

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AUG 06 2004

Commonwealth Edison Company,)
Petitioner)

v.)

Illinois Environmental Protection Agency,)
Respondent)

PCB 04-215 STATE OF ILLINOIS
Trade Secret Appeal Pollution Control Board

Midwest Generation EME, LLC,)
Petitioner)

v.)

Illinois Environmental Protection Agency,)
Respondent)

PCB 04-216
Trade Secret Appeal
(not consolidated)

NOTICE OF FILING

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Chicago, Illinois 60601

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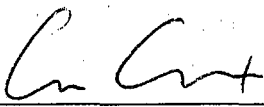
Please take notice that today we have filed with the Office of the Clerk of the Pollution Control Board an original (1) and nine (9) copies of IEPA's Response to Commonwealth Edison's and Midwest Generation's Opposition to Consolidation. A copy is herewith served upon the assigned Hearing Officer, the attorneys for the

Petitioner, Commonwealth Edison Company, Midwest Generation EME, LLC, and the attorneys for the Sierra Club.

Dated: Chicago, Illinois
August 6, 2004

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
Asbestos Litigation Division

BY:  _____

Ann Alexander, Assistant Attorney General and
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**IEPA'S RESPONSE TO COMMONWEALTH EDISON'S AND
MIDWEST GENERATION'S OPPOSITION TO CONSOLIDATION**

Respondent, Illinois Environmental Protection Agency ("IEPA"), by Lisa Madigan, Attorney General of the State of Illinois, herewith submits its response to the Opposition to Consolidation pleadings separately submitted by Midwest Generation EME, LLC ("Midwest Generation") and Commonwealth Edison ("Com Ed") to the Board in this matter.

1. Appellants disregard entirely the fact that the salient issue in this proceeding will be the legal, not factual, issue of whether the information for which trade secret protection is claimed constitutes emission data that is exempt from trade secret protection under the Clean Air Act as incorporated into the Illinois Environmental Protection Act. Moreover, while appellants correctly point out a small number of differences between the two appeals, they never demonstrate how these differences justify entirely separate proceedings for these two overwhelmingly similar matters. Indeed, it remains clear that proceeding separately would result in massive duplication of effort, and thus a significant waste of the Board's resources.

2. Entirely unaddressed in either appellant's opposition to consolidation is the fact that the overarching issue in these proceedings will be whether the information for which protection is sought constitutes emission data for purposes of Clean Air Act § 114(c), 42 U.S.C. 7417(c) and 415 ILCS 5/7 – a legal issue that is identical with respect to both appellants. Respondent IEPA is requesting that the Board determine that the information in question fits the definition of § 114(c) emission data set forth in the USEPA regulations at 40 C.F.R. 2.301(a)(2)(i), which encompasses any “Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emission 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).” See 415 ILCS 5/7 (emission data exempted from trade secret protection to the same extent as under the federal Clean Air Act). Here, for reasons that will be elaborated upon in the proceeding, the information for which trade secret protection is claimed is essential to a determination as to whether its emissions were lawful under the New Source Review requirements of the Clean Air Act. Since this specific issue has not been directly addressed by the Board previously, and its resolution will have wide-reaching precedential impact, it is essential that the Board issue a unified ruling rather than running the risk of conflicting rulings in separate proceedings.

3. Leaving aside this critical issue, Appellants have failed to point to any differences between the two proceedings that would justify keeping them separate. Appellants in the first instance complain that since Com Ed has asserted a claim in addition to the claims jointly asserted by the two companies, its time will be wasted if it is required to be present for the portion of the proceedings devoted to that additional Com Ed claim. Midwest Generation's

EME, LLC's Opposition to Consolidation ("Midwest Generation Opposition") ¶ 2. This argument ignores the obvious fact that keeping the two proceedings separate will waste the *Board's* time, not to mention respondent IEPA's, as the Board would be compelled to conduct identical parallel proceedings on the major issue that both appeals share in common. A far more appropriate solution to Midwest Generation's concern is for Midwest Generation simply to be given permission to decline to appear for those portions of the proceeding that do not concern it.

4. Appellants next assert that, notwithstanding the fact that identical documents are at issue in both proceedings, the two would require "separate factual determinations." Midwest Generation Opposition ¶ 4. However, the purported distinctions between the facts applicable to the two appellants are illusory.

5. The first factual issue highlighted by Midwest Generation – whether appellants properly complied with procedures for making a trade secret claim – does not exist at all in this proceeding, as respondent IEPA has not raised it and does not intend to.

6. The second factual issue – purportedly "whether *the petitioner* has published or disseminated the CPR" (emphasis added) – is misstated by Midwest Generation so as to imply that trade secret protections hinge on the party's conduct rather than the status of the information itself, such that separate determinations would be required for each party. In fact, the relevant issue under the governing regulations is not whether a particular party published or disseminated the information at issue, but whether "[t]he article has not been published, disseminated or otherwise become a matter of general public knowledge" – *i.e.*, by anyone, not necessarily by the particular party before the Board. 35 Ill. Adm. Code 130.208(a)(2)(A). Thus, the facts relevant to that issue – going to whether the information is public or not – are identical for both appellants.

7. The third factual issue – whether the information has competitive value to each petitioner – again implies a divergence that is largely illusory. Only Midwest Generation has provided any specifics in its statement of justification as the competitive value of the information – i.e., that it could purportedly alert competitors to expenditures at its plants that would shift the company’s cost position in the marketplace and alter future maintenance expectations. Com Ed cannot assert any such interest, as it no longer owns the plants – the most it can offer is an overwhelmingly vague reference to concern with its “overall business strategies, past and present.” Given Com Ed’s clear lack of any direct interest in information pertaining to the plants it no longer owns, it is unlikely that the issues of competitive value will extend beyond those raised by Midwest Generation. To the extent they do at all, as noted above, the inconvenience to the Board of holding entirely separate proceedings far outweighs any marginal inconvenience to Midwest Generation.

8. Notwithstanding whatever minor differences, if any, that may exist in the factual proof that will be offered by the two appellants, neither has presented any information to suggest that the burdens of proof would vary between the two, one of the elements of a consolidation determination under 35 Ill. Adm. Code 101.406. Regardless of the particular factual claim at issue, the burden remains on appellants to prove those claims in accordance with the Board’s June 17 order and authorities cited therein.

9. Appellants assert further that since the Sierra Club has not moved to intervene in Midwest Generation’s appeal, only Com Ed’s, Midwest Generation would be prejudiced by consolidation. This issue is now moot in light of Sierra Club’s motion for intervention in the Midwest Generation appeal filed August 3, 2004.

10. Finally, Midwest Generation states that, while it has moved for reconsideration of the Board's order that the hearing be held on the record, "Com Ed may not want this order reconsidered." Midwest Generation Opposition ¶ 6. However, in its own cursory submission, Com Ed never indicates that this is the case, saying nothing one way or the other as to whether it would support such a motion. More importantly, however, the ground for Midwest Generation's motion is that the relief it seeks is a requirement of constitutional due process. If this were the case, and due process required that the motion be granted, then it would be irrelevant to the Board's decision on the motion whether Com Ed had joined it.

Dated: Chicago, Illinois
August 6, 2004

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
Asbestos Litigation Division

BY: 

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CERTIFICATE OF SERVICE

I hereby certify that I did on the 6th Day of August 2004 send by First Class Mail, with postage thereon fully paid and deposited into the possession of the United States Postal Service, one (1) original and nine (9) copies of the following instruments entitled Notice of Filing and IEPA's Response to Commonwealth Edison's and Midwest Generation's Opposition to Consolidation to

To: Dorothy Gunn, Clerk
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and a true and correct copy of the same foregoing instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

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Dated: Chicago, Illinois
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