

ILLINOIS POLLUTION CONTROL BOARD

June 17, 2004

COMMONWEALTH EDISON COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 04-215
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

MIDWEST GENERATION EME, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 04-216
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	(Not Consolidated)
PROTECTION AGENCY,)	
)	
Respondent.)	

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

Two companies have separately appealed two trade secret determinations of the Illinois Environmental Protection Agency (IEPA). In each determination, IEPA denied trade secret protection from public disclosure for information about six coal-fired generating stations. The stations are formerly owned by Commonwealth Edison Company (ComEd) and currently owned by Midwest Generation EME, LLC (Midwest Generation). The information claimed to be trade secret in each appeal was submitted to IEPA by ComEd and some of the same information is at issue in each appeal.

Specifically, on June 2, 2004, ComEd timely filed a petition asking the Board to review an April 23, 2004 trade secret determination of IEPA. *See* 415 ILCS 5/40(a)(1) (2002); 35 Ill. Adm. Code 130.214(a). The Board docketed this appeal as PCB 04-215. On June 3, 2004, Midwest Generation timely filed a petition asking the Board to review a separate April 23, 2004 trade secret determination of the IEPA. The Board docketed this appeal as PCB 04-216.

For the reasons below, the Board accepts for hearing the petitions for review of ComEd and Midwest Generation. The Board also directs the parties to address whether the two appeals should be consolidated for purposes of hearing and decision. In this order, the Board first

provides the legal background for trade secret protection. The Board then describes the two petitions before accepting them for hearing.

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 the appeals of ComEd and Midwest Generation, 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 130.¹ 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.*

COMED’S PETITION

In its petition, ComEd states that on January 30, 2004, it submitted information in response to an information request made by the United States Environmental Protection Agency

¹ “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).

(USEPA) under Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). ComEd Petition at 1. ComEd submitted a “courtesy copy” of the information to IEPA at USEPA’s suggestion, according to the petition. *Id.* ComEd states that the information included “excerpts from a Continuing Property Record (‘CPR’) and Generating Availability Data System (‘GADs’) data relating to six coal-fired generating stations formerly owned by ComEd.” *Id.*

The petition provides that the excerpts from the CPR are “compiled listings of confidential detailed financial information related to expenditures at the six coal-fired generating stations.” ComEd Petition at 1. The petition further provides that the GADs data “contains compiled information relating to the operation of the electric generating units at the six coal-fired generating stations.” *Id.* at 2. ComEd states that the information has been kept and marked as confidential and that if its competitors had access to the information, ComEd would be disadvantaged. *Id.* According to ComEd, the CPR is also considered trade secret by the current owner of the six coal-fired generating stations, Midwest Generation. *Id.* at 3.

On March 1, 2004, IEPA asked ComEd to provide a statement justifying the trade secret claims. ComEd Petition at 3. ComEd submitted its statement of justification to IEPA on March 11, 2004. *Id.* As noted, IEPA issued its final determination on April 23, 2004, denying trade secret protection. *Id.* ComEd argues that IEPA erred in determining the company failed to show that the claimed information had not become a matter of general public knowledge, had competitive value, and did not constitute emission data exempt from protection. *Id.* IEPA granted trade secret status only to work order numbers in the CPR compilation. *Id.* at 3-4, Attachment. ComEd asks that the claimed information “be filed under seal” and 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 4.

MIDWEST GENERATION’S PETITION

In its petition, Midwest Generation also states that on January 30, 2004, ComEd submitted information in response to USEPA’s request under Section 114 of the federal Clean Air Act (42 U.S.C. § 7414) and submitted a “courtesy copy” of the information to IEPA. MG Petition at 1. Midwest Generation similarly notes that the information ComEd submitted included “excerpts from a continuing property record (‘CPR’) relating to six coal-fired generating stations formerly owned by ComEd and currently owned by Midwest Generation.” *Id.* at 1-2, Attachment 1.

The petition further states that Midwest Generation purchased the six stations in December 1999 and received a copy of the CPR pursuant to an asset sale agreement between ComEd and Edison Mission Energy, Midwest Generation’s parent company. MG Petition at 2. As with ComEd’s petition, Midwest Generation’s petition asserts that the excerpts from the CPR are “compiled listings of confidential detailed financial information related to expenditures at the six generating stations.” *Id.* Midwest Generation states that ComEd marked the information as confidential. *Id.*

Midwest Generation maintains that after it was informed of IEPA’s request that ComEd provide a statement justifying the trade secret claims, Midwest Generation submitted an

independent statement of justification to IEPA concerning the CPR. Midwest Generation's statement of justification did not address the GADs data. MG Petition at 2, Attachments 2-4. IEPA issued a final determination on April 23, 2004, responding to Midwest Generation's statement of justification and denying trade secret protection for the information submitted by ComEd. IEPA granted trade secret status only to work order numbers in the CPR. *Id.* at 2, Attachment 4.

Like ComEd, 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. MG Petition at 3. Midwest Generation claims that disclosure of the information will harm the company's competitive position. *Id.* at 3-4. Midwest Generation filed the information (Petition, Attachment 1) in both full and redacted form. 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.

HEARING

The Board accepts for hearing the petitions of ComEd and Midwest Generation. All of the information claimed to be trade secret in these appeals was submitted by ComEd and concerns the same six coal-fired generating plants. Unlike ComEd, Midwest Generation does not appeal IEPA's trade secret determination on the GADs data. However, both petitioners appeal IEPA's determination that the CPR submitted does not constitute trade secret. In addition, IEPA denied trade secret protection for the CPR on the same grounds in each of the two decision letters.

Under these circumstances, the Board directs the parties to address whether it would be appropriate to consolidate the two appeals for purposes of hearing, if any, and decision. *See* 35 Ill. Adm. Code 101.406. The parties have ten days from receipt of this order to file the pleading, and seven days from service of the pleading to file any response.

In accordance with Section 130.214(a) of the Board's procedural rules (35 Ill. Adm. Code 130.214(a)) and whether or not the Board consolidates the two appeals, these trade secret cases will proceed under the procedures for permit appeals at 35 Ill. Adm. Code 105.Subparts A and B. Accordingly, ComEd and Midwest Generation each 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 petitioner may extend by waiver

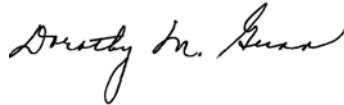
(see 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the respective decision deadlines, petitioner may deem its request for trade secret protection granted. See 415 ILCS 5/40(a)(2) (2002). Currently, the decision deadline is September 30, 2004, in the ComEd appeal and October 1, 2004, in the Midwest Generation appeal. These dates represent the 120th day after the Board received the respective petition. See 35 Ill. Adm. Code 105.114. The Board meeting immediately before each decision deadline is scheduled for September 16, 2004.

As petitioners 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 each of its determinations by July 6, 2004. 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 June 17, 2004, by a vote of 5-0.

A handwritten signature in black ink, appearing to read "Dorothy M. Gunn", written in a cursive style.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board