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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD JUL 2 6 2004

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STATE OF ILLINOIS Pollution Control Board

Midwest Generation EME, LLC Petitioner,

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To:

Illinois Environmental Protection Agency, Respondent.

NOTICE OF FILING

Lisa Madigan Attorney General of the State of Illinois Matthew Dunn Environmental Enforcement/ Asbestos Litigation Division Ann Alexander Assistant Attorney General and Environmental Counsel Paula Becker Wheeler Assistant Attorney General, Office of the Attorney General 188 West Randolph Street, Suite 2000 Chicago, Illinois 60601 Byron F. Taylor Chante D. Spann Sidley Austin Brown & Wood LLP Bank One Plaza 10 South Dearborn Chicago, IL 60603

PCB 04-216

Trade Secret Appeal

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

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board an original (1) and nine (9) copies of Midwest Generation EME, LLC's Opposition to Consolidation, a copy of which is herewith served upon you.

Main BY: Mary Ann Mullin

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

Dated: Chicago, Illinois July 26, 2004

CERTIFICATE OF SERVICE

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

Lisa Madigan Attorney General of the State of Illinois Matthew Dunn Environmental Enforcement/ Asbestos Litigation Division Ann Alexander Assistant Attorney General and Environmental Counsel Paula Becker Wheeler Assistant Attorney General, Office of the Attorney General 188 West Randolph Street, Suite 2000 Chicago, Illinois 60601 Byron F. Taylor Chante D. Spann Sidley Austin Brown & Wood LLP Bank One Plaza 10 South Dearborn Chicago, IL 60603

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

Dated: Chicago, Illinois July 26, 2004

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: Man

Mary A. Mullin

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One of the Attorneys for Midwest Generation EME, LLC

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JUL 26 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOAR DTATE OF ILLINOIS Pollution Control Board

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Midwest Generation EME, LLC Petitioner,

v.

PCB 04-216 Trade Secret Appeal

Illinois Environmental Protection Agency, Respondent.

MIDWEST GENERATION'S EME, LLC'S OPPOSITION TO CONSOLIDATION

By order dated June 17, 2004, the Illinois Pollution Control Board (the "Board") directed the parties to two appeals before the Board; <u>Commonwealth Edison Company v. IEPA</u>, 04-215 and <u>Midwest Generation EME, LLC v. IEPA</u>, 04-216, to address whether it would be appropriate to consolidate the two appeals for purpose of hearing, if any, and decision. June 17, 2004 Order at 4. The Hearing Officer extended the time to file this pleading until July 26, 2003. July 8, 2004 Hearing Officer Order at 1. For the reasons set forth below, Midwest Generation, EME, LLC opposes consolidation of these appeals.

1. The general rules of the Illinois Pollution Control Board (the "Board") provide:

The Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary.

35 Ill. Adm. Code 101.406. Consolidation is not appropriate in this circumstance because it is not in the interest of expeditious determination of the claims, would cause material prejudice to the petitioners, and the burdens of proof vary in the two proceedings.

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

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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

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party of a fair and impartial trial, it constitutes an abuse of discretion and is reversible error. <u>Lowe v. Norfolk and Western Railway Co</u>. 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,

MIDWEST GENERATION EME, LLC

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Sheldon A. 'Zabel Mary Ann Mullin Andrew N. Sawula

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Attorneys for Midwest Generation EME, LLC

Dated:

Chicago, Illinois July 26, 2004

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