEPA is mistaken; Midwest Generation did not submit any information to NERC for the time period covered in the chart.

9. As a member of certain private exchange energy markets operated by Regional Transmission Organizations and Independent System Operators, Midwest Generation is required to submit certain operating data, including heat rate, for its units. Pursuant to the governing operating agreements of these organization, this data is designated as confidential and is not disclosed to other operators. See Attachment 2, Affidavit of Michael King at 4. Given that this information is required to be submitted to these organizations and is submitted confidentially, it can not be said to be "publicly available."

10. Midwest Generation submits certain information regarding monthly net generation and coal heat content, as required, to the Department of Energy ("DOE"). The DOE,

however, does not maintain this information in a simple chart format; rather, the DOE maintains pieces of this information in numerous coded spreadsheets on the DOE website. The information is deeply embedded, difficult to access and is in numerous locations requiring the pursuit of multiple links. Sophisticated technical and substantive knowledge would be necessary to even attempt to replicate this data. Generally, the information on the DOE website is aggregated on a plant level and is not available for individual units. If a competitor could obtain unit net generation and coal heat content information on the Generation Chart, which was compiled solely to comply with the USEPA Information Request, simply by filing a FOIA request rather than piecing it together from various hard to obtain sources, competitors would gain an improper windfall. *Worthington Compressors v. Costle,* 662 F.2d 45 (D.C. Cir. 1981). Monthly net heat rate is not available on the DOE website. For the purpose of the USEPA Information Request, Midwest Generation calculated each unit's monthly net heat rate from the coal consumption data, coal heat content data and generation data. The results of this calculation are not publicly available nor could they be determined from publicly available sources.

11. Finally, regardless of whether the individual pieces of information in the Project Chart and Generation Chart are independently available from public sources, the compilation is not. *See also*, Section II.C below.

12. IEPA acted arbitrarily and improperly in denying Midwest Generation's trade secret claims to these compilations on the suspicion that a portion of the information was "publicly available."

C. Midwest Generation Is Entitled To The Presumption That The CBI Has Not Become A Matter Of General Public Knowledge

13. Pursuant to IEPA's trade secret regulations, Midwest Generation is entitled to a rebuttable presumption that an article has not been published, disseminated, or otherwise become a matter of general public knowledge, if:

> 1) The owner has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access to the article for limited purposes; and
>
> 2) The statement of justification contains a certification that the owner has no knowledge that the article has ever been published, disseminated, or otherwise become a matter of general public knowledge.

35 IL Admin. Code 130.208(b). Midwest Generation's Statement of Justification contained the Company's extensive Confidentiality Procedures; IEPA no where contends that these procedures are inadequate. Further, the Statement of Justification includes the requisite certification from Midwest Generation. Despite the Board's November 4, 2004 order, IEPA has proffered no evidence to rebut the presumption to which Midwest Generation is entitled. IEPA has, therefore, acted improperly in finding the CBI has been publicly disseminated.

II. IEPA IMPROPERLY CONCLUDED THAT THE RELEASE OF THE CBI WOULD NOT CAUSE MIDWEST GENERATION COMPETITIVE HARM

14. In its Statement of Justification, Midwest Generation described why the CBI constitutes trade secret information. In the Supplemental Determination, IEPA seems to assert that the description is not convincing. But the November 4, 2004 Board, required IEPA to provide the reason why it believes Midwest Generation failed to show that the CBI has competitive value. Board Order at 30. As set forth below, the information clearly has competitive value to Midwest Generation.

A. Midwest Generation Competes With Other Power Producers.

15. Midwest Generation is an independent power producer whose primary business is generating electricity for sale in the competitive wholesale market. In simplest terms, Midwest Generation sells its power either by executing bilateral or forward contracts, or by offering to sell electricity into an exchange energy market. While all three types of transactions involve heated competition, the CBI is particularly sensitive with respect to Midwest Generation's competition with other power producers to enter into bilateral contracts and to sell electricity into exchange energy markets. In essence, companies offer to enter into bilateral contracts or bid electricity into exchange energy markets based, in part, on the operating costs of their units. In order to determine how high above their operating costs to bid their units (i.e., their profit margin), companies attempt to predict other companies' bids by discerning the operating costs of those other companies' units. If Midwest Generation's competitors outbid Midwest Generation, then Midwest Generation does not sell as much (or, possibly, any) power, or the price it receives may be less than it would otherwise receive. Clearly, Midwest Generation is in "actual competition" with other power producers, including over 400 other power producers that, like Midwest Generation, are members of the PJM Interconnection regional transmission organization. *See generally,* Affidavit of King, attached hereto as Attachment 2.

B. Disclosure Of The CBI Would Likely Cause Midwest Generation Substantial Competitive Injury.

16. Disclosure of the CBI would likely cause Midwest Generation substantial competitive injury. As a general matter, disclosure of information could help Midwest Generation's competitors compete with Midwest Generation for bilateral contracts and to sell electricity into exchange energy markets if the information could help a competitor (1) estimate the current or future operating costs of Midwest Generation's units, (2) predict the availability or

capacity of Midwest Generation's units to produce power (a) on a given date in the short term (relevant to energy exchange markets) or (b) in the long term (relevant to bilateral contracts), or (3) lower the operating costs of its (the competitor's) own units. In addition, such disclosure could help Midwest Generation's competitors compete with Midwest Generation for bilateral contracts and to sell electricity into exchange markets if the information could have the effect of increasing the operating costs of Midwest Generation's units.

17. First, if a competitor could predict or approximate the operating costs of Midwest Generation's units, then it could set its own price at a level to cut Midwest Generation out of the market, while maximizing its own profit margin. *Cf.*, *Braintree Elec. Light Dep't v. Dep't of Energy*, 494 F. Supp. 287, 290 (D.C. Cir. 1980) (In the wholesale oil market, "[i]f one wholesaler is able to discern the financial condition of a competitor, it can then underbid that competitor. Here, all information concerning a competitor's pricing mechanism becomes helpful."). See also, *Broston v. Warmann*, 190 Ill. App. 2d 87, 546 N.E.2d 3 (3d Dist. 1989).

18. Second, by knowing when Midwest Generation's units will be available and knowing Midwest Generation's capacity, a competitor could know when to plan its own outages and could take advantage of periods during which Midwest Generation is not available in order to set its bid higher. Third, a competitor could use the CBI to help determine how to target its plant maintenance practices to better compete with Midwest Generation. Fourth, some standard power products in the power markets explicitly consider availability of generating units. To the extent that competitors of Midwest Generation obtain access to Midwest Generation's confidential information on the availability of its generating units, those competitors will be able to structure offers to the market that they otherwise would not be able to, with the result that Midwest Generation will be at a disadvantage to those entities.

19. As articulated below, disclosure of the CBI would likely cause Midwest Generation substantial competitive injury. The discussion first addresses the CBI according to categories of information and then addresses the CBI according to categories of documents. The affidavit of Mike King, attached hereto as Attachment 2, provides a more detailed explanation of the competitive process and how disclosure of the CBI would likely cause Midwest Generation substantial competitive injury.

Performance Data

20. The CBI includes various measures of a unit's performance, including, but not limited to, (a) heat rate, (b) generation, (c) coal heat content, (d) outage events (i.e., maintenance projects undertaken), and (e) outage dates (dates the unit was taken offline for maintenance). Individually and collectively, this data will be referred to as "Performance Data." In his affidavit, Mike King explains in detail how disclosure of the Performance Data would help Midwest Generation's competitors estimate the Company's operating costs, predict the availability and capacity of Midwest Generation's units to produce power, or otherwise help them compete with Midwest Generation.

21. In addition to helping a competitor estimate Midwest Generation's operating costs, much of the Performance Data (*e.g.*, heat rate, generation, coal heat content, etc.) describes the input or output rates of the units. USEPA has specifically identified "operating costs," "input and output rates, and similar information" as examples of information encompassed by the term "trade secrets" under Section 114(c) of the Clean Air Act. Public Information, 40 Fed. Reg. 21987, 21990 (May 20, 1975).

22. Thus, disclosure of Midwest Generation's Performance Data would likely cause Midwest Generation competitive injury.

Financial Data

23. The CBI includes specific cost information on dollars spent on maintenance projects (the "Financial Data"). Disclosure of the Financial Data could help competitors estimate the operating costs of Midwest Generation's units. By estimating Midwest Generation's operating costs, Midwest Generation's competitors would be able to anticipate Midwest Generation's costs and fees and, thus, underbid Midwest Generation in future bidding contests.

24. Disclosure of the Financial Data could also increase the operating costs of Midwest Generation's units by helping the Company's vendors bargain with Midwest Generation. If the Project Chart is released, vendors will be able to determine how much Midwest Generation paid for common maintenance projects. If Midwest Generation has been paying one vendor more than another, the vendors who are receiving less could use this information to negotiate an increase of their rates. Moreover, vendors who bid to supply similar services in the future may be able to negotiate better rates with Midwest Generation than they would otherwise have been able to negotiate. Such disclosure, further, could help Midwest Generation's competitors lower the operating costs of their own units, placing them in an even better position to underbid Midwest Generation. For example, if a competitor learns what Midwest Generation has paid for certain maintenance projects, the competitor could better negotiate its own contracts for the same type of maintenance project. *Shermco Indus., Inc. v. Sec'y of the Air Force*, 613 F.2d 1314, 1317-18 (5th Cir. 1980) (holding that pricing information by a contract bidder constitutes confidential and proprietary information under Exemption 4 of the Freedom of Information Act).

25. Thus, disclosure of Midwest Generation's Financial Data would likely cause Midwest Generation substantial competitive injury.

Maintenance Details

26. The CBI includes details about maintenance performed at the Generating Stations including identification of the maintenance, the cost of the maintenance, and the date the maintenance took place. (This information is collectively referred to as the Maintenance Details.)

27. Disclosure of the Maintenance Details would help Midwest Generation's competitors estimate the current and future operating costs of Midwest Generation's units and predict the availability and capacity of Midwest Generation's units to produce power several years into the future. By knowing the Maintenance Details, a competitor could better estimate the current and future operating costs of Midwest Generation's units. A competitor could estimate roughly how much money Midwest Generation spent on the maintenance and discern Midwest Generation's philosophy toward maintenance at each unit; that is, the competitor could learn what level of investment Midwest Generation is making to maintain the performance of the unit. The competitor would be enabled to better evaluate the condition of Midwest Generation's units and the level of investment in the units that Midwest Generation will need to make to maintain the performance levels of the units. In other words, the competitor would be better able to estimate Midwest Generation's current and future operating costs, as well as evaluate whether Midwest Generation's units will be available to produce power in the future at their current capacity.

28. Thus, disclosure of Midwest Generation's Engineering Details would likely cause Midwest Generation substantial competitive injury.

C. Release Of Compiled Data Will Cause Midwest Generation Competitive Harm.

29. As described above, Midwest Generation expended considerable resources to compile the Generation Charts and the Project Chart. IEPA does not contest the fact that Midwest Generation has maintained the confidentiality of these compilations, rather IEPA contends the compilations are not protectable as a trade secrets because portions of the information are publicly available. Midwest Generation disagrees.

30. Under Illinois law, a trade secret includes a compilation that:

> (1) is sufficiently secret to derive economic value, actual or potential, not from being generally known to other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality.

765 ILCS 1065/2(d). The effort of compiling useful information is, of itself, entitled to protection even if the information is otherwise generally known. *ISC v. Altech*, 765 F. Supp. 1310, 1321 (N.D. Ill. 1990). Under Illinois law, trade secrets may exist in combination of a number of elements of information, even if discrete elements may be found in the public domain. *Nilssen v. Motorola, Inc.*, 963 F. Supp. 664 (N.D. Ill. 1997.) *Worthington*, 662 F.2d at 51; *ISC-Bunker Ramo Corp. v. Altech, Inc.*, 765 F. Supp. 1310, 1321-22 (N.D. Ill. 1990) ("[T]he effort of compiling useful information is, of itself, entitled to protection even if the information is otherwise generally known."). If a competitor can recreate a compilation, but only at a considerable cost, then it would gain an improper "windfall" if it could, instead, obtain that compilation through a FOIA request. *Worthington*, 662 F.2d at 51. That windfall, in turn, "could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government." *Id.*

III. THE PROJECT CHART IS NOT EXCLUDED FROM TRADE SECRET PROTECTION AS EMISSION DATA.

31. In its Supplemental Determination, IEPA maintains that the Project Chart constitutes "emission data" and is therefore excluded from trade secret protection. IEPA further asserts that Midwest Generation had the obligation to demonstrate the Project Chart was not emission data in its Statement of Justification. But, as explained below, the Project Chart cannot properly be considered emission data under the Illinois Environmental Protection Act. Further, the regulations implementing the trade secret provisions of the Illinois Environmental Protection Act do not require an owner to demonstrate in the Statement of Justification that exceptions to the regulations are inapplicable.

A. The Project Chart Is Not Emission Data Under Applicable Illinois Law

32. The trade secret provisions of the Illinois Environmental Protection Act provide

> [A]ll emission data reported to or otherwise obtained by the Agency, the Board or the Department in connection with any examination, inspection or proceeding under this Act shall be available to the public to the extent required by the federal Clean Air Act, as amended.

415 ILCS 5/7(c). The Project Chart does not fall within this definition because (1) it is not emission data, (2) it was not obtained by IEPA "in connection with any examination, inspection or proceeding under" the Illinois Environmental Protection Act and 3) the federal Clean Air Act does not require the public release of the Project Chart.

1. The Project Chart does not contain emission data.

33. The implementing regulations of the trade secret provisions of the Illinois Environmental Act define the term "emission data" as:

> The identity, amount, frequency, concentration, or other characteristics (related to air quality) of any contaminant that:
> A) Has been emitted from an emission unit;
> B) Results from any emission by the emission unit;

C) Under an applicable standard or limitation, the emission unit was authorized to emit; or

D) Is a combination of any of the items described in subsection (b)(1)(A), (B), or (C) of this Section.

35 Ill. Adm. Code 130.110(b). Further, information represents emission data to the extent it is "necessary to determine or calculate emission data, including rate of operation, rate of production, rate of raw material usage, or material balance." 35 Ill. Adm. Code 130.110(c). Accordingly, "emission data" is information about pollutants. None of the information contained in the Project Chart contains information about pollutants. The Project Chart merely lists information about capital projects undertaken at the Generating Stations, it contains no information about pollutants.

34. IEPA has taken the position that emission data is any information relevant to determining how much a particular facility is "authorized to emit." This position contravenes the plain meaning of the regulations. The regulations provide that emission data is the data concerning the identity, amount, frequency, concentration or other characteristics of a source's emissions. The regulation says "under an applicable standard," it does not say "to determine what the applicable standard is." The regulation presumes knowledge of the applicable standard; "emission data" is the information used to determine compliance with the standard – with the authorization – not the information used to determine what the standard or authorization is. Even if the Project Chart could somehow aid in determining "what the facility is authorized to emit," that is determining what regulatory limits may apply, but is not, itself, "emission data." As set forth in Attachment 3, the affidavit of Scott Miller, Midwest Generation has submitted all "emission data" as required by its air permits and applicable regulations; these submittals are available to the public.

2. IEPA did not obtain the Project Chart in connection with an inspection under the Illinois Environmental Protection Act.

35. The Project Chart was neither submitted to IEPA nor obtained in a proceeding under the Act; rather, IEPA was provided a copy of the Project Chart after Midwest Generation submitted the document in response to the USEPA's investigation under the federal Clean Air Act. IEPA never sought this information from Midwest Generation, nor has IEPA asserted it obtained this information in connection with an investigation under the Illinois Environmental Protection Act. Accordingly, even if the Project Chart can somehow be considered "emission data," the trade secret provisions of the Environmental Protection Act do not exclude the Project Chart from trade secret protection.

3. The Clean Air Act does not require the public release of Project Chart.

36. IEPA takes the position that all information submitted under a Section 114 Information Request would likely constitute emission data. Supplemental Determination at 3. This position ignores Section 114(c) of the Clean Air Act and its implementing regulations. Indeed, IEPA's interpretation of the term "emission data" would mean that virtually no data submitted to IEPA under its Air program would be considered trade secret. Section 114(c) of the Clean Air Act provides that trade secret information obtain in inspections under Section 114, such as the USEPA Information Request, shall be afforded protection from disclosure. 42 U.S.C. §114(c). Section 114(c) excludes emission data from this protection; but, as USEPA has observed, Section 114 clearly contemplates that some information obtained pursuant to Section 114 information requests will be entitled to confidentiality. *See, e.g.*, Public Information, 40 Fed. Reg. at 21990. It follows that not all information submitted in response to a Section 114 request can constitute emission data.

37. The relevant federal regulation defining emission data for purposes of the exception, which is substantially similar to the Illinois regulation, provides:

> Emission data means, with reference to any source of emission of any substance into the air –
>
> (A) Information necessary to determine the identify, amount, frequency, concentration or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;
>
> (B) Information necessary to determine the identity, amount, frequency, concentration or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source). . . .

40 C.F.R. §2.301(a)(2)(i)(A) and (B). Substantial case law supports the proposition that the "emission data" exception is narrow. Courts have cautioned that "a strict interpretation of the 'necessary to determine' requirement is warranted in order to ensure that the exception does not swallow the rule." *Natural Resources Defense Council v.* Leavitt, No. Civ. A. 04-01295 HHK, 2006 WL 667327, at *4 (D.D.C. March 14, 2006) (citing *RSR Corp. v. Environmental Protection Agency*, 588 F. Supp. 1251 (N.D. Tex. 1984); and Ruling on Petroleum Information Requested to be Held as Confidential, Op. Att'y Gen. (Inf.) 507, 1991 WL 541991, (Alaska A.G. Dec. 4, 1991)). Potentially confidential information is only "necessary to determine" emissions or a source if use of that information is the "only practical way" to determine the emissions or identify the source. *RSR*, 588 F. Supp. at 1255. *See also,* Ruling on Petroleum Information, 1991 WL 541991, at *3 (applying *RSR* standard to State law, held throughput data not "necessary" for calculating quantity of emissions where State agency previously calculated quantity of emissions and disclosed results of those calculations).

38. The *RSR* decision is particularly instructive. In that case, RSR Corporation challenged a decision by USEPA to release certain documents, pursuant to a FOIA request, that the Agency determined constituted emission data. *Id.* at 1253-55. The documents in question contained information that could be used to perform a material balance calculation to determine the emissions of RSR's smelter. *Id.* at 1255. Because emissions from RSR's smelter were "not continuously sampled," USEPA concluded that any information that could be used in a material balance calculation was necessary to determine the smelter's emissions. *Id.* USEPA reasoned that calculations such as material balance calculations "are often the only means of determining the amount of pollutants emitted by a source." *Id.* The court held that USEPA's analysis of whether these documents constitute emission data under Section 2.301(a)(2)(1) was arbitrary and capricious. *Id.* at 1255-56. The court explained that USEPA's record contained only the Agency's "bare conclusion that the only practical way to determine emissions is by a material balance calculation." *Id.* at 1256. For example, the record did not include "a discussion of alternative methods of identifying or measuring pollutants, with a comparison of their capabilities, advantages and disadvantages." *Id.* Such a discussion would have been particularly relevant because the Agency "[i]ndirectly" admitted that, "at least in some circumstances," it could have used other means to determine the level of emissions. *Id.* Because USEPA's record did not demonstrate that the Agency "(1) considered and examined all relevant factors and alternatives or (2) adequately explained the evidence regarding these relevant factors and alternatives," the court held that the Agency's determination was arbitrary and capricious. *Id.*

39. None of information on the Project Chart is emission data under 40 C.F.R. §2.301(a)(2)(1)(A), because none of the information "necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality)" of

emissions. As IEPA is aware, Midwest Generation and has submitted years of emission data to IEPA and USEPA without a claim of confidentiality, including the identity, amount, frequency, concentration and, to the extent related to air quality, other characteristics of emissions from the Power Stations. See Affidavit of Miller, ¶¶3-6 for a list of data reported. Because IEPA and USEPA already possess these data, the information in the CBI is not "necessary to determine" the data. *See RSR*, 588 F. Supp. at 1255. *See also, NRDC v. Leavitt*, 2006 WL 667327, at *4; Ruling on Petroleum Information, 1991 WL 541991, at *3.

40. Further, none of the information on the project Chart is emission data as defined by Section 2.301(a)(2)(i)(B) because none of the information is "necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit." 40 C.F.R. § 2.301(a)(2)(i)(B). The purpose of this provision is to ensure that the public can know "not only the actual emission figures, but also the emissions allowable under applicable standards and limitations." Request for Information; Confidentiality of Business Information, 41 Fed. Reg. 36902, 36922 (Sept. 1, 1976). For example, emissions limitations for some sources may be expressed in terms of units of pollution per unit of raw material processed. *Id.* In such a case, knowing the units of raw material processed during the term would be necessary to determine the emissions a source was authorized to emit. *Id.* But no information on the Project Chart is necessary to determine applicable and limitations.

41. IEPA and USEPA already possesses sufficient information that is not subject to a claim of confidentiality to determine the emissions that the units at the Generating Stations were authorized to emit under the applicable standards and limitations. *See* Affidavit of Miller, ¶¶3, 5, 7.

B. IEPA Improperly Concluded That Midwest Generation Was Obligated To Make An Affirmative Showing In The Statement Of Justification That The Project Chart Was Not Emission data

42. Contrary to IEPA's assertion, the trade secret regulations do not require an affirmative showing that the exclusions from trade secret protection are not applicable. See 35 Ill. Adm. Code 130.203 The regulations require an owner to address whether the article has to be publicly disclosed and the competitive value of the article, but the regulation does not create an obligation that the owner address exclusions. Further, in its January 5, 2004 letter to Midwest Generation requesting a Statement of Justification, IEPA specifically asked Midwest Generation to address the competitive value and the confidential nature of the CBI, but was silent as to the emission data exclusion. See Attachment 4. Given that the Project Chart contains no information relevant to Midwest Generation's actual emissions; Midwest Generation had no reason to anticipate that IEPA would consider the Project Chart emission data.

IV. THIS MATTER MUST BE REMANDED TO IEPA TO MAKE A DETERMINATION AS TO THE CONFIDENTIALITY OF THE CBI UNDER THE ILLINOIS ENVIRONMENTAL PROTECTION ACT AND THE ILLINOIS FREEDOM OF INFORMATION ACT

43. IEPA's Trade Secret Determination and Supplemental Determination concern only whether the Project Chart and Generation Chart constitute trade secrets. Under the Provisions of the Illinois Environmental Protection Act, 415 ILCS 5/7(a)(iv), and the Illinois Freedom of Information Act, 5 ILCS 140/7(9), Midwest Generation's confidential information is also entitled to protection from disclosure. Midwest Generation considers the CBI confidential data protected from disclosure under these provisions. IEPA has improperly failed to make a determination under these provisions.

44. If the Board were to decide that IEPA properly determined that the information did not constitute trade secrets under Section 7(a)(i) of the Illinois Environmental Protection Act,

the Board should remand this matter to IEPA to require IEPA to comply with 415 ILCS 5/7(a)(iv) and 5 ILCS 140/7(9) before the Project Chart and the Generation Charts are released to the public.

Dated: May 29, 2007

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: _____

Sheldon A. Zabel
Mary Ann Mullin
Andrew N. Sawula
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(847) 295-4318

Attorneys for
MIDWEST GENERATION EME, LLC

CH2\ 1857583.2

ATTACHMENT 1

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

217/782-5544
217/782-9143(TDD)

November 30, 2004

Mary Ann Mullen, esq.
Schiff Harden & Waite
6600 Sears Tower
Chicago, Illinois 60606-6360

Re: Midwest Generation EME, L.L.C. – Clarification of Trade Secret Determination

Dear Ms. Mullen:

INTRODUCTION

On January 26, 2004, at its request, the Illinois EPA received a statement of justification for a claim of trade secret from Midwest Generation EME, LLC ("Midwest"). On March 10, 2004, the Illinois EPA issued its determination on the claim. By this document, the Illinois EPA is issuing a clarification of its trade secret determination pursuant to the Pollution Control Board ("Board") order issued earlier this month (PCB 04-185, November 4, 2004). More specifically, the Illinois Environmental Protection Agency is clarifying the reasoning behind its denial of certain information claimed trade secret by Midwest.

This matter involves the denial of trade secret protection to information provided to the Illinois EPA in conjunction with Midwest's response to the United States Environmental Protection Agency's (USEPA) §114 request for information ("USEPA information request"). The two categories of information at issue are the capital projects list for each of Midwest's coal-fired

electric generating units ("capital project list")[1] and information identifying the monthly net and annual net generation, the monthly and annual coal heat content, and the monthly and annual net heat rate for each of Midwest's coal-fired units ("generation data").[2] Midwest submitted these two categories of information in response to Request Two and Request Three of the USEPA information request.

GENERAL DISCUSSION

The Illinois EPA's denial is made on multiple bases, consistent with the applicable laws and rules that govern protection of information that is claimed to constitute a trade secret. First, for certain of the information claimed trade secret by Midwest, information existed indicating that it was a matter of public knowledge; or lacked competitive value or both. Second, claimed information constituted emission data. Third, for certain of the information, Midwest's statement of justification was deficient, failing to demonstrate that all of the information submitted was entitled to trade secret protection.[3]

In making its determination that Midwest had not met its burden of demonstrating that the information is not publicly available, the Illinois EPA did not, nor is it required to, search exhaustively for all information claimed trade secret by Midwest to confirm whether the material is publicly available. Rather, Midwest was required – and failed -- to demonstrate the lack of public availability. The fact that the Illinois EPA was able locate at least some of the specific information that Midwest claimed to be a trade secret not only required rejection of the claim with respect to that particular information, but also cast sufficient doubt on the balance of Midwest's trade claim secret claim so as to warrant a blanket denial.

Indeed, prior to making its trade secret determination, the Illinois EPA informed Midwest of its failure to account for the complete dissemination of all information claimed to be a trade secret. Specifically, the Illinois EPA called to Midwest's attention, in telephone conversations prior to issuance of the Agency's formal decision, Midwest's apparent failure to follow its own procedures for ensuring protection of trade secret information. At a minimum, it was pointed out in these discussions, Midwest had failed to address the complete chain of custody for the information in dispute. It was also pointed out, as noted above, that Midwest did not account for all public entities to which it is required to submit the type of data for which it claims protection, and the record keeping policies at such entities. Despite these pre-decisional discussions, Midwest failed to address the Illinois EPA's concerns in a supplemental statement of justification prior to the Agency's trade secret determination.

---

[1] This information was submitted in response to information request number three. Information request number three states "For all currently active coal-fired generating units provide a list of all capital projects, of an amount greater than $100,000, approved or completed between January 1, 1975 and the date of this request. For each such capital project identify the work performed, the date completed or projected to be completed, the project work order number and the dollar amount approved and/or expended."

[2] This information was submitted in response to information request number two. Information request number two states "For all currently active coal-fired generating units provide monthly and annual total gross and net generation (MW-hr), monthly and annual average heat rate (BTU/Kw-hr) and monthly and annual average coal heat content (BTU/lb) and percent sulfur for all years from 1975 through 2002.

[3] 35 Ill. Adm. Code 130.203

Finally, pursuant to state and federal law, emission data cannot be accorded trade secret status. In its statement of justification, Midwest completely failed to address the nature of submitted information as it might be considered to constitute an article containing emission data. As information was being submitted in response to a USEPA request for information under §114 of the CAA, it was both reasonable and appropriate for Midwest to address the status of the submitted information, as it would likely be considered to contain emission data.[4] Under 35 Ill. Adm. Code 130.203(e), Midwest was under a specific obligation to do so, as in a statement of justification "any other information that will support the claim." Midwest failed to satisfy its obligation under 35 Ill. Adm. Code 130.230(e).

In this regard, emission data includes information on the amount of emissions of various pollutants that an emission unit is authorized to emit under applicable standards and limitations.[5] It also includes any related information that is necessary to determine emission data, including data related to authorized or allowable emissions.[6] The New Source Review (NSR) programs[7] established by the CAA and incorporated into the Environmental Protection Act are appropriately considered standards and limitations for the purpose of defining emission data as these programs establish legal restrictions on emissions. In particular, these programs establish limitations on the emissions of new or modified emission units, as distinguished from existing unmodified units, which are not subject to such limitations. The purpose of the information solicited by the USEPA information request was to determine whether Midwest's units have been modified so as to be subject to limitations under one or more of the NSR programs. As such, submitted information should generally be expected to constitute emission data.

The two categories of information that are in dispute are directly relevant to the applicability of NSR. They relate to the two tests that must be met for a modification, or major modification to have occurred. The first test is that a physical change or change in method of operation has been accompanied by an actual or potential increase in emissions. The generation data that is the subject of dispute generally constitutes emission data as it relates to increases in emissions that have occurred at units. The capital project list generally constitutes emission data as it identifies activities that have been performed on units, some or all of which may entail physical changes to or changes in the method of operation of such units. Considered together, these two categories of information are needed to determine whether units have been modified, and thus should be subjected to standards and limitations for modified units set by NSR.

---

[4] Section 114(c) of the Clean Air Act specifically provides that submitted data that constitutes emission data must be available to the public.

[5] 35 Ill. Adm. Code 230.110(b)(1)(C)

[6] 35 Ill. Adm. Code 230.110(c)

[7] These programs include New Source Performance Standards (NSPS), 40 C.F.R. Part 60, Prevention of Significant Deterioration of Air Quality (PSD), 40 C.F.R. 52.21, and non-attainment New Source Review (NA NSR), 35 Ill. Adm. Code Part 203.

GENERATION DATA

The generation data is contained in pages MWG0024 through MWG000056 of Midwest's information response. The Illinois EPA determined that certain generation data (i.e. information regarding gross generation (Mwhr) and gross heat rate (BTU/GKwhr)) constituted confidential business or trade secret information. The Illinois EPA denied trade secret protection to the information regarding net generation rate (Mwhr), net heat rate (BTU/NKwhr), and average coal heat content (BTU/lb). The following is a discussion of the general rationale for denial and the specific rationale for each category of data.

Within the statement of justification, the claimant must provide a detailed statement identifying the persons or class of persons to whom the article has been disclosed.[8] Midwest's "detailed" statement for generation data consisting of the following two sentences: "Midwest Generation only provides this information [net generation, etc.], as needed, to its senior management and to personnel in the following departments: market and trade, finance, operations and risk management. Midwest Generation also provides this information, to the extent required, to lenders and rating agencies."

These cursory statements fail to address, *inter alia*, Midwest's submittal of the type of information at issue to governmental authorities that regulate the generation of electricity. Thus, Midwest's certification within the statement of justification was, at minimum, misleading, erroneous, and insufficient. Additionally, the certification specifically states that "[u]pon information and belief, the Confidential Information has not been published or disseminated, and has not otherwise become a matter of general public knowledge." Midwest's certification fails to acknowledge that information substantially identical to the information contained in the subject documents had in fact been published or disseminated and become a matter of public knowledge. Once again, the certification was, at minimum, misleading, erroneous, and insufficient.

Regarding the competitive value of generation data, under 35 Ill. Adm. Code 130.203(d), Midwest must provide a detailed discussion concerning the competitive value of information claimed trade secret. For generation data, Midwest states "[t]his information defines Midwest Generation's competitive position in the marketplace and, thus, possesses competitive value."[9] An article is considered trade secret if the statement of justification *demonstrates* (italics added) that the article has competitive value.[10] A single sentence assertion of competitive value can hardly be construed as a demonstration. Midwest does not explain the competitive value of net generation rate, net heat rate, or average coal heat content individually, but rather makes a blanket assertion. As discussed below, to the extent the information is publicly available, it cannot by definition have competitive value as confidential information.

---

[8] 35 Ill. Adm. Code 130.203(b)
[9] Part II.A of Midwest's statement of justification dated January 23, 2004
[10] 35 Ill. Adm. Code 130.208(a)(2)(B)

Net Generation Rate

The Illinois EPA denied trade secret protection to the net generation rate data on the grounds that the information is a matter of public knowledge, and as such has no competitive value. The Illinois EPA's position is supported by the fact it was able to locate the net generation information for each of Midwest's coal-fired generating units on a publicly accessible federal government website.[11]

Additionally, the Illinois EPA also considers the information emission data as it indirectly relates to emissions from each unit. In particular, an increase in generation would reflect an increase in operation of a unit and its accompanying emissions. As such, generation data constitutes data that is relevant to determining whether the second test for a modification has been satisfied, i.e., an increase in emissions. In this regard, as generation data is provided on an annual basis, it is relevant to the occurrence of a major modification, pursuant to PSD or non-attainment NSR.

Net Heat Rate

Regarding net heat rate, the Illinois EPA denied trade secret protection as, the information is a matter of public knowledge. Net heat rate can be derived by information available to the public. Information that is available to the public includes, but is not limited to, information reported to the federal government, information reported to the Illinois EPA, and information contained in Midwest's various construction and operating permits. The Illinois EPA maintains that such information cannot be of competitive value if it is discernable through simple calculations.

Additionally, the information is considered emission data. In particular, an improvement in heat rate of a unit indicates that change has occurred at the unit that has reduced the amount of fuel consumed per unit of electricity generated. This is indicative of a possible physical change or change in the manner of operation of a unit. It is also indicative of a possible increase in emissions as a unit that operates more efficiently may be utilized more, compared to other units that are less efficient.

Average Coal Heat Content

[11] In fact, contrary to Midwest's assertion in its July 1, 2004 motion to partially reconsider the Board's May 6, 2004 order, counsel for the petitioner was put on notice of the website. The Illinois EPA also discussed with counsel, prior to issuing its trade secret determination, the sufficiency of its claim.

As with the net generation rate and net heat rate data, average coal heat content data is also publicly available information. Through applicable federal and state reporting requirements, Midwest is required to submit information regarding the average coal heat content.

Furthermore, average coal heat content is considered emission data as it indirectly relates to the rate of pollutants emitted at each of Midwest's coal-fired generating units. In particular, this information is needed to determine the amount of coal burned in a boiler from data heat input to a unit or a unit's heat rate.

CAPITAL PROJECT LIST

The Illinois EPA denied trade secret protection to all information contained in the capital project list submitted by Midwest in response to USEPA's information request, except for the work order numbers.[12] The Illinois EPA denied trade secret protection to information contained in the capital project list, as some of the information is publicly available, Midwest failed to demonstrate that any of the information is of competitive value, and much of the information is emission data as it is necessary to determine compliance.

Specifically, as evidenced in the record filed in this matter by the Illinois EPA, a number of the projects identified in the capital project list that are claimed trade secret are subject to permitting requirements. For these projects, project details are found in the publicly available applications for state construction permits or the construction permits or subsequently issued operating permits themselves contained in the Illinois EPA's files; and similar details are found in submissions made to other government entities, including, for example, the Illinois Commerce Commission. The competitive value of the information in the project list is cast in serious doubt not only by the public availability of the particular information at issue in government filings, but also by the ready availability of similar information to the public in ongoing NSR/PSD enforcement cases and like matters.

Midwest contends that information contained in the capital project list possesses competitive value as, if disclosed, competitors could determine its environmental control strategies and assess whether the projects would shift its cost position in the marketplace. Furthermore, Midwest suggests that the information would allow competitors to predict future maintenance costs giving them a competitive advantage. Lastly, Midwest suggests that competitors could use the information regarding costs of certain equipment to negotiate more favorable prices with vendors, resulting in harm to its competitive position. Midwest failed to articulate and expound upon the aforementioned blanket statements thereby failing to make a sufficient demonstration of competitive value. The discussion of competitive value is not correlated with any particular project or information rather the discussion applies generally to all of the information in the capital project list.

---

[12] Column 2 contains the work order number, which the Illinois EPA determined is confidential business information. Specifically, the work order number does not constitute emissions data and is not necessary to determine the source's compliance status (e.g., NSR/PSD applicability). Rather, the work order number assigned by Midwest could be used solely for internal purposes.

Moreover, the capital project list generally contains emission data. Operational changes at a facility constitute emission data as such activities may be physical or operational changes to emission units, and meet the first test for determining whether modifications under NSR have occurred. The capital projects list also contains information describing projects that is relevant (although not sufficiently presented) to determining whether physical changes or changes in the method of operation.[13]

Chris Pressnall by PB

Chris Pressnall
Assistant Counsel
Division of Legal Counsel
Illinois EPA

Cc: Fred W. McCluskey, Vice-President, Midwest Generation EME, LLC

[13] Wisconsin Electric Power Co. v. Reilly, Nos. 88-3264 and 89-1339, United States Court of Appeals for the Seventh Circuit (1990).

CERTIFICATE OF SERVICE

I, TERRY COTTON, an employee of the Illinois Attorney General's Office, hereby certify that I caused to be served this 30th day of November 2004, the foregoing Midwest Generation EME, LLC Clarification of Trade Secret Determination upon the persons listed on said Notice by personal service on or before 5:30 p.m.

TERRY COTTON

Subscribed and Sworn before me this
30th day of November, 2004.

Notary Public

OFFICIAL SEAL
PHYLLIS DUNTON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 12-7-2004

ATTACHMENT 2

DECLARATION OF MICHAEL J. KING

May 25, 2007

Being duly sworn I hereby state:

I. QUALIFICTIONS AND BACKGROUND

1. My name is Michael J. King. I am a Senior Vice President, NERA Economic Consulting ("NERA"). My business address is 370 Interlocken Boulevard, Broomfield Colorado, 80021. NERA is an economic consulting company engaged in providing economic consulting services in support of litigation matters and advice to clients. My work focuses on the power generation sector and the regulation of utilities. I have been employed by NERA since 2003. Prior to my affiliation with NERA, I was a managing partner of PA Consulting Group, Inc. (PA) and head of the Wholesale Energy Market practice. The Wholesale Energy Markets practice focused on: valuation of energy facilities in a changing environment, finance of generation assets, divestiture, energy trading strategy and analytics, and performance based regulation. My experience in electric wholesale markets includes extensive demand forecasting and production cost modeling. My professional experience and qualifications are summarized in my resume, which is included as Exhibit 1 to this affidavit. I am familiar with many of the types of information collected and maintained by electric utilities in the course of their business and the competitive importance of that information.

2. I have reviewed the documents marked "confidential business information" that have been provided by Midwest Generation EME, LLC ("Midwest Generation") to the Illinois EPA. (See Exhibit 2 for a list of documents reviewed). These documents pertain to the Crawford, Joliet, Will County, Waukegan, Fisk and Powerton Generating Stations currently (the "Power Stations") and include various charts compiled by Midwest Generation for the U.S. EPA. The purpose of my review was to assess the potential for adverse competitive harm to Midwest Generation if the documents were released publicly. My conclusion, discussed more fully below, is that release of this information would likely cause Midwest Generation substantial competitive injury.

II. RELEASING THIS INFORMATION TO THE PUBLIC COULD DISADVANGTAGE MIDWEST GENERATION IN WHOLESALE MARKET TRANSACTIONS

A. Description of Midwest Generation's Wholesale Market Transactions

3. Midwest Generation is an Independent Power Producer (IPP), or non-utility generator. Unlike a regulated utility, which has an obligation to serve the demand of customers of a designated franchised service area, Midwest Generation's primary business is generating electricity for sale in the competitive wholesale market. Thus, Midwest Generation has no end-use or retail customers, but sells electricity to a variety of intermediaries in the wholesale market such as regulated utilities, cooperatives, municipalities, retail suppliers or aggregators – all of whom sell power they make or purchase from entities like Midwest Generation to consumers – and power marketers, traders, or brokers who buy and sell power in the wholesale power market. In simplest terms, Midwest Generation sells their power either by offering to sell electricity into an exchange energy market or by executing bilateral or forward contracts. Sales of electricity to an exchange energy market are governed by the prevailing market rules. Energy exchanges aggregate buyers' (utilities, load serving entities, retailers) load and match supply offered by generators. The price of electricity paid to Midwest Generation – if their offer is accepted – is set by the market clearing price that is established according to the rules of the exchange. Bilateral contracts and their terms and conditions, including the price of electricity paid to Midwest Generation, are negotiated between Midwest Generation and a counterparty. Forward contracts are a standardized product with industry specified terms and conditions for the sale of electricity at a future time and are often priced at market indices.

1. Exchange Energy Markets

4. The exchange energy markets are operated by Regional Transmission Organizations, or RTOs, and/or Independent System Operators, or ISOs. RTOs/ISOs are independent market operators of the transmission system and some perform the centralized dispatch of generators for large regions of the country. They also generally organize a short-term energy market where physical power flows are coordinated and imbalances (mismatches between supply and demand, or between scheduled and delivered) are priced and cleared (or

eliminated). Midwest Generation is a member of the PJM RTO and Midwest ISO ("MISO")[1] and all of Midwest Generation's transactions, either contracts or exchange market transactions, are scheduled through the appropriate RTO/ISO. In order to become a member of PJM or MISO, Midwest Generation signed the respective Operating Agreements and provided specific design and operating data describing each of their generating facilities. Per the Operating Agreements, the data provided to the market operator are designated confidential and are not disclosed to other members.[2] The data provided include the efficiency, or heat rate, of the unit at various levels of MW output, the ability of the unit to start and stop (e.g. the number of hours necessary for the unit to start up to produce a given level of output and/or the length of time the unit must keep running after it has been started up), the quantity of fuel required to start the unit, and various other operational characteristics such as the generating unit's ability to provide ancillary services.[3] These data are important to the RTO/ISO in fulfilling its role to balance supply of generation with load on a second to second basis. Without detailed data on the operational characteristics, flexibility, and constraints of the various generation units, the market operator (RTO/ISO) would not have some of the crucial information on how to adjust supply to meet the variations in load or (most importantly) system emergencies, such as loss of generation or transmission equipment.

5. In competitive markets such as PJM and MISO, exchange energy market clearing prices are set based on the bids or offers to sell electricity submitted by participating generators, or market sellers. For each hour of each day, the market clearing price, which is the price paid to all generators who operate in a given hour, is set based on an economic ordering of the generating units' bids. In order to determine the market clearing price, the market operator employs very sophisticated software which uses the detailed operating characteristics provided by the owners of the generating units to determine the least cost ordering of units feasible to follow load or to meet the second-by-second demands of the electrical system.[4] In simple terms,

---

[1] Midwest Generation's affiliate, Edison Mission Marketing and Trading, is an IPP/EWG member of the Midwest ISO.

[2] Amended and Restated Operating Agreement of PJM Interconnection, LLC as approved by FERC through May 23, 2007. Relevant pages are attached hereto as Exhibit 3.

[3] Ancillary services include spinning and operating reserves and regulation.

[4] Different generation units may have similar bids, but different ability to change their output. For example, one unit may be able to increase its output ("ramp up") more rapidly than another. Because load cycles up during the day

based on the expected customer demand in each hour, the bids are stacked up in ascending order until supply equals demand (along with some reserve for unforeseen events such as increases in load or loss of generating or transmission equipment). The hourly market clearing price is set equal to the bid of the last generator needed to supply the customer demand. Bids are generally based on the average or marginal operating cost of the specific unit, i.e. the efficiency of the unit, or the heat rate, multiplied by the cost of fuel plus an adder for variable operations and maintenance costs.

6. Similar to the operating characteristics of the units, actual bids submitted to the market operator are kept highly confidential. In most markets, bid data are made available in the public domain with a several month lag (e.g. 6 months) and the market operators go to great lengths to disguise the bid data so that market participants (and other interested parties) are unable to determine what bids belong to specific generators. With a 6-month lag, PJM posts to its website files that provide the date and time of bids and the bid points (a $/MWh price for a specific MW level). The identity of the generating unit and the company are disguised by codes. The statement on the PJM website reads, "The identity of each generator and company is market sensitive information which cannot be revealed by PJM."

2. Bilateral Contracts

7. Bilateral contracts (also known as over the counter, or OTC, contracts because they are not traded on an organized exchange) comprise several types of arrangements with unique terms and conditions including amount (MWh and/or MW), price ($/MWH and/or $/kW), length of service, periods of service (on-peak, off-peak, or round the clock), and level of "firmness" of the power being delivered. There are several types of bilateral contracts which I will broadly categorize as 1) purchase power agreements including unit contingent contracts, firm power contracts, non-firm power contracts and 2) tolling agreements. The counterparty in a bilateral contract could be a regulated utility, a cooperative utility, a municipal utility, a retail supplier or aggregator, or another wholesale market participant. A brief description of each contract type is provided below:

---

and down overnight, the market operator must ensure that enough generators with sufficient flexibility to change their output are online and able to adjust to follow load.

- Unit contingent contracts or unit power sales agreements involve the sale of power from an identified generating unit. The counterparty to this agreement or contract would be purchasing an agreed upon amount of capacity from a specific generating unit for an agreed upon term and price. The IPP or power producer is responsible for all aspects of producing and delivering the power, but is only obligated to provide power when the generating unit is available.

- A firm power contract is an agreement to provide firm power without identifying a specific source for an agreed upon amount of time and at an agreed upon price. If the seller fails to deliver the power, there usually is some sort of liquidated damages provision – hence, the term "firm" power. Because the obligation to supply power is firm, these arrangements trade at a premium to unit contingent contracts. An IPP providing firm power may source power from its units, but will generally source the power from multiple units or "firm" the power from a single unit with a financial product to hedge the risk that a specific generating unit becomes unavailable.

- Tolling agreements are different from purchase power agreements in that the counterparty is responsible for the fuel supply. In effect, a counterparty in a tolling agreement buys the service of converting fuel into electricity. The generating unit owner charges the purchaser a "toll" or fee for converting the purchaser's fuel through the owner's project – often, the tolling fee is designed to cover the variable cost of operations, absent the cost of fuel. The generating unit owner does not bear the risk of fuel price, fuel availability, or fuel transportation.

8. Bilateral contracts can either be the result of negotiations between two parties or the result of trading (buyer and seller contact each other with a request offer and bid to transact), a competitive bidding process, or a Request for Proposal (RFP) process. In a competitive bidding or RFP process, the IPP or generation owner prepares and submits a bid for the requested service and is the selected provider based on the results of the process. In most of these processes, price is the key metric used in selecting a winning bidder, although non-price factors can also play a role, such as availability guarantees in tolling arrangements.

3. Forward Contracts

9. As mentioned above, a forward contract is a standardized product that conforms to generally accepted product definitions (amount of power and timing of its delivery) and generally uses a standardized set of contract terms (covering a variety of factors, such as force majeure, collateral requirements, settlement, delivery, arbitration, etc.). Sometimes these contracts are priced on published market price indices, but more often the price is negotiated

between the buyer and the seller. Buyers of forward contracts include trading organizations, power marketers and brokers, utilities, and other wholesale market participants.

B. The Costs of Power Production; Variable vs. Fixed Operating Costs

10. The costs incurred to produce power are usually differentiated by fixed versus variable operating costs. Fixed operating costs are those costs that you incur regardless of whether the generating unit produces power and include staffing costs, equipment costs, property taxes, etc. Variable operating costs are directly related to the amount of power production at the generating unit and include fuel, some portion of maintenance costs, and any other variable commodity such as chemicals used in the power production process. In order to have a profitable business, IPPs need to recover both their fixed and variable operating costs as well as earn a margin on the power sold.

11. After fuel costs, the maintenance of the power plant and the resulting costs are a significant portion of the total costs of power production.

C. Factors Power Producers Consider in Formulating Bids or Setting Price in Contracts

1. Variable Operating Costs ($/MWh)

12. Transactions in the exchange markets are by definition short-term transactions, given that the exchange markets are Day-Ahead or Real-Time markets. As the name suggests, in Day-Ahead markets, bids are submitted the day ahead for delivery of power the next day. In real-time markets, prices for delivery of power on either an hourly or sub-hourly basis are determined on the basis of bids that may be submitted as far as a day in advance. Bid formulation is unique to each bidder, but is likely to bear some resemblance to the marginal operating cost of the generating unit (or the cost of producing additional power from the unit). In formulating a bid, power producers may consider their heat rate, fuel cost, and variable operation and maintenance costs as well as the cost to start the unit and/or the cost of shutting down the unit in the event their bid is not accepted. In order to prepare a "competitive" bid, power producers may also consider the likely bids of similar units, or competitors, in order to submit a bid that is likely to be accepted by the market operator.

2. Fixed Operating Costs ($/kW)

13. When preparing bids or offers for longer-term transactions, the power producer is likely to consider the variable operating costs of the unit as well as the fixed costs of the unit. Power producers often recover the fixed costs of operating the generating unit through a capacity charge specified in $/kW. Capital, or fixed costs, can be recovered through bidding and selling capacity into the exchange markets or by a negotiated rate in bilateral contracts. In determining an appropriate level of fixed cost recovery, the power producer assesses staffing costs, maintenance costs, and other costs specific to the generating unit.

14. Similar to bids in short-term transactions, power producers try to assess the fixed costs of their competitors so that they can prepare a competitive bid or offer.

3. Availability and Reliability

15. In addition to the variable and fixed costs, the reliability or availability of the generating unit may also be a critical factor underlying some of the key terms and conditions of the bid or offer. The availability factor of a unit describes the percentage of time the unit will likely be available to produce electricity over a given period of time (e.g. monthly or yearly). In some contracting arrangements (particularly bilateral contracts for unit contingent power and tolling arrangements), the minimum availability of the unit may be specified with a penalty clause if the actual availability falls below the threshold. Sellers of power with availability clauses compete not only on the basis of price, but also on the "firmness" of the power as represented by the availability guarantees. Further, sellers of firm power may also look to their competitors for the likely availability of their generating units to understand how much it may cost them to firm their physical power supplies.

D. How a Competitor May Use Midwest Generation's Information

1. Exchange Energy Markets

16. If a competitor has access to Midwest Generation's (or other generating units') performance data, or detailed unit characteristics, they can use this information when formulating their own bids. If a competitor has access to the actual heat rate of a generating unit, its likely fuel costs, its operation and maintenance costs, and the expected availability of Midwest Generation's generating units, they can use this information to their competitive advantage. In

the exchange energy markets, a competitor could use this information to set their bid slightly lower than what they expect Midwest Generation's unit to bid, resulting in their unit being selected to run. If they are successful, Midwest Generation might not be selected to produce electricity and therefore would not produce revenue. Even if Midwest Generation is selected to run, if Midwest Generation's unit is the last unit selected, they may not produce all of the electricity they otherwise would have produced, again losing revenue.

17. In addition to potentially losing money as a result of competitors using detailed unit characteristics data that generally would not be known, the fact that Midwest Generation would not have similar data on competitors creates an un-level playing field. A fundamental concept of competitive markets is a level playing field for all participants. Having highly confidential operational characteristics of a competitor's generating unit does not make for a level playing field.

18. The revenue impact will be different depending on the type of generating unit. Midwest Generation owns and operates all types of units including base-load, intermediate, and peaking units. For base-load units such as large coal plants that are required to run in most hours of the year, the bidding strategy of the generator or the underlying unit characteristics may not be as valuable to a competitor, although there are occasions when the unit is backed-down from full capacity due to low demand levels (such as in the middle of the night in the Fall or Spring when there is not much air conditioning or heating load). During these few hours, a competitor could use the operational characteristics of a Midwest Generation unit to "estimate" Midwest Generation's bid in order to formulate bids for their unit that would allow them to be selected to continue running their unit(s) at full load while Midwest Generation has to back down their units resulting in lost revenue for Midwest Generation. Availability data on base-load units, however, would be of use to competitors as the competitor would have more information on the costs of Midwest Generation to assemble a firm power product with specific generators based on their likely unavailability.

19. For intermediate units (units that run on average 30-60% of the time), there is a much larger percentage of time when similar units are competing to operate and based on their respective bids some will be selected and some will not. If a competitor has the advantage of knowing Midwest Generation's operational characteristics this situation could result in the

competitor under bidding Midwest Generation, resulting in Midwest Generation's bid not being accepted and a loss of revenue.

2. Bilateral Contracts

20. In longer-term transactions such as bilateral or OTC contracts, Midwest Generation is either "competitively" bidding for a contract or negotiating directly with a counterparty. In the competitive bidding process, a competitor may use both the performance, or operational characteristics, of Midwest Generation's units and/or the cost profile of Midwest Generation's units to formulate a bid at a lower price than what they believe Midwest Generation will submit. Because most competitive procurement processes use price as the main metric to select the winning bidder, the result could be a loss of the contract for Midwest Generation, which depending on the term of the contract, could be a significant loss of revenue.

21. In negotiating directly with a counterparty, if the counterparty has access to Midwest Generation's confidential information, Midwest Generation will be competitively harmed. If the counterparty has access to the availability data of the unit or the fleet of units, it may negatively impact Midwest Generation's negotiating ability and result in less desirable terms and conditions in the contract as well as a lower price for the products described in the contract.

III. THE DOCUMENTS CONTAIN SENSITIVE AND PROPIETARY CONFIDENTIAL BUSINESS INFORMATION.

22. As set forth in Exhibit 2, I have reviewed the documents submitted to Illinois EPA; these documents contain the competitively sensitive information described above. Examples of the data and the documents containing this data are summarized below.

1. Performance Data or Operational Characteristics

23. These data include net generation, gross generation, heat rate (the ratio of Btus of fuel consumed to MWhs produced, gross or net), sulfur content of coal and coal heat content. These data, especially if compiled in one source, could provide competitors with detailed performance or operational data that is not available in the public domain. The data elements together provide a detailed look at the operation of a specific generating unit, the fuel used and quality of the fuel, as well as the efficiency of the unit (i.e. heat rate). Heat rate data, gross and

net generation, and fuel characteristics are the key components in deriving a generating unit's variable operating cost in $/MWh. The variable operating cost of the unit is the basis for both bids into an energy exchange and energy prices offered in contracting arrangements. The availability of this type of data would allow a competitor to estimate Midwest Generation's variable operating cost, and as discussed above could be used to undercut Midwest Generation's bids in both the exchange markets and competitive bidding processes. Similar categories of data are reported to NERC-GADS (National Electric Reliability Council – Generating Availability Data System) and the market operators, but in both cases this data is only released to other parties with the approval of the owner of the generating unit. The market operators consider this data highly confidential and market sensitive.

24. Midwest Generation's Generation Charts (MWG0024 through MWG0055) provide monthly and annual detail on the performance of Midwest Generation's generating units. This data includes gross generation, net generation, gross heat rate, average heat content of the coal, and % of sulfur of the coal.

25. Some of this performance data is available in the public domain but it is generally aggregated, i.e. at the plant not unit level, or provided as annual, not monthly data. For example, monthly fuel used and fuel quality data is available from FERC Form 423. Unlike the documents cited, the FERC Form 423 data is aggregated to the plant level making it quite difficult to assess the fuel characteristics of a specific generating unit. Generator ratings are available in EIA Form 411 and EIA Form 860 but are provided as seasonal ratings, not monthly, and are net ratings only (not gross).[5] The publicly available data merged with the release of Midwest Generation's confidential data could be quite valuable not only to Midwest Generation's competitors but also to others such as consultants and analysts who prepare assessments of the competitive markets and trading organizations who transact in the markets.

2. Event or Outage Data

26. Event data includes outage start and end times, outage types, outage causes, components repaired and any other information related to an outage. Similar to performance data, this type of data is reported to NERC-GADS and is protected as confidential information by

[5] EIA data can be found at the EIA website, www.eia.doe.gov.

NERC. These data would provide a competitor with detailed information regarding the availability of the generating unit. These types of data provide a detailed look into the maintenance schedules and outages experienced by the unit and could provide insight into future availability of the unit.

27. Midwest Generation's Outage Chart (example: MWG0060-0068) provide work order numbers, outage end dates, descriptions of the repairs and replacements performed during the outage, and dollars expended on the repair.

3. Fixed Costs such as Maintenance and Equipment Replacement Costs

28. The Outage Charts provide maintenance and repair costs and the timing of outages. This information could be used by competitors to understand the level of maintenance required of the generating unit, the level of maintenance performed (which may reveal the Company's operational goals), and the timing of the maintenance outages. This information could be used by the competitor to optimize their own maintenance plans as well as to ascertain the Company's operational objectives and the costs to meet those objectives. Release of this type of information allows the competitor to assess the fixed costs incurred by the generating unit for maintenance and equipment repair and replacement and could be used by a competitor to assess the total cost profile of Midwest Generation's generating units.

4. Availability Data and Projections

29. Both the Generation Charts and the Outage Charts provide information describing the historical availability of a specific generating unit and information that could be used to derive estimates of the future availability of the unit.

I declare that the foregoing is true and correct.

Executed on this 4th day of May, 2007.

Michael J. King

Sworn and subscribed before me this the 4th day of May, 2007.

State of Colorado County of Broomfield
Subscribed and sworn before me on 05/04/07 (Date)
(Notary Signature)

Notary Public

CH2\ 1857854.2

ARSEN GRIGORYAN NOTARY PUBLIC STATE OF COLORADO
My Commission Expires DECEMBER 13, 2009

EXHIBIT 1

NERA
Economic Consulting

Michael King
Senior Vice President

National Economic Research Associates, Inc.
370 Interlocken Boulevard, 4th Floor
Broomfield,C olorado 80021
+1 303 327 1467 Fax +1 303 327 1499
Direct dial: +1 303 327 1466
mike.king@nera.com
www.nera.com

MICHAEL KING
SENIOR VICE PRESIDENT

Mike King is an economist and management consultant with extensive experience in electric wholesale markets, electric utility restructuring, strategy,a nd regulation. Mr. King's recent work has focused on the merchant generation sector, where he hasp rovided strategy and valuation advice on mergers and acquisitions the financing of merchant energy companies, and the financial restructuring ofd istressed companies. He has also appeared asa n expert witness in litigation related to the generation sector.

Mr. King's work int he merchant energy sector has focused ona cquisitions of generating facilities and their finance. Mr. King has provided valuation services to acquirers, assisting them in acquiring more than 21,000 MW of generation in North America, Europe, and Asia-Pacific. He also has been one of the leading authorities on markets for wholesale energy, supervising the preparation of independent markete xpert's report's that supported financing for merchant energy companies, including most of the major financing's in North America (NRG's Northeast portfolio in the syndicated loan and capitalm arkets, US Generating's New England assets in the syndicated loan and capital markets, Orion Power's assets in New York, Edison Mission Energy's Homer City and Midwest Generation assets in the syndicated loan and capital markets, Mirant's US portfolio in the syndicated loan and capital markets, Reliant's Northeast portfolio in the syndicated loan market, Entergy's letter of credit to support the Northeast nuclear acquisition, the Lake Road facility, the FPL Rise facility, Exelon's merchant power credit ratings, AEP's merchantc reditr atings, etc.).

Mr. King has appeared as an expert witness in a New Source Review case and in a commercial damages case relating to M&A activity in the energy sector. The alledged breach concerned the wrongful acquisition of a power plant, and required Mr. King to assess the value of the facility. The plaintiff asserted a damages claim that was in excess of $500 million. He has appeared as a witness in a new source review case. He appeared as an expert witness in a resource procurement proceeding. He has appeared as an expert witness on integrated resource planning issues. And he has appeared as an expert witness on the design and implementation of performance based and incentive regualtory schemes. Mr. King led the development of the performance-based regulation scheme for theP rovince of Ontario, includingt he design and executiono f the stakeholder involvement process for over 270 utilities int he province in

addition to consumer groups, the government, and the regulator. Finally Mr. King has appeared as an expert witness on the issue of resource procurementa nd prudence.

Mr. King has not only assessed the impacts of regulatory barriers in the restructuring energy markets, he hasl ed the efforts to start new companies in these markets. For an integrated gas company, he developed the business plan for a retailing subsidiary that combined existing and acquired gas marketing, cogeneration development, and performance contracting businesses into a single entity. Upon approval of the business plan, Mr. King served as the interim senior vice president of marketing for the reformed company. Mr. King subsequently led the initial launch efforts to form a power marketing joint venture of three large public power agencies. Most recently, he has been focused on the development of a structured logistical power marketing firm, where he has ledt he use and development of option pricing methods in the product development area.

Prior to joining NERA, Mr. King spent eight years with PA Consulting (formerly PHB Hagler Bailly), most recently as a managing partner, deputy group head of the Energy Group, and Head oft he Global Wholesale Energy Markets practice. In that capacity he served on the extended management committee of PA Consulting, had profit and loss responsibility for his practice, and led many strategy, merger and acquisition, and financing projects.

Education

MA Economics,U niversity of Wyoming, 1980
BA Economics, University of Wyoming, 1979

Professional Experience

	National Economic Research Associates
2004-	*Senior Vice President*
2003	*Vice President*
	PA Consulting Group
2000-2002	*Managing Partner*
	Head, PA Americas
	Head,W holesale Energy Markets Practice
	Deputy Group Head, Energy Group
	Member, Extended Management Committee
	PHB Hagler Bailly
1995-2000	*Senior Vice President*
	Member of the Hagler Bailly Management Committee
	Synergic Resources Corporation
1985-2000	*Senior Vice President*
	Member of the Management Committee

Experience

Areas of Qualification

Assetv aluation, market restructuring, pricing and contracting practices, strategy, trading, energy retailing and utility planning

Employment History

Senior Vice President (2004-), National Economic Research Associates, Denver and Washington DC
Vice President(2003), National Economic Research Associates, Denver and Washington DC
Managing Partner (2001-2002), PA Consulting Group, Boulder Colorado.
Associate Partner (2000-2001), PA Consulting Group, Boulder Colorado
Senior Vice President (1999-2000), Vice President(1997-1999), Principal (1995-1997), PHB Hagler Bailly, Boulder, CO
Senior Vice President, Synergic Resources Corporation, Oakland, CA, 1992-1995
Vice President, Synergic Resources Corporation, Oakland, CA, 1988-1992
Director, Pacific Northwest Division,S ynergic Resources Corporation, Seattle, WA, 1985-1987
Group Leader, Utility Economics, Battelle Pacific Northwest Laboratories, Richland, WA, 1980-1985
Rate Analyst, Mountain Bell, Cheyenne, WY, 1979-1980

Professional Experience

Mr. King is an economist and management consultant with extensive experience in the electric power and electric utility sectors. His current areas of focus are valuation of energy facilities in a changing environment, finance of generation assets, financial restructuring of distressed energy merchant companies, corporate strategy, energy trading strategy and analytics, and performance based regulation.

Prior to joining NERA, Mr. King was responsible for PA's market assessment work in support of generation assetf inance. He led the firm's work on many major financings in the syndicated loan and capitalm arkets, including the U.S. Generating financing of the NEES assets and Lake Road generation project, Southern Energy North America Generating's financing of its US power plant portfolio, Edison Mission Energy's financing of Homer City Station and the Commonwealth Edison assets, NRG Energy's financing ofi ts Northeast portfolio, West Coast Power's financing of its California assets, Southern Energy's financing of its U.S. generation portfolio, PP&L Global's financing of the Montana Power assets, Orion Power's financing of its Northeast Portfolio, PSEG Power's financing of the transfer of assets from PSE&G andi s currently leading work obtaining debt ratings for the to-be-formed unregulated generation company of AEP as well as the financing of the La Rosita power plant in Mexico. In addition, Mr. King has assisted bidders in many of the generation asset auction in the U.S., and has supported several bidders successful bids for generation assets. He has also supported bidders in

direct M&A activity of publicly traded companies. Virtually all of this work involved forecasting future operations of generating facilities.

Mr. King has also been a pioneer in the development and application off inancial engineering methods in the energy and power industries. He developed a methodology to value the real option value of power plants as well as a method to value the development options associated with existing sites. He applied these methods not only in the acquisition of power plants, but also in securing debt financing and rating the debt of new debt offerings.

Mr. King has also appeared as an expert witness in a number of issues. He appeared as an expert witness in the Dynegy Midwest Generating/Illinois Power Company New Source Review litigation. He was an expert on damages associated with an alleged wrongful acquisition ofa power plant in New York testifying on the value of the plant and the damages incurred. He has also appeared as an expert witness on incentive rate-making issues in administrative law proceedings.

Mr. King has not only assessed the impacts of regulatory barriers in the restructuring energy markets, he hasl ed the efforts to start new companies in these markets. For an integrated gas company, he developed the business plan for a retailing subsidiary that combined existing and acquired gas marketing, cogeneration development, and performance contracting businesses into a single entity. Upon approval of the business plan, Mr. King served as the interim senior vice president of Marketing fort he reformed company. Mr. King subsequently led the initial launch efforts to form a power marketing joint venture of three large public power agencies. Most recently, he has been focused on the development of a structured logistical power marketing firm, where he has ledt he use and development of option pricing methods in the product development area.

Expert Testimony

Mr. King prepared an expert report and testified in Federal DistrictC ourt for the Southern District of Ohio in the United States of America v. American Electric Power Service Corp.; Indiana Michigan Power Co., d/b/a American Electric Power; Ohio Power Company, d/b/a American Electric Power; Appalachian Power Company, d/b/a American Electric Power; Cardinal Operating Company; and Central Operating Company New Source Review case. Mr. King's report and testimony addressed whether or not the AEP Companies should have expected that a series of activities would reasonably have been expected to cause an increase in emissions under the 1992 NSR regulations.

Mr. King testified in Federal District Court for the Southern District of Illinois in the Dynegy Midwest Generating, LLC/Illinois Power Company New Source Review case on the issue of whether Illinois Power Company should have anticipated that a series of projects at the Baldwin Power Station would cause a significant increase in emissions.

Mr. King has prepared two expert reports and is scheduled to appear as an expertw itness in an arbitration involving a construction dispute over an industrial energy facility. Mr. King's reports

and testimony address what the reasonable expectations would have been for the future operations of the facility and the damages suffered by the owner of the facility.

Mr. King has testified before regulatoryc ommissions in Montana, Ontario, California and Hawaii. His expert testimony includes the following:

- On behalf of PPL Montana on the issue of resource procurement and the reasonableness of the Basin Creek power project
- On behalf of PPL Montana on the issue of the reasonableness of the Judith Gap power project
- On behalf of the Staff of the Ontario Energy Board on the issues of performance-based regulation and the Staff's proposed distribution rate handbook
- On behalf of Hawaiian Electric Company on the issue of externalities in gas and electric integrated resource planning.
- On behalf of Hawaiian Electric Company on the issues of environmental externalities, DSM shareholder incentives,D SM programs, and fuel substitution in HECO's IRP.
- On behalf of Maui Electric Company on the issues of DSM shareholder incentives, DSM programs, and fuel substitution in MECO's IRP.
- On behalf of Hawaii Electric Light Company on the issues of DSM shareholder incentives, DSM programs, and fuel substitution in HELCO's IRP.
- On behalf of Hawaiian Electric Company on the issues of appropriate levels of DSM shareholder incentives, measurement and evaluation of DSM programs, and administrative procedures in HECO's planned commercial and industrial DSM program.
- On behalf of Hawaiian Electric Company on the issues of appropriate levels of DSM shareholder incentives, measurement and evaluation of DSM programs, and administrative procedures in HECO's planned residential DSM programs.
- On behalf of Hawaiian Electric Company on the appropriateness of customer incentives and cost recovery for fuel substitution programs.
- On behalf of Southern California Edison Company on methods for integrating demand and supply resources before the California Energy Commission.

Market Assessment in Support of Financing

Mr. King has led a number of market assessments to support both bank syndication and capital markets transactions. Some of these deals include:

- U.S. Generation – Financing of the NEPGEN assets (bank deal and 144(A))
- Edison Mission Energy – Financing of Homer City Station (bank deal and 144(A))
- PPL Global – Financing of the Montana Power assets [144(A)]
- NRG Energy – Financing of Northeast Portfolio (bank deal – 144(A))
- Southern Energy – Financing of US Portfolio (bank deal and 144(A))

- WestC oast Power – Financing of California Assets (bank deal)
- Orion Power Holdings – Financing of Northeast Power Portfolio [144(A)]
- Edison Mission Energy – Financing of Commonwealth Edison assets
- PG&E Generation – Financing of the Lake Road project(bank deal)
- PSEG Global – Financing transfer of generation assets from PSE&G (capital markets deal)
- AEP Resources – Credit ratings of unregulated generating assets of AEP
- Exelon – Credit ratings of merchant generating assets

Mr. King has worked with over 40 lending and financial institutions in the role of independent market expert for securing electric generation plant financing, including both lead and supporting institutions involved in the syndication. These include:

- Lehman Brothers
- JP Morgan/Chase Securities
- Salomon Smith Barney
- Warburg Dillon Read LLC
- Credit Suisse First Boston
- Societe Generale
- Citibank
- Bank of America
- Union Bank
- BNP-Paribas
- CIT.

Several of these projects had numerous banks involved in the syndication. Homer City project in PJM has 18 supporting financial institutions most of which we have spoke with over the last few months. The project work in New York and NEPOOL also had numerous financial institutions supporting the syndication (between 15 and 20). The financial institutions listed above have been the lead financial institutions and, in many cases, were the direct client for the work.

Asset Valuation

Mr. King led an independent valuation effort of the NEES generation assets. This work, conducted for the CFO and CEO of the client, was performed to provide independent checks on the client's bid price. Mr. King led a large group of analysts in this effort in constructing a valuation model and supervising components of due diligence. The analysis included the identification and valuation of embedded options (such as plant expansion opportunities) that were valued using option pricing techniques. In addition, Mr.K ing assisted the client in the development of their bidding strategy.

Mr. King led separate analyses for clients involved in the Boston Edison, CentralM aine Power, NYSEG, GPU, Homer City, Commonwealth Edison, Consolidated Edison, Niagara Mohawk, Southern California Edison, and EUA auctions. In these cases, Mr. King managed the development of forward price analyses projecting energy and capacity prices in the restructured market.

Mr. King has also led efforts to develop state-of-the-art models to support decision-making. He led the development of two Cournot game theory models to support a client interested in market strategies in Europe. He also led a team in using a Cournot model to assess a bid for control of a publicly-traded company.

Corporate Strategy

Mr. King has also led several significant strategy engagements. He assisted a leading public powere ntity develop theirc orporate strategy. In addition, Mr. King played an important role in the forming the corporate concept for a startup powerm arketing firm targeting the Northeastern United States. He led a strategy development effort for the retail sector for an integrated gas company, then served as the interim Senior Vice President of Marketing during the launch and integration of several acquisitions of the client before turning over the company.

Pricing and Rate Design

Mr. King led a two year-long effort to develop a performance based regulation (PBR) scheme for electric distribution utilities inO ntario. He led this process for the Ontario EnergyB oard, including development of key PBR concepts, formulation and leadership of the consultation process (with 270 distribution utilities as well as numerous other stakeholders), and drafting of the PBR strawman proposal.

Mr. King has provided or directedr ate designa nda nalysis services for numerous clients, including Southern California Edison (time-of-use pricing), Bonneville Power Administration (projections of economy sales and prices), Pacific Gas and Electric (low-income rate design, rate design assessment model), Hawaiian Electric (time-of-use and interruptible rate design), Green

Mountain Power (time-of-use rate design), US West (measured service telephone rates), and Puget Power (rate simulation and analysis software).

Mr. King also led a team for Vattenfall in the design of the price andm arketing study, a significant undertaking intended to resolve the extent to which price-induced management of demand would be sufficient to dealw ith the phase-out of nuclearg eneration in Sweden (which accounts for 50% of the installed generation base). He conducted the review of response to time-differentiated rates conducted as parto f that study as well as a later undertaking to identify how consumers in the United States had responded to very large (>100%) price changes.

Utility Management Consulting

Mr. King has undertaken several assignments related to strategy and business operations. Most of his work in this area has to do with either regulatory restructuring of the industry and its implications for utility operations or startup of new businesses. Some of his most relevant experience includes the following:

- Business plan development fora n energy service company. This study, undertaken fora utility, examined entering the energy service industry. Mr. King was responsible for assessing the market, identifying how to build a sustainable competitive advantage, preparing the marketing strategy, and developing pro forma financial statements for the startup. Mr. King also presented the business plan to the management committee of the utility. The utility has since obtained board approval for the startup.

- Broadband network assessment. For a holding company, Mr. King managed a project team that built estimates of the revenue that could be obtained from the regulated utility for broadband network services. The project team assisted in the negotiations with potential joint venture partners in building a business case for broadband network services to residentialc ustomers. In addition, Mr. King provided regulatory assistance in assessing the regulatory risks and obstacles in moving forward with full-scale deployment.

- Worldwide market assessment for distributed generation. For a Fortune 50 firm, Mr. King directed a market assessment fordistributed generationa s part of the business assessmento f the manufacturer in entering the distributed generation market.

- Regulatory strategy for packet radio network roll-out. For Southern California Edison, Mr. King assisted in the development of a regulatory strategy for roll-out of Netcomm, a packet radio network capable of two-way communications with customers.

- Advised a California utility on restructuring initiatives. This project examined the internationale xperience in electric power restructuring, and developed recommendations fort he client on how to reposition theirp roduct and service line given several scenarios of how restructuring initiatives launched by the "Blue Book" might play out.

- Described alternative regulatory frameworks that might evolve over the next few years for a large utility. This included assessing status quo regulation and the risks it might entail. Three alternative regulatory frameworks were assessed for their potential risk to the client. Recommendations were made onh ow to affect the course of regulatory restructuring.

- Managed a major international research project for the International Energy Agency. This project, undertaken as part of the IEA's International Agreement on DSM, examined improved methods for incorporating DSM into resource planning and government policy. The project was the largest project in the agreement with 13 countries participating in the research. The project focused considerable energy on restructuring of the power industry and the incentives for encouraging DSM in these restructured environments.

- Assisted a major utility in realigning their energy service offerings to an energy service company basis. The strategy includes the investment of shareholder funds on a below line profit basis.

- Developed market segment strategies for the new construction and transportation equipment market segments for PG&E. This project included a market assessment, competitive scan, customer needs assessment, and development of specific marketing strategies for these market segments.

- Developed a new loads program for PG&E. This project examined customer satisfaction in the commercial buildings segment with PG&E's services, then developed recommendations for how service and load could be increased.

- Developed cost recovery, shareholder incentives, and lost margin mechanisms for Hawaiian Electric Company, Maui Electric, and Hawaii Electric Light Company. This project includedt he identification of possible strategies, development of a company position, including estimating the financial impacts of the alternative strategies on the company and ratepayers, and negotiations with a group of intervenors, including the Consumer Advocate.

- Assessed the financiali mpacts of alternative demand-side strategies for one of the largest utilities in the United States. This project assessed the impacts on earnings, share price, capitalization, and liabilities of alternate energy efficiency (sales reduction) and marketing (sales growth) strategies. The analysis was used to determine the scope and nature of the utility's demand-side management strategy.

- Conducted policy option assessment of options to reduce CO_2 emissions for a major Japanese utility.

- Assessed the roles of utilities and energy service companies in development of DSM programs for a multiclientc onsortium of seven major utilities.

Utility Planning

- Determined the impacts of early refill of Ross Lake on power production, recreation, fisheries, and the value of power for FERC relicensing of the Skagit hydropower plant. This project involved modifying a hydroelectric reservoir model to be consistent with the rules of the Pacific Northwest Coordination Agreement and to simulate the operation of the Ross Lake system over 60 years of hydrological conditions.

- Built an optimization model to determine the value of energy to the Northwest and Southwest for the Bonneville Power Administration. This model included the cost of production ofe nergy in the Northwest system, and simulated the trade prices at which energy could be sold to the Southwest. The resulting framework allowed determination of the value of additionalc onservation investments in terms of "freed" energy that could be subsequently sold to the Southwest.

- Assessed options to defray or avoid expansion of transmission capability for the Bonneville Power Administration. In this major program for Bonneville, a framework was developed for determining the ability and cost-effectiveness of conservationt o defray transmission projects in the Northwest.

- Designedi ntegrated planning strategies for Southern California Edison for the DSM Integration Pilot in the Biennial Resource Plan Update proceeding. Mr. King examined them ethods that could be used to integrate demand and supply-side resources in the capacity expansion process, and contributed to the testimony of SCE on these subjects.

- Conducted DSM analysis for PG&E and SCE in the DSM IntegrationP ilot int he Biennial Resource Plan Update proceeding. This work had to do with how to treat DSM in integration. Issues included bundling of DSM programs into resource blocks for testing,t iming of DSM impacts, and treatment of flexibility.

Market Research

- Directed many survey data collection projects fort he Bonneville PowerA dministration, Seattle Water Department, Pacific Gas and Electric, Southern California Gas, and Lansing Board of Water and Power, among others.

- Constructed the Residential Appliance Saturation Survey (RASS) graphical analysis system for PG&E.

- Constructed the Load Shape Analysis System for SCE.

- Analyzed the EIA NBECS data for the Energy Information Administration to support end-use demand forecasting.

Demand Forecasting

- Implemented HELM for Tokyo Electric Power.
- Managed development of RELOAD, a system for forecasting load shape impacts resulting from DSM programs for the Electric Power Research Institute.
- Reviewed techniques for forecasting peak demand and developed recommended peak demand forecasting strategies for the Canadian Electric Association.
- Directed the development of the Electric Power Research Institute's INDEPTH econometric models for providing forecasts of electricity demand in the industrial sector.
- Built an end-use/econometric forecasting model for the assessment of generation alternatives in the Railbelt Region of Alaska.
- Built and implemented an end-use forecasting model for 34 members of the Massachusetts Municipal Wholesale Electric Company.
- Modified Northeast Utilities' commercial sector electricity demand forecasting modelt o conduct uncertainty analysis.
- Developed enhanced end-use forecasting algorithms in the ORNL commercialm odel for the U.S. Department of Energy.
- Managed development of end-use data for Southern California Edison's residential and commercial end-use forecasting models.

2/5/066

EXHIBIT 2

EXHIBIT 2
Documents Considered

1. **Midwest Generation Response to Request No. 2 for Annual Data, MWG 0024-0029**

2. **Midwest Generation Response to Request No. 2 for Monthly Data, MWG 0030-0056**

3. **Midwest Generation Response to Request No. 3, Capital Project List, MWG 000058-000068**

EXHIBIT 3

AMENDED AND RESTATED

OPERATING AGREEMENT

OF

PJM INTERCONNECTION, L.L.C.

The following sheets reflect all revisions approved by FERC in orders issued through April 26, 2006, and all revisions from compliance filings submitted through April 26, 2006, as well as clean up revisions to: (1) incorporate language accepted by FERC in prior versions of the Operating Agreement, but not previously integrated into the current effective pages; and (2) correct minor typographical and formatting errors.

11.3 Member Responsibilities.

11.3.1 General.

To facilitate and provide for the work of the Office of the Interconnection and of the several committees appointed by the Members Committee, each Member shall, to the extent applicable;

(a) Maintain adequate records and, subject to the provisions of this Agreement for the protection of the confidentiality of proprietary or commercially sensitive information, provide data required for (i) coordination of operations, (ii) accounting for all interchange transactions, (iii) preparation of required reports, (iv) coordination of planning, including those data required for capacity accounting under the Reliability Assurance Agreement and Reliability Assurance Agreement-West, and Reliability Assurance Agreement-South; (v) preparation of maintenance schedules, (vi) analysis of system disturbances, and (vii) such other purposes, including those set forth in Schedule 2, as will contribute to the reliable and economic operation of the PJM Region;

(b) Provide such recording, telemetering, revenue quality metering, communication and control facilities as are required for the coordination of its operations with the Office of the Interconnection and those of the other Members and to enable the Office of the Interconnection to operate the PJM Region and otherwise implement and administer this Agreement, including equipment required in normal and Emergency operations and for the recording and analysis of system disturbances;

(c) Provide adequate and properly trained personnel to (i) permit participation in the coordinated operation of the PJM Region, (ii) meet its obligation on a timely basis for supply of records and data, (iii) serve on committees and participate in their investigations, and (iv) share in the representation of the Interconnection in inter-regional and national reliability activities. Minimum training for Members that operate Market Operations Centers and local control centers shall include compliance with the applicable training standards and requirements in PJM Manual 01, Conrtol Center Requirements, including the PJM System Operator Training Requirements in Attachmetn C;

(d) Share in the costs of committee activities and investigations (including costs of consultants, computer time and other appropriate items), communication facilities used by all the Members (in addition to those provided in the Office of the Interconnection), and such other expenses as are approved for payment by the PJM Board, such costs to be recovered as provided in Schedule 3;

(e) Comply with the requirements of the PJM Manuals and all directives of the Office of the Interconnection to take any action for the purpose of managing, alleviating or ending an Emergency, and authorize the Office of the Interconnection to direct the transfer or interruption of the delivery of energy on their behalf to meet an Emergency and to implement agreements with other Control Areas interconnected with the PJM Region for the mutual provision of service to meet an Emergency, and be subject to the emergency procedure charges specified in Schedule 9 of this Agreement for any failure to follow the Emergency instructions of the Office of the Interconnection. In addressing any Emergency, the Office of the Interconnection shall comply with the terms of any reserve sharing agreements in effect for any part of the PJM Region.

11.3.2 Facilities Planning and Operation.

Consistent with and subject to the requirements of this Agreement, the PJM Tariff, the governing agreements of the Applicable Regional Reliability Councils, the Reliability Assurance Agreement, the Reliability Assurance Agreement-West, the Reliability Assurance Agreement-South, the West Transmission Owners Agreement, the East Transmission Owners Agreement, the South Transmission Owner Agreement, and the PJM Manuals, each Member shall

cooperate with the other Members in the coordinated planning and operation of the facilities of its System within the PJM Region so as to obtain the greatest practicable degree of reliability, compatible economy and other advantages from such coordinated planning and operation. In furtherance of such cooperation each Member shall, as applicable:

(a) Consult with the other Members and the Office of the Interconnection, and coordinate the installation of its electric generation and Transmission Facilities with those of such other Members so as to maintain reliable service in the PJM Region;

(b) Coordinate with the other Members, the Office of the Interconnection and with others in the planning and operation of the regional facilities to secure a high level of reliability and continuity of service and other advantages;

(c) Cooperate with the other Members and the Office of the Interconnection in the implementation of all policies and procedures established pursuant to this Agreement for dealing with Emergencies, including but not limited to policies and procedures for maintaining or arranging for a portion of a Member's Capacity Resources, at least equal to the applicable levels established from time to time by the Office of the Interconnection, to have the ability to go from a shutdown condition to an operating condition and start delivering power without assistance from the power system;

(d) Cooperate with the members of the Applicable Regional Reliability Councils to augment the reliability of the bulk power supply facilities of the region and comply with Applicable Regional Reliability Councils and NERC operating and planning standards, principles and guidelines and the PJM Manuals implementing such standards, principles and guidelines;

(e) Obtain or arrange for transmission service as appropriate to carry out this Agreement;

(f) Cooperate with the Office of the Interconnection's coordination of the operating and maintenance schedules of the Member's generating and Transmission Facilities with the facilities of other Members to maintain reliable service to its own customers and those of the other Members and to obtain economic efficiencies consistent therewith;

(g) Cooperate with the other Members and the Office of the Interconnection in the analysis, formulation and implementation of plans to prevent or eliminate conditions that impair the reliability of the PJM Region; and

(h) Adopt and apply standards adopted pursuant to this Agreement and conforming to NERC, and Applicable Regional Reliability Council standards, principles and guidelines and the PJM Manuals, for system design, equipment ratings, operating practices and maintenance practices.

11.3.3 Electric Distributors.

In addition to any of the foregoing responsibilities that may be applicable, each Member that is an Electric Distributor, whether or not that Member votes in the Members Committee in the Electric Distributor sector or meets the eligibility requirements for any other sector of the Members Committee, shall:

(a) Accept, comply with or be compatible with all standards applicable within the PJM Region with respect to system design, equipment ratings, operating practices and maintenance practices as set forth in the PJM Manuals, or be subject to an interconnected Member's requirements relating to the foregoing, so that sufficient electrical equipment, control capability, information and communication are available to the Office of the Interconnection for planning and operation of the PJM Region;

(b) Assure the continued compatibility of its local system energy management system monitoring and telecommunications systems to satisfy the technical requirements of interacting automatically or manually with the Office of the Interconnection as it directs the operation of the PJM Region;

(c) Maintain or arrange for a portion of its connected load to be subject to control by automatic underfrequency, under-voltage, or other load-shedding devices at least equal to the levels established pursuant to the Reliability Assurance Agreement, Reliability Assurance Agreement-West, and Reliability Assurance Agreement-South, as applicable, or be subject to another Member's control for these purposes;

(d) Provide or arrange for sufficient reactive capability and voltage control facilities to conform to Good Utility Practice and (i) to meet the reactive requirements of its system and customers and (ii) to maintain adequate voltage levels and the stability required by the bulk power supply facilities of the PJM Region;

(e) Shed connected load, share Capacity Resources, initiate active load management programs, and take such other coordination actions as may be necessary in accordance with the directions of the Office of the Interconnection in Emergencies;

(f) Maintain or arrange for a portion of its Capacity Resources at least equal to the level established pursuant to the Reliability Assurance Agreement to have the ability to go from a shutdown condition to an operating condition and start delivering power without assistance from the power system;

(g) Provide or arrange through another Member for the services of a 24-hour local control center to coordinate with the Office of the Interconnection, each such control center to be furnished with appropriate telemetry equipment as specified in the PJM Manuals, and to be staffed by system operators trained and delegated sufficient authority to take any action necessary to assure that the system for which the operator is responsible is operated in a stable and reliable manner. In addition to meeting any training standards and requirements specified in this Agreement, local control center staff shall be required to meet applicable training standards and requirements in PJM Manual 01, Conrtol Center Requirements, including the PJM System Operator Training Requirements in Attachmetn C;

(h) Provide to the Office of the Interconnection all System, accounting, customer tracking, load forecasting (including all load to be served from its System) and other data necessary or appropriate to implement or administer this Agreement, the Reliability Assurance Agreement, the Reliability Assurance Agreement-West and the Reliability Assurance Agreement-South; and

(i) Comply with the underfrequency relay obligations and charges specified in Schedule 7 of this Agreement.

11.3.4 Reports to the Office of the Interconnection.

Each Member shall report as promptly as possible to the Office of the Interconnection any changes in its operating practices and procedures relating to the reliability of the bulk power supply facilities of the PJM Region. The Office of the Interconnection shall review such reports, and if any change in an operating practice or procedure of the Member is not in accord with the established operating principles, practices and procedures for the PJM Region and such change adversely affects such region and regional reliability, it shall so inform such Member, and the other Members through their representative on the Operating Committee, and shall direct that such change be modified to conform to the established operating principles, practices and procedures.

11.4 Regional Transmission Expansion Planning Protocol.

The Members shall participate in regional transmission expansion planning in accordance with the Regional Transmission Expansion Planning Protocol set forth in Schedule 6 to this Agreement.

11.5 Member Right to Petition.

(a) Nothing herein shall deprive any Member of the right to petition FERC to modify any provision of this Agreement or any Schedule or practice hereunder that the petitioning Member believes to be unjust, unreasonable, or unduly discriminatory under section 206 of the Federal Power Act, subject to the right of any other Member (a) to oppose said proposal, or (b) to withdraw from the LLC pursuant to Section 4.1.

(b) Nothing herein shall be construed as affecting in any way the right of the Members, acting pursuant to a vote of the Members Committee as specified in Section 8.4, unilaterally to make an application to FERC for a change in any rate, charge, classification, tariff or service, or any rule or regulation related thereto, under section 205 of the Federal Power Act and pursuant to the rules and regulations promulgated by FERC thereunder, subject to the right of any Member that voted against such change in any rate, charge, classification, tariff or service, or any rule or regulation related thereto, in intervene in opposition to any such application.

11.6 Membership Requirements.

(a) To qualify as a Member, an entity shall:

i) Be a Transmission Owner a Generation Owner, an Other Supplier, an Electric Distributor, or an End-Use Customer; and

ii) Accept the obligations set forth in this Agreement.

(b) Certain Members that are Load Serving Entities are parties to the Reliability Assurance Agreement, Reliability Assurance Agreement-West, or Reliability Assurance Agreement-South. Upon becoming a Member, any entity that is a Load Serving Entity in the MAAC Control Zone and that wishes to become a Market Buyer shall also simultaneously execute the Reliability Assurance Agreement. Any entity that is a

Load Serving Entity in the PJM West Region and that wishes to become a Market Buyer shall also simultaneously execute the Reliability Assurance Agreement-West. Any entity that is a Load Serving Entity in the PJM South Region and that wishes to become a Market Buyer shall also simultaneously execute the Reliability Assurance Agreement-South.

(c) An entity that wishes to become a party to this Agreement shall apply, in writing, to the President setting forth its request, its qualifications for membership, its agreement to supply data as specified in this Agreement, its agreement to pay all costs and expenses in accordance with Schedule 3, and providing all information specified pursuant to the Schedules to this Agreement for entities that wish to become Market Participants. Any such application that meets all applicable requirements shall be approved by the President within sixty (60) days.

(d) Nothing in this Section 11 is intended to remove, in any respect, the choice of participation by other utility companies or organizations in the operation of the PJM Region through inclusion in the System of a Member.

(e) An entity whose application is accepted by the President pursuant to Section 11.6(c) shall execute a supplement to this Agreement in substantially the form prescribed in Schedule 4, which supplement shall be countersigned by the President. The entity shall become a Member effective on the date the supplement is countersigned by the President.

(f) Entities whose applications contemplate expansion or rearrangement of the PJM Region may become Members promptly as described in Sections 11.6(c) and 11.6(e) above, but the integration of the applicant's system into all of the operation and accounting provisions of this Agreement and the Reliability Assurance Agreement, or, as applicable, the Reliability Assurance Agreement-West or the Reliability Assurance Agreement-South, shall occur only after completion of all required installations and modifications of metering, communications, computer programming, and other necessary and appropriate facilities and procedures, as determined by the Office of the Interconnection. The Office of the Interconnection shall notify the other Members when such integration has occurred.

(g) Entities that become Members will be listed in Schedule 12 of this Agreement.

(h) In accordance with the MAAC Agreement, a Member serving load in the MAAC Control Zone shall be a member of MAAC and any other Member may be a member of MAAC.

12. TRANSFERS OF MEMBERSHIP INTEREST

The rights and obligations created by this Agreement shall inure to and bind the successors and assigns of such Member; provided, however, that the rights and obligations of any Member hereunder shall not be assigned without the approval of the Members Committee except as to a successor in operation of a Member's electric operating properties by reason of a merger, consolidation, reorganization, sale, spin-off, or foreclosure, as a result of which substantially all such electric operating properties are acquired by such a successor, and such successor becomes a Member.

13. INTERCHANGE

13.1 Interchange Arrangements with Non-Members.

Any Member may enter into interchange arrangements with others that are not Members with respect to the delivery or receipt of capacity and energy to fulfill its obligations hereunder or for any other purpose, subject to the standards and requirements established in or pursuant to this Agreement.

Members attending. The Office of the Interconnection shall reimburse all Board Members for their reasonable costs of attending meetings.

18.14 Notice.

(a) Except as otherwise expressly provided herein, notices required under this Agreement shall be in writing and shall be sent to a Member by overnight courier, hand delivery, telecopier or other reliable electronic means to the representative on the Members Committee of such Member at the address for such Member previously provided by such Member to the Office of the Interconnection. Any such notice so sent shall be deemed to have been given (i) upon delivery if given by overnight couriers or hand delivery, or (ii) upon confirmation if given by telecopier or other reliable electronic means. Notices of meetings of the Members Committee or committees, subcommittees, task forces, working groups and other bodies under its auspices may be given as provided in the Members Committee by-laws.

(b) Notices, as well as copies of the agenda and minutes of all meetings of committees, subcommittees, task forces, working groups, User Groups, or other bodies formed under this Agreement, shall be posted in a timely fashion on and made available for downloading from the PJM website.

18.15 Headings.

The section headings used in this Agreement are for convenience only and shall not affect the construction or interpretation of any of the provisions of this Agreement.

18.16 No Third-Party Beneficiaries.

This Agreement is intended to be solely for the benefit of the Members and their respective successors and permitted assigns and, unless expressly stated herein, is not intended to and shall not confer any rights or benefits on any third party (other than successors and permitted assigns) not a signatory hereto.

18.17 Confidentiality.

18.17.1 Party Access.

(a) No Member shall have a right hereunder to receive or review any documents, data or other information of another Member, including documents, data or other information provided to the Office of the Interconnection, to the extent such documents, data or information have been designated as confidential pursuant to the procedures adopted by the Office of the Interconnection or to the extent that they have been designated as confidential by such other Member; provided, however, a Member may receive and review any composite documents, data and other information that may be developed based on such confidential documents, data or information if the composite does not disclose any individual Member's confidential data or information.

(b) Except as may be provided in this Agreement or in the PJM Open Access Transmission Tariff, the Office of the Interconnection shall not disclose to its Members or to third parties, any documents, data, or other information of a Member or entity applying for Membership, to the extent such documents, data, or other information has been designated confidential pursuant to the procedures adopted by the Office of the Interconnection or by such Member or entity

applying for membership; provided that nothing contained herein shall prohibit the Office of the Interconnection from providing any such confidential information to its agents, representatives, or contractors to the extent that such person or entity is bound by an obligation to maintain such confidentiality; provided further that nothing contained herein shall prohibit the Office of the Interconnection from providing Member confidential information to the North American Electric Reliability Council or any of its regional reliability councils, or to any reliability coordinator, to the extent that (i) the Office of the Interconnection determines in its reasonable discretion that the exchange of such information is required to enhance and/or maintain reliability within the Members' Applicable Regional Reliability Councils and their neighboring reliability councils, or within the region of any reliability coordinator, (ii) such entity is bound by a written agreement to maintain such confidentiality, and (iii) the Office of the Interconnection has notified the affected party of its intention to release such information no less than five business days prior to the release. The Office of the Interconnection shall collect and use confidential information only in connection with its authority under this Agreement and the Open Access Transmission Tariff and the retention of such information shall be in accordance with PJM's data retention policies.

(c) Nothing contained herein shall prevent the Office of the Interconnection from releasing a Member's confidential data or information to a third party provided that the Member has delivered to the Office of the Interconnection specific, written authorization for such release setting forth the data or information to be released, to whom such release is authorized, and the period of time for which such release shall be authorized. The Office of the Interconnection shall limit the release of a Member's confidential data or information to that specific authorization received from the Member. Nothing herein shall prohibit a Member from withdrawing such authorization upon written notice to the Office of the Interconnection who shall cease such release as soon as practicable after receipt of such withdrawal notice.

18.17.2 Required Disclosure.

(a) Notwithstanding anything in the foregoing Section to the contrary, and subject to the provisions of Section 18.17.3, if a Member or the Office of the Interconnection is required by applicable law, or in the course of administrative or judicial proceedings other than FERC proceedings or investigations, to disclose to third parties other than the FERC or its staff, information that is otherwise required to be maintained in confidence pursuant to this Agreement, that Member or the Office of the Interconnection may make disclosure of such information; provided, however, that as soon as the Member or the Office of the Interconnection learns of the disclosure requirement and prior to making disclosure, that Member or the Office of the Interconnection shall notify the affected Member or Members of the requirement and the terms thereof and the affected Member or Members may direct, at their sole discretion and cost, any challenge to or defense against the disclosure requirement. The disclosing Member and the Office of the Interconnection shall cooperate with such affected Members to the maximum extent practicable to minimize the disclosure of the information consistent with applicable law. Each Member and the Office of the Interconnection shall cooperate with the affected Members to obtain proprietary or confidential treatment of such information by the person to whom such information is disclosed prior to any such disclosure.

(b) Nothing in this Section 18.17 shall prohibit or otherwise limit the Office of the Interconnection's use of information covered herein if such information was: (i) previously

known to the Office of the Interconnection without an obligation of confidentiality; (ii) independently developed by or for the Office of the Interconnection using nonconfidential information; (iii) acquired by the Office of the Interconnection from a third party which is not, to the Office of the Interconnection's knowledge, under an obligation of confidence with respect to such information; (iv) which is or becomes publicly available other than through a manner inconsistent with this Section 18.17.

(c) The Office of the Interconnection shall impose on any contractors retained to provide technical support or otherwise to assist with the implementation or administration of this Agreement or of the Open Access Transmission Tariff a contractual duty of confidentiality consistent with this Agreement. A Member shall not be obligated to provide confidential or proprietary information to any contractor that does not assume such a duty of confidentiality, and the Office of the Interconnection shall not provide any such information to any such contractor without the express written permission of the Member providing the information.

(d) Section 18.17.2(a) does not apply to disclosure of information to the FERC or its staff.

18.17.3 Disclosure to FERC.

Notwithstanding anything in this Section to the contrary, if the FERC or its staff, during the course of an investigation or otherwise, requests information from the Office of the Interconnection that is otherwise required to be maintained in confidence pursuant to this Agreement, the Office of the Interconnection shall provide the requested information to the FERC or its staff, within the time provided for in the request for information. In providing the information to the FERC or its staff, the Office of the Interconnection may, consistent with 18 C.F.R. § 388.112, request that the information be treated as confidential and non-public by the FERC and its staff and that the information be withheld from public disclosure. The Office of the Interconnection shall notify any affected Member(s) when it is notified by FERC or its staff, that a request for disclosure of, or decision to disclose, confidential information has been received, at which time the Office of Interconnection and the affected Member may respond before such information would be made public, pursuant to 18 C.F.R. § 388.112.

18.17.4 Disclosure to Authorized Persons

(a) Notwithstanding anything in this section to the contrary, the Office of the Interconnection and/or the PJM Market Monitor shall disclose confidential information, otherwise required to be maintained in confidence pursuant to this Agreement, to an Authorized Person under the following conditions:

i) The Authorized Person has executed a Non-Disclosure Agreement with the Office of the Interconnection, representing and warranting that he or she: (i) is an Authorized Person; (ii) is duly authorized to enter into and perform the obligations of the Non-Disclosure Agreement; (iii) has adequate procedures to protect against the release of any confidential information received, (iv) is familiar with, and will comply with any applicable procedures of the Authorized Commission which the Authorized Person represents, (v) covenants and agrees on behalf of himself or herself to deny any Third Party Requests and defend against any legal process which seeks the release of any confidential information that would be released in contravention of the

terms of the Non-Disclosure Agreement, and (vi) is not in breach of any Non-Disclosure Agreement entered into with the Office of the Interconnection.

ii) The Authorized Commission employing or retaining the Authorized Person has provided the Office of the Interconnection with: (a) a final order of FERC prohibiting the release by the Authorized Person or the Authorized Commission of confidential information in accordance with the terms of this Agreement and the Non-Disclosure Agreement; and (b) either an order of such Authorized Commission or a certification from counsel to such Authorized Commission, confirming that the Authorized Commission (i) has statutory authority to protect the confidentiality of any confidential information received from public release or disclosure and from release or disclosure to any other entity, (ii) will defend against any disclosure of Confidential Information pursuant to any Third Party Request through all available legal process, including, but not limited to, obtaining any necessary protective orders, (iii) will provide the Office of the Interconnection with prompt notice of any such Third Party Request or legal proceedings and will consult with the Office of the Interconnection and/or any Affected Member in its efforts to deny the Third Party Request or defend against such legal process, (iv) in the event a protective order or other remedy is denied, will direct Authorized Persons authorized by it to furnish only that portion of the confidential information which their legal counsel advises the Office of the Interconnection in writing is legally required to be furnished, (v) will exercise its best efforts to obtain assurance that confidential treatment will be accorded to such confidential information and (vi) has adequate procedures to protect against the release of such confidential information; and (c) confirmation in writing that the Authorized Person is authorized by the Commission to enter into the Non-Disclosure Agreement and to receive confidential information under this Agreement.

iii) The Authorized Commission employing or retaining the Authorized Person has provided the Office of the Interconnection with a State Certification.

iv) The Office of the Interconnection and the PJM Market Monitor shall be expressly entitled to rely upon such FERC and Authorized Commission orders, the State Certification and/or certifications of counsel in providing confidential information to the Authorized Person, and shall in no event be liable, or subject to damages or claims of any kind or nature hereunder due to the ineffectiveness of the FERC and/or Commission orders, or the inaccuracy of such certification of counsel.

v) The Authorized Person may discuss confidential information with other Authorized Persons who are parties to Non-Disclosure Agreements; provided, however, that the Office of the Interconnection shall have confirmed in advance and in writing that it has previously released the confidential information in question to such Authorized Persons. The Office of the Interconnection shall respond to any written request for confirmation within two (2) business days of its receipt.

vi) The Office of the Interconnection shall maintain a schedule of all Authorized Persons and the Authorized Commissions they represent, which shall be made publicly available on its website, or by written request. Such schedule shall be compiled by the Office of the Interconnection, based on information provided by any Authorized Person and/or Authorized Commission. The Office of the Interconnection shall update the schedule promptly upon receipt of information from an Authorized Person or Authorized Commission, but shall have no obligation to verify or corroborate any such information, and shall not be liable or otherwise responsible for any inaccuracies in the schedule due to incomplete or erroneous information conveyed to and relied upon by the Office of the Interconnection in the compilation and/or maintenance of the schedule.

(b) The PJM Market Monitor or other designated representative of the Office of the Interconnection may, in the course of discussions with an Authorized Person, orally disclose information otherwise required to be maintained in confidence, without the need for a prior Information Request. Such oral disclosures shall provide enough information to enable the Authorized Person or their Authorized Commission to determine whether additional Information Requests for information are appropriate. The PJM Market Monitor or other representative of the Office of the Interconnection will not make any written or electronic disclosures of confidential information to the Authorized Person pursuant to this section. In any such discussions, the PJM Market Monitor or other representative of the Office of the Interconnection shall ensure that the individual or individuals receiving such confidential information are Authorized Persons as defined herein, orally designate confidential information that is disclosed, and refrain from identifying any specific Affected Member whose information is disclosed. The PJM Market Monitor or other representative of the Office of the Interconnection shall also be authorized to assist Authorized Persons in interpreting confidential information that is disclosed. The PJM Market Monitor or representative of the Office of the Interconnection shall provide any Affected Member with oral notice of any oral disclosure immediately, but not later than one (1) business day after the oral disclosure. Such oral notice to the Affected

Member shall include the substance of the oral disclosure, but shall not reveal any confidential information of any other Member and must be received by the Affected Member before the name of the Affected Member is released to the Authorized Person; provided however, the identity of the Affected Party must be made to the Authorized Person within two (2) business days of the initial oral disclosure.

(c) As regards Information Requests:

(i) Information Requests to the Office of the Interconnection shall be in writing, which shall include electronic communications, addressed to the PJM Market Monitor or other designated representative of the Office of the Interconnection, and shall: (a) describe with particularity the information sought; (b) provide a description of the purpose of the Information Request; (c) state the time period for which confidential information is requested; and (d) re-affirm that only the Authorized Person shall have access to the confidential information requested. The Office of the Interconnection shall provide an Affected Member with written notice, which shall include electronic communication, of an Information Request of the Authorized Person as soon as possible, but not later than two (2) business days after the receipt of the Information Request.

(ii) Subject to the provisions of section (c)(iii), the Office of the Interconnection shall supply confidential information to the Authorized Person in response to any Information Request within five (5) business days of the receipt of the Information Request, to the extent that the requested confidential information can be made available within such period; provided however, that in no event shall confidential information be released prior to the end of the fourth (4^{th}) business day without the express consent of the Affected Member. To the extent that the Office of the Interconnection can not reasonably prepare and deliver the requested confidential information within such five (5) day period, it shall, within such period, provide the Authorized Person with a written schedule for the provision of such remaining confidential information. Upon providing confidential information to the Authorized Person, the Office of the Interconnection shall either provide a copy of the confidential information to the Affected Member(s), or provide a listing of the confidential information disclosed; provided, however, that the Office of the Interconnection shall not reveal any Member's confidential information to any other Member.

(iii) Notwithstanding section (c)(ii), above, should the Office of the Interconnection or an Affected Member object to an Information Request or any portion thereof, either of them may, within four (4) business days following the Office of the Interconnection's receipt of the Information Request, request, in writing, a conference with the Authorized Commission or the Authorized Commission's authorized designee to resolve differences concerning the scope or timing of the Information Request; provided, however, nothing herein shall require the Authorized Commission to participate in any conference. Any party to the conference may seek assistance from FERC staff in resolution of the dispute. Should such conference be refused by any participant, or not resolve the dispute, then the Office of the Interconnection, the Affected Member or the Authorized Commission may initiate appropriate legal action at FERC within three (3) business days following receipt of written notice from any conference participant terminating such conference. Any complaints filed at FERC objecting to a particular Information Request shall be designated by the party as a "fast track" complaint and each party shall bear its own costs in connection with such FERC proceeding. If no FERC proceeding regarding the Information Request is commenced within such three day period, the Office of the Interconnection shall utilize its best efforts to respond to the Information Request promptly.

(d) In the event of any breach of a Non-Disclosure Agreement:

(i) The Authorized Person and/or their respective Authorized Commission shall promptly notify the Office of the Interconnection, who shall, in turn, promptly notify any Affected Member of any inadvertent or intentional release, or possible release, of confidential information provided pursuant to any Non-Disclosure Agreement.

(ii) The Office of the Interconnection shall terminate such Non-Disclosure Agreement upon written notice to the Authorized Person and his or her Authorized Commission, and all rights of the Authorized Person thereunder shall thereupon terminate; provided, however, that the Office of the Interconnection may restore an individual's status as an Authorized Person after consulting with the Affected Member and to the extent that: (i) the Office of the Interconnection determines that the disclosure was not due to the intentional, reckless or negligent action or omission of the Authorized Person; (ii) there were no harm or damages suffered by the Affected Member; or (iii) similar good cause shown. Any appeal of the Office of the Interconnection's actions under this section shall be to FERC.

(iii) The Office of the Interconnection and/or the Affected Member shall have the right to seek and obtain at least the following types of relief: (a) an order from FERC requiring any breach to cease and preventing any future breaches; (b) temporary, preliminary, and/or permanent injunctive relief with respect to any breach; and (c) the immediate return of all confidential information to the Office of the Interconnection.

(iv) No Authorized Person shall have responsibility or liability whatsoever under the Non-Disclosure Agreement or this Agreement for any and all liabilities, losses, damages, demands, fines, monetary judgments, penalties, costs and expenses caused by, resulting from, or arising out of or in connection with the release of confidential information to persons not authorized to receive it, provided that such Authorized Person is an employee or member of an Authorized Commission at the time of such unauthorized release. Nothing in this Section (d)(iv) is intended to limit the liability of any person who is not an employee of or a member of an Authorized Commission at the time of such unauthorized release for any and all economic losses, damages, demands, fines, monetary judgments, penalties, costs and expenses caused by, resulting from, or arising out of or in connection with such unauthorized release.

(v) Any dispute or conflict requesting the relief in section (d)(ii) or (d)(iii)(a) above, shall be submitted to FERC for hearing and resolution. Any dispute or conflict requesting the relief in section (d)(iii)(c) above may be submitted to FERC or any court of competent jurisdiction for hearing and resolution.

18.18 Termination and Withdrawal.

18.18.1 Termination.

Upon termination of this Agreement, final settlement for obligations under this Agreement shall include the accounting for the period ending with the last day of the last month for which the Agreement was effective.

ATTACHMENT 3

DECLARATION OF SCOTT MILLER

May 23, 2007

DECLARATION OF SCOTT MILLER

I, Scott Miller, being duly sworn upon oath, depose and state:

1. I am employed by Midwest Generation EME, LLC ("Midwest Generation" or "Company") as a Senior Engineer and am responsible for managing the air quality programs for the Company's six coal-fired power stations in the State of Illinois, known as the Crawford, Fisk, Joliet, Powerton, Will County and Waukegan power stations (the "Power Stations"). Specifically, I am responsible for overseeing compliance of the Power Stations with all applicable air quality programs, including the Acid Rain, NO_x SIP, ERMS, NSPS, NSR, Title V, HAPs, RACT, BART, and NAAQS programs. I have held this position with the Company since 1999, and served in the same capacity from 1982 through 1999 as an employee of Commonwealth Edison Company ("ComEd"), the previous owner and operator of the Power Stations. I began my career with ComEd in 1978 as an employee at the Zion Nuclear Station. I received a Bachelor of Science in mechanical engineering form the University of Illinois at Urbana-Champaign in 1977 and a Master of Science in engineering management from Northwestern University in 1982.

2. In sum, I have twenty-eight years of experience in the environmental field, including my twenty-three years in charge of overseeing the compliance of the Power Stations with air quality programs. As such, I am knowledgeable about the Company's compliance with air quality programs, including its recordkeeping and reporting of emission data.

3. The purpose of my affidavit is to explain the manner in which Midwest Generation reports to U.S. EPA and Illinois EPA the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of (a) emissions from the units at the Power Stations (hereinafter, the "Actual Emissions") and (b) the emissions which, under an applicable standard or limitation, the units were authorized to emit (hereinafter, the "Permissible Emissions").

4. Midwest Generation submits its Actual Emissions of each pollutant regulated under the Illinois SIP or NSPS to U.S. EPA, Illinois EPA, or both. Midwest Generation has done so since its inception in 1999, and ComEd submitted similar data to the agencies from at least 1982 through 1999.

5. Midwest Generation currently submits the following reports of Actual Emissions:

(a) Annual Emissions Reports submitted to Illinois EPA pursuant to 35 Ill. Admin. Code 254, which include Actual Emissions, on an annual basis, of NO_x, SO_2, PM, PM10, PM2.5, VOM, CO, Lead and Ammonia;

(b) Quarterly Acid Rain and NO_x SIP Electronic Data Reports submitted to U.S. EPA pursuant to 40 C.F.R. Parts 75 and 96, which include Actual Emissions, on a quarterly basis, of NO_x and SO_2;

Further, affiant sayeth not.

Scott B. Miller

Scott Miller, Senior Engineer

Subscribed and sworn to before me, May 23, 2007
a Notary Public, in and for the
County of Cook, State of Illinois

Kathleen Knapp

"OFFICIAL SEAL"
Kathleen Knapp
Notary Public, State of Illinois
Commission Expires 3/12/2011

Notary Public
My Commission expires 3/12/2011

CH2\ 1441786.2

ATTACHMENT 4

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276, 217-782-3397
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601, 312-814-6026

ROD R. BLAGOJEVICH, GOVERNOR RENEE CIPRIANO, DIRECTOR

Received

217/782-5544
217/782-9143(TDD)

January 5, 2004

Jane E. Montgomery
Schiff Harden & Waite
6600 Sears Tower
Chicago, Illinois 60606-6360

Re: Midwest Generation EME, L.L.C.

Dear Ms. Montgomery:

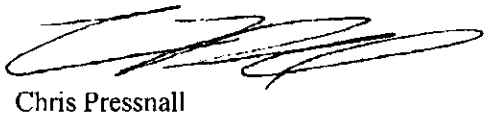
The Illinois Environmental Protection Agency ("Illinois EPA") is in receipt of Midwest Generation EME, L.L.C.'s ("Midwest") November 6, 2003, response to the USEPA Section 114 of the Clean Air Act information request, which was dated February 13, 2003. The attachments to Midwest's responses to requests number 1 - 3 and 9 were claimed as "confidential business information", however, the claim was not properly justified pursuant to the Illinois Pollution Control Board ("Board") trade secret regulations. (35 Ill. Adm. Code Part 130)

The Illinois EPA is hereby requesting a statement of justification within 10 working days of receiving this letter as the Illinois EPA has received a FOIA request pertaining to the Section 114 request response. (35 Ill. Adm. Code 130.201(a) and 130.202(a)) Specifically, on November 3, 2003, the Illinois EPA received a Freedom of Information Act (FOIA) request from the Sierra Club seeking records relating to all coal-fired power plants in Illinois. Upon receipt of the statement of justification and until such time as the Illinois EPA has made a final trade secret determination, the documents will be protected from public disclosure. (35 Ill. Adm. Code 130.200(d))

In order for materials to be claimed confidential or trade secret, the requirements of 35 Ill. Adm. Code Part 130, Identification and Protection of Trade Secrets and Other Non-Disclosable Information, must be met. The Board regulations require that a statement of justification accompany the submission of any trade secret or confidential information or be submitted upon request by the Illinois EPA. In addition, Midwest must mark the documents in accordance with 35 Ill. Adm. Code 130.302.

Specifically, the statement of justification must contain a detailed description of the procedures used by Midwest to safeguard the article from becoming available to persons other than those selected by Midwest to have access thereto for limited purposes; a detailed statement identifying the persons or class of persons to whom the article has been disclosed; a certification that Midwest has no knowledge that the article has ever been published or disseminated or has otherwise become a matter of general public knowledge; a detailed discussion of why Midwest believes the article to be of competitive value; and any other information that will support the claim (35 Ill. Adm. Code 130.203).

If you have any questions or concerns regarding this matter please do not hesitate to contact me.



Chris Pressnall
Assistant Counsel
Division of Legal Counsel

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Amended Petition for Review, by U.S. Mail, upon the following persons:

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, IL 60601

Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
Office of the Attorney General
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

Dated: May 29, 2007

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: _____

Sheldon A. Zabel
Mary Ann Mullin
Andrew N. Sawula
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5687

One of the Attorneys for
Midwest Generation EME, LLC