

ILLINOIS POLLUTION CONTROL BOARD

May 6, 2004

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

ORDER OF THE BOARD (by A.S. Moore):

On April 19, 2004, Midwest Generation EME, LLC (Midwest Generation) timely filed a petition asking the Board to review a March 10, 2004 trade secret determination of the Illinois Environmental Protection Agency (IEPA). *See* 415 ILCS 5/40(a)(1) (2002); 35 Ill. Adm. Code 130.214(a). IEPA denied Midwest Generation's request for trade secret protection of information the company submitted to IEPA. For the reasons below, the Board accepts the petition for review.

**TRADE SECRET PROTECTION**

Under Section 7 of the Environmental Protection Act (Act) (415 ILCS 5/7 (2002)), all files, records, and data of the Board, IEPA, and the Illinois Department of Natural Resources are open to public inspection and copying. However, the Act provides that certain materials may represent "trade secrets," "privileged" information, "internal communications of the several agencies," or "secret manufacturing processes or confidential data" and, accordingly, be protected from public disclosure. *See* 415 ILCS 5/7(a) (2002); *see also* 415 ILCS 5/7.1 (2002) (trade secrets). Even so, the Act denies protection from public disclosure for: effluent data under the National Pollutant Discharge Elimination System (NPDES) permit program; emission data to the extent required by the federal Clean Air Act; and the quantity, identity, and generator of substances being placed or to be placed in landfills or hazardous waste treatment, storage, or disposal facilities. *See* 415 ILCS 5/7(b)-(d) (2002).

In Midwest Generation's appeal, trade secret status is at issue. The Act defines "trade secret" as follows:

[T]he whole or any portion or phase of any scientific or technical information, design, process (including a manufacturing process), procedure, formula or improvement, or business plan which is secret in that it has not been published or disseminated or otherwise become a matter of general public knowledge, and which has competitive value. A trade secret is presumed to be secret when the owner thereof takes reasonable measures to prevent it from becoming available to

persons other than those selected by the owner to have access thereto for limited purposes. 415 ILCS 5/3.48 (2002).

The Board has established procedures for identifying and protecting articles that constitute trade secrets or other non-disclosable information. *See* 35 Ill. Adm. Code 130.<sup>1</sup> These include procedures for appealing trade secret determinations of State agencies. An owner of an article submitted to IEPA (or a person, known as a “requester,” seeking an article from IEPA) who is adversely affected by a final trade secret determination of IEPA, may appeal that determination to the Board. *See* 35 Ill. Adm. Code 130.214(a). Trade secret appeals before the Board are governed by the procedural rules for permit appeals set forth in Subparts A and B of Part 105 of Title 35 of the Illinois Administrative Code. *Id.*

### **MIDWEST GENERATION’S PETITION**

In its petition, Midwest Generation states that it submitted information to IEPA on November 6, 2003, claiming trade secret protection for the information. Petition at 1-2. The company explains that it provided the submittal in response to an information request that the United States Environmental Protection Agency (USEPA) made pursuant to Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). Midwest Generation states that, as required by USEPA’s Section 114 request, the company sent a copy of its response to IEPA. *Id.* On January 5, 2004, IEPA asked Midwest Generation to provide a statement justifying the trade secret claims. *Id.*, Attachment 2. Midwest Generation submitted its statement of justification to IEPA on January 23, 2004. *Id.*, Attachment 3. As noted, IEPA issued its final determination on March 10, 2004, denying trade secret protection, and Midwest Generation has timely appealed to the Board. *Id.* at 2, Attachment 1.

IEPA denied trade secret protection for what Midwest Generation describes as two types of information: (1) “information Midwest Generation compiled concerning capital projects at each of its coal-fired electric generating units”; and (2) “information identifying the monthly and annual net generation, the monthly coal heat content, and the monthly net heat rate for each of its coal-fired units.” Petition at 2. Midwest Generation’s petition includes, in full and redacted form, the company’s statement purporting to justify trade secret status and the information claimed to be trade secret. Petition at 2, 6, Attachments 3-5.

Midwest Generation argues that IEPA erred in determining the company failed to demonstrate that the information claimed to be trade secret had not become a matter of general public knowledge, had competitive value, and did not constitute emission data exempt from protection. Petition at 2-5, Attachment 1. Midwest Generation claims that disclosure of the information will put the company at a competitive disadvantage. *Id.* at 4-5. Finally, Midwest Generation asks that the Board’s hearing on the petition contesting IEPA’s determination be held *in camera* to avoid disclosing to the public the information claimed to be trade secret. *Id.* at 6.

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<sup>1</sup> “Article” means “any object, material, device or substance, or whole or partial copy thereof, including any writing, record, document, recording, drawing, sample, specimen, prototype, model, photograph, culture, microorganism, blueprint or map.” 415 ILCS 5/7.1 (2002).

### **HEARING**

The Board accepts Midwest Generation's petition for hearing. In accordance with Section 130.214(a) of the Board's procedural rules (35 Ill. Adm. Code 130.214(a)), this trade secret appeal will proceed under the procedures for permit appeals at 35 Ill. Adm. Code 105.Subparts A and B. Because this appeal was not brought by a requester and no requester has been identified, the only parties to this proceeding are Midwest Generation, as petitioner and article owner, and IEPA, as respondent and the State agency that rendered the contested trade secret determination. *See Archer Daniels Midland Co. v. IEPA*, PCB 99-166 (May 20, 1999).

Midwest Generation has the burden of proof. *See* 415 ILCS 5/40(a)(1) (2002); *see also* 35 Ill. Adm. Code 105.112(a). Hearings will be based exclusively on the record before IEPA at the time it issued its trade secret determination. *See* 35 Ill. Adm. Code 105.214(a). Therefore, though the Board hearing affords petitioner the opportunity to challenge IEPA's reasons for denial, information developed after IEPA's decision typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom.* 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3d Dist. 2002).

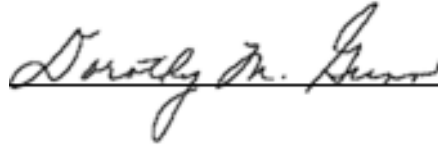
Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(2) (2002)), which only Midwest Generation may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Midwest Generation may deem its request for trade secret protection granted. *See* 415 ILCS 5/40(a)(2) (2002). Currently, the decision deadline is August 17, 2004, which is the 120th day after the Board received Midwest Generation's petition. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for August 5, 2004.

As requested, any hearings will be held *in camera*. In accordance with Part 130 of the Board's procedural rules (35 Ill. Adm. Code 130), articles properly identified as containing claimed trade secrets will be segregated and handled to avoid unauthorized disclosure. IEPA must continue to protect the claimed information during the course of this and any subsequent appeal. *See* 35 Ill. Adm. Code 130.210(c).

Unless the Board or the hearing officer orders otherwise, IEPA must file the entire record of its determination by May 19, 2004, which is 30 days after the Board received Midwest Generation's petition. *See* 35 Ill. Adm. Code 105.212(a). If IEPA wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.212(b).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 6, 2004, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board