



CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Opposition to Consolidation, by US Mail, upon the following persons:

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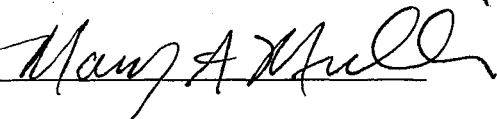
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Dated: Chicago, Illinois  
July 26, 2004

Respectfully submitted,

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By: 

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2. Rather than expediting determination of the claims, consolidation will cause administrative confusion. Commonwealth Edison Company's (ComEd's) appeal concerns IEPA's denial of its trade secret claims as to the continuing property record (CPR) as well as to Generation Availability Data ("GADs") for six generating stations: the Crawford, Fisk, Joliet, Powerton, Will County, and Waukegan power stations formerly owned by ComEd and currently owned by Midwest Generation. Midwest Generation's appeal, on the other hand, only concerns IEPA's denial of its trade secret claim to the CPR for these stations. Midwest Generation does not have an interest in the GADs data and, while both Midwest Generation and ComEd have an interest in the CPR, each company's interest is different.

3. While both companies claim that the same document is trade secret, there are not sufficient common issues of fact to warrant consolidation. 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 if the article has competitive value.

35 Ill. Admin. Code 130.208(a).

4. As set forth in Midwest Generation's Petition for Review, both Midwest Generation and ComEd are owners of the CPR and each has the right to make a claim for trade secret protection. In evaluating these claims, the Board must make separate factual determinations for each petitioner; as to each petitioner, the Board must determine 1) whether the petitioner properly complied with the procedures for making a claim and justification; 2) whether the petitioner has published or disseminated the CPR; and 3) whether the CPR has competitive value to that petitioner. These determinations will rest upon entirely different facts. While

ComEd made the initial claim for both companies by stamping the CPR, each company submitted an independent Statement of Justification. Similarly, the CPR possesses competitive value to petitioners for different reasons. Further, Midwest Generation has no claim to the GADs data, portions of the proceeding concerning the trade secret status of the GADs data would be irrelevant to Midwest Generation. Consolidation, therefore, will not decrease the amount of evidence and testimony presented to the Board; rather, it will expand the hearing time for each petitioner, as they will need to be present for each other's cases. Consolidation, thus, will cause petitioners to incur unnecessary expense but will not alleviate the Board's administrative burden.

5. Consolidation will cause material harm to Midwest Generation. The Sierra Club has not moved to intervene in Midwest Generation's appeal; it has only moved to intervene in ComEd's appeal. If the cases are consolidated and the Board grants the Sierra Club's Motion to Intervene, the Sierra Club would become a party to Midwest Generation's appeal. Midwest Generation would have been denied the opportunity to oppose the intervention. Intervention of the Sierra Club will unfairly complicate Midwest Generation's case.

6. Further, Midwest Generation and ComEd will be materially prejudiced if forced to become co-petitioners. Midwest Generation, for example, intends to ask the Board to reconsider the portion of its June 17, 2004 Order holding that the hearing will be "on the record before IEPA" at the time of its determination. ComEd may not want this Order reconsidered. If the cases are consolidated, ComEd runs the risk of having this Board ruling overturned, thereby losing its right to proceed to hearing "on the record." Conversely, if ComEd fails to join Midwest Generation in its Motion for Reconsideration, Midwest Generation's chances of being successful in its Motion for Reconsideration could be prejudiced. If consolidation deprives a

party of a fair and impartial trial, it constitutes an abuse of discretion and is reversible error. Lowe v. Norfolk and Western Railway Co. 124 Ill. App. 3d 80,105, 463 NE 2d 792 (Ill. App. 1984). Consolidating the appeals will, in essence, prevent both ComEd and Midwest Generation from having their day in court.

7. The general rules of the Board provide that the Board will not consolidate proceedings where the burdens of proof vary. 35 Adm. Code 101.406. As discussed above, whether the proceedings are consolidated or not, Midwest Generation and ComEd will each have to prove a different set of facts. Accordingly, the requirements of proof will vary and consolidation is not warranted.

For the reasons stated above, Midwest Generation opposes the consolidation of IPCB 04-215 and 04-216.

Respectfully submitted,

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