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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AUG 17 2004

STATE OF ILLINOIS
Pollution Control Board

Midwest Generation EME, LLC)

Petitioner)

v.)

Illinois Environmental Protection Agency,)
Respondent.)

PCB 04-216

Trade Secret Appeal

NOTICE OF FILING

To:

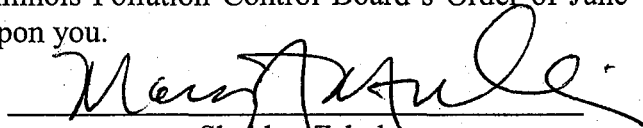
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Illinois Environmental Regulatory
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3150 Roland Avenue
Springfield, IL 62703

Keith Harley
Chicago Legal Clinic
205 W. Monroe, 4th Floor
Chicago, Illinois 60606

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board, Midwest Generation EME, LLC's Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of June 17, 2004 and Memorandum in Support of Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of June 17, 2004, copies of which are herewith served upon you.



Sheldon Zabel
Mary A. Mullin

Dated: August 17, 2004

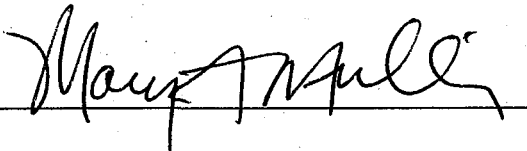
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5577

3. Without objection, the Hearing Officer extended the time in which Petitioner had to file its motion for reconsideration of the June 17, 2004 Order until August 17, 2004.

4. For the reasons set forth in the accompanying Memorandum in Support of Midwest Generation's Motion for Partial Reconsideration of the Board's Order of June 17, 2004, Midwest Generation respectfully requests that the Board partially reverse its Order and find that petitioners can supplement the record at hearing.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Sheldon A. Zabel
Mary Ann Mullin
Andrew Sawula

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5540

Attorneys for
Midwest Generation EME, LLC

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 17 2004

STATE OF ILLINOIS
Pollution Control Board

Midwest Generation EME, LLC
Petitioner,

v.

Illinois Environmental Protection Agency,
Respondent.

PCB 04-216
Trade Secret Appeal

MEMORANDUM IN SUPPORT OF MIDWEST GENERATION'S
MOTION FOR PARTIAL RECONSIDERATION OF THE
ILLINOIS POLLUTION CONTROL BOARD'S ORDER OF
JUNE 17, 2004

As more fully set forth in Midwest Generation EME, LLC's ("Midwest Generation's") Petition for Review, Midwest Generation (or "Petitioner") claimed that certain information submitted to the IEPA by Commonwealth Edison ("ComEd") in response to an USEPA §114 information request contain Midwest Generation's trade secrets. Midwest Generation submitted a Statement of Justification for these trade secret claims on March 11, 2004. (Attachment 1). In the Statement of Justification, Midwest Generation identified as trade secret excerpts from a continuing property record ("CPR") relating to six coal-fired generating stations formerly owned by ComEd and currently owned by Midwest Generation. In the Statement of Justification, Midwest Generation explained that the excerpt from the CPR was not publicly available and identified specific reasons why the release of the information would cause Midwest Generation competitive harm. Midwest Generation supplied the affidavit of a corporate official attesting to the fact that the information was not made publicly available.

By letter, IEPA summarily denied most of Midwest Generation's claims. (Attachment 2). The denial merely stated that Midwest Generation did not comply with the requirements for making a claim but does not identify a reason why Midwest Generation's submittal was deficient. IEPA stated:

Midwest, and/or ComEd failed to adequately demonstrate that the information has not been published, disseminated, or otherwise become a matter of general public knowledge and/or failed to demonstrate that the information has competitive value. Further, Midwest and/or ComEd has failed to demonstrate that the information does not constitute emissions data.

Attachment 2 at 1. The letter does not state whether IEPA's position is that the information is both publicly available and does not have competitive value or that only one of these factors has been met. If IEPA's position is that the information is publicly available, IEPA has failed to articulate the factual or other basis for this conclusion. If IEPA has determined that the information has no competitive value, again IEPA has failed to articulate the basis for that conclusion or to state any reason for rejecting Midwest Generation's statement, submitted under oath, that the information has competitive value. Further, IEPA failed to explain how the excerpts from the CPR, which are merely a list of hardware additions and retirements at the plants, could be considered emissions data. Perhaps most egregious, the letter fails to identify whether it was both ComEd's and Midwest Generations submittals that were inadequate, or if only one company's submittal was inadequate.

Midwest Generation was not given notice of IEPA's determination until the determination was final. IEPA never discussed Midwest Generation's claims with Midwest Generation before issuing this denial and Midwest Generation was given no opportunity to respond or submit evidence to refute IEPA's conclusory determinations. Even now Midwest Generation does not know the basis of IEPA's denial.

On June 17, 2004, the Pollution Control Board ("Board") issued an Order holding that the hearing on this matter "will be based exclusively on the record before IEPA at the time it issued its trade secret determination." Order at 4. For the reasons set forth below, Petitioner contends that this ruling violates the due process requirements under the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Illinois Constitution, and due process requires that Midwest Generation be entitled to supplement the agency record.

Argument

An administrative hearing must be conducted in accordance with the due process requirements under the Fourteenth Amendment to the United States Constitution and Article I, Section 2, of the Illinois Constitution. In re Abandonment of Wells Located in Illinois v. Department of Natural Resources, 343 Ill. App. 3d 303, 796 NE 2d 623 (Ill. App. Ct. 2003) citing In re Estate of Hect, 63 Ill. App. 3d 539, 540, 20 Ill. Dec. 254, 379 N.W. 2d 1332, 1324 (1978). A fair trial before a fair tribunal is a basic requirement of due process, a requirement that applies to both courts and administrative agencies that perform adjudicatory functions. Arvia v. Madigan, 809 NE 2d 88, 101 (Ill. 2004), Tennessee Valley Authority v. Whitman, 336 F.3d 1236, 1258 (11th Cir. 2003) *cert. denied*, 124 S.Ct. 2096, 158 L.Ed. 2d 711, 41 USLW 3685 (2003). The due process clause requires the opportunity to be heard occur at a meaningful time and in a meaningful manner. Lyon v. Dept. of Children and Family Services, 807 NE 2d 423, 430 (Ill. 2004), citing Mathews v. Eldridge, 424 US 319, 333, 96 S.Ct. 893, 47 L. Ed 2d 18, (1976). The United States Supreme Court has explained the factors courts should consider when evaluating procedural due process claims:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the

Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Lyon at 423 citing Mathews, 424 U.S. at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33. Applying the first factor, Midwest Generation's claim involves the protection of trade secrets, a property interest. As set forth in the Statement of Justification, disclosure of these trade secrets will cause Midwest Generation financial harm. As to the second factor, the risk of deprivation of this interest is great if Midwest Generation is prevented from knowing IEPA's reasons for denial and from submitting evidence to refute these reasons. Regarding the third factor, the Government's interest, the Government has no interest in releasing trade secret information; it is protected from disclosure under 415 ILCS 5/7(a). Lastly, allowing Midwest Generation to submit additional evidence at the Board hearing will not cause a significant administrative burden; it will only slightly lengthen the required hearing.

While the due process clause is flexible, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. People v Botruff, 331 Ill. App. 3d 486, 575, 771 NE 2d 570, (Ill. App. Ct. 2002) Due process requires that all parties have an opportunity to offer evidence in rebuttal. Novosad v. Mitchell, 251 Ill. App. 3d 166, 621 NE 2d 960, 966 (Ill. App. Ct. 1993), Anderson v. Human Rights Commission, 314 Ill. App. 35, 731 NE 2d 371, 376 (Ill. App. Ct. 2000).

If a party is denied an effective opportunity to submit information at the IEPA level, this denial of due process will not be corrected at the Board level if, in the proceedings before the Board, the party cannot submit additional information. See, Village of Sauget v. PCB, 207 Ill. App. 3d, 974, 982 (1990), see also, Wells Manufacturing Company v. EPA, 195 Ill. App. 3d 593, 596 (Ill. App. Ct. 1990) In Village of Sauget, the court found that petitioner, Monsanto, was denied due process because it was denied an effective opportunity to introduce evidence into

the agency record responding to USEPA's comments on its permit application. Village of Sauget at 983. The court reasoned:

If, as occurred here, the parties are precluded from supplementing the record before the IEPA on such issues, this failure cannot be cured through the Board hearing because the scope of a Board hearing in a permit appeal is limited to the record developed before the IEPA.

Id. The court concluded: "We find that the procedural safeguards to which Monsanto was due at the agency level were not afforded, and the proceedings before the Board did not cure this deficiency." Id.

In Wells, the IEPA denied Wells' application to renew its air permit concluding that operation of the Wells facility would cause a violation of the Environmental Protection Act. Wells at 596. Wells did not have the opportunity to present evidence that it would not violate the Act before its renewal application was denied. Wells at 597. The Board affirmed this decision, but the Appellate Court reversed reasoning:

There are several problems with this procedure. The Board's decision was based on the record compiled by the Agency. . . . However, Wells never had an opportunity to proffer evidence that it would not pollute.

Wells at 597. The Court concluded:

. . . it is obvious that the manner in which the Agency compiled information denied Wells a fair chance to protect its interest. The Agency asserts that the Board hearing gave Wells an opportunity to challenge the information relied on by the Agency in its permit denial. This is by no means the same as being allowed to submit evidence, some time during the application process, in order to show that it is not polluting the air.

Wells at 598.

Like Monsanto and Wells, Midwest Generation was not given an effective opportunity to protect its interest by responding to IEPA before IEPA denied trade secret protection to its information. Midwest Generation submitted its initial Statement of Justification that IEPA disagreed with or conclusorily rejected on a basis unknown to Midwest Generation and as to

which Midwest Generation never had an opportunity to respond. This denial of due process will not be cured by a Board hearing on the record before IEPA because Midwest Generation will not have the opportunity to submit evidence responding to IEPA's determinations.

If IEPA has determined, for example, that release of the confidential data would not cause competitive harm to Midwest Generation, Midwest Generation will not learn the basis of this determination until the proceedings before the Board. At this point, Midwest Generation would be denied the opportunity to introduce evidence responding to IEPA's determination. Midwest Generation was denied an effective opportunity to submit evidence at the IEPA level and this denial of due process can only be corrected at the Board level, if at all, if Midwest Generation is allowed to submit additional information. Thus, unless Midwest Generation is allowed to submit additional evidence, it will be deprived of the basic requirement of due process, the opportunity to be heard in a meaningful manner.

Similarly, the IEPA apparently determined that the CPR constitutes emissions data. The CPR is merely a listing of hardware additions and retirements at the generating stations. Emissions data is "Information necessary to determine the identity, amount, frequency, concentration and other characteristics (to the extent related to air quality) of any emission. . . ."¹ Midwest Generation thought it obvious that the CPR, a listing of hardware addition and retirements, was not emissions data. There is no requirement in the statute or regulations to demonstrate that the information does not constitute emissions data probably because it is obvious. 35 Ill. Adm. Code 130.208. The IEPA, however, apparently came up with a novel theory, totally unarticulated, as to why the CPR is emissions data. Midwest Generation was not on notice as to this novel and counter-intuitive theory, and neither the IEPA procedures nor the

¹ 40 CFR 2.301(a)(2)(i)(B)

Board procedures give Midwest Generation an opportunity to meaningfully respond to this theory, whatever it may be. Unless the Board reverses its order, Midwest Generation will be prevented from introducing evidence showing that this is an unreasonable interpretation of the term "emissions data." Accordingly, Midwest Generation will be denied the opportunity to be heard in a meaningful manner unless the Board allows Midwest Generation to supplement the record.

In its Order, the Board cites 35 Ill. Adm. Code 105.214(a) for its holding that the hearing in this matter will be based exclusively on the record before IEPA at the time it issued its trade secret determination. This regulation, however, explicitly allows for the submittal of additional evidence. In relevant part, the regulation provides: "If any party desires to introduce evidence before the Board with the [sic] respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with the respect to the issue of fact." 35 Ill. Adm. 105.214(a). The Board's Order would seem to negate the protection afforded in the regulation.

Further, the authorizing statute for this regulation, the trade secret provisions of the Illinois Environmental Protection Act ("Act"), does not require the Board to base its decision exclusively on the record before the IEPA. 415 ILCS 5/7.1. Section 105.214(a) also applies to appeals of permit denials and the permitting provisions of the Act do require appeals of permit denials to be based exclusively on the record, 415 ILCS 5/40(d), unlike the trade secret provisions of the Act.

Even assuming the implementing regulations require Board review to be limited to the record developed by IEPA, this is not determinative of whether Midwest Generation's due process rights have been violated, particularly if the procedures for the development of that record fail to satisfy due process. The United States Supreme Court has made clear that due

process is a matter of Federal constitutional law, so compliance or noncompliance with state procedural requirements is not determinative of whether minimum procedural due process standards have been met. Lyon v. Department of Children & Family Services, 209 Ill. 2d 264, 807 NE 2d 423 (Ill. 2004) citing Cleveland Board of Education v. Loudermill, 470 US 532, 541, 105 S. Ct. 1487, 1492, 84 L Ed. 2d 494, 503 (1985).

Further, the cases cited in the Order pertain to appeals of permit denials and do not support the holding that “information developed after IEPA’s decision typically is not admitted at hearing or considered by the Board.” Order at 3.² First, the issue does not pertain to information “developed after IEPA’s decision” but, rather, it is information that existed before the decision but that Midwest Generation did not know it needed to put into the record nor was it given a reasonable opportunity to do so. In Community Landfill the Board expressly allowed a petitioner to supplement the record with information that was not part of the agency’s record because the information pertained to an estoppel argument the petitioner did not know it would have to make until after it received IEPA’s permit denial. Community Landfill v. IEPA, PCB 01-170; 2001 WL 1598272 at 4 (Ill. Pol. Control Bd. 2001).

Second, in Community Landfill, the issue before the court was a narrow factual issue concerning whether the IEPA had certain documents in its possession when it made a decision to deny a permit. The court merely found that the record on appeal was inadequate for it to make this determination. The court concluded: “Because this court has insufficient information to

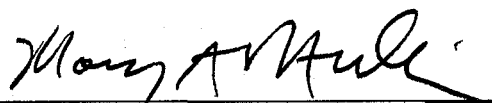
² In Alton, the court only mentioned the procedural due process issues in dicta. See Alton Packaging Corp v. Pollution Control Board, 516 NE 2d 275, 279 (Ill. App. Ct. 1987). In Alton, the court merely observed that the Waste Management case did not change the law with respect to the requirements of the hearing before the Board in a permit appeals. Alton at 280 citing Environmental Protection Agency v. Pollution Control Board, 115 Ill. 2d 65, 70 (1986) (hereafter referred to as “Waste Management”). The Waste Management court, however, found that when procedural due process is unavailable at the Agency level, the Board is not required to apply the manifest-weight test to the Agency’s findings. Waste Management at 70.

guide us in our evaluation of this issue, we must presume the hearing officer correctly excluded the evidence". Community Landfill Co. v. Pollution Control Board, 331 Ill. App. 3d 1056, 1063 (Ill. App. Ct. 2002). The issue before the court was not whether the hearing should be limited to the record, but rather, whether the IEPA properly included information in the record. The court found it could not decide the issue because the appellant had not filed a sufficient record on appeal. Id. The court did not address whether information developed after IEPA's decision was admissible.

Because the proceedings before the IEPA did not meet the test of due process, a hearing before the Board on the record developed by the IEPA cannot meet the test of due process. Therefore, Midwest Generation respectfully requests that the Board partially reverse its Order and find that Midwest Generation be permitted to supplement the record.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Sheldon A. Zabel
Mary Ann Mullin

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5540

Attorneys for
Midwest Generation EME, LLC

ATTACHMENT 1



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276, 217-782-3397
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601, 312-814-6026

ROD R. BLAGOJEVICH, GOVERNOR

RENLE CIPRIANO, DIRECTOR

217/782-5544
217/782-9143(TDD)

April 23, 2004

Andrew N. Sawula
Schiff Harden & Waite
6600 Sears Tower
Chicago, Illinois 60606-6360

**Re: Midwest Generation EME, L.L.C.
Trade Secret Justification – Commonwealth Edison information**

Dear Mr. Sawula:

The Illinois Environmental Protection Agency ("Illinois EPA") is in receipt of Midwest Generation EME, L.L.C.'s ("Midwest") trade secret Statement of Justification dated March 11, 2004 and received by the Illinois EPA on March 12, 2004. The Statement of Justification was provided at the request of the Illinois EPA and addresses information submitted by Commonwealth Edison ("ComEd") to the Illinois EPA in response to a United States Environmental Protection Agency ("USEPA") request for information under §114 of the Clean Air Act ("information request"). This letter serves as the Illinois EPA's response to Midwest's Statement of Justification.

Seven attachments marked "confidential business information" were submitted by ComEd on January 30, 2004, in response to the information request and supplement its September 11, 2003, response. Attachments A through F are responsive to information request numbers 3 and 10 and contain information from ComEd's Continuing Property Record ("CPR") for each of the six coal-fired electric generating stations subject to the information request. Midwest Gen's Statement of Justification asserts that the CPR is confidential business information as such is of competitive value to competitors and has been safeguarded by both ComEd and Midwest. The Illinois EPA is denying trade secret protection to all information contained in Attachments A through F (i.e., the CPR) responsive to information request numbers 3 and 10 except the work order numbers. Midwest and/or ComEd failed to adequately demonstrate that the information has not been published, disseminated, or otherwise become a matter of general public knowledge and/or failed to demonstrate that the information has competitive value. Further, Midwest and/or ComEd has failed to demonstrate that the information does not constitute emission data.

ROCKFORD – 4302 North Main Street, Rockford, IL 61103 – (815) 987-7760 • DES PLAINES – 9511 W. Harrison St., Des Plaines, IL 60016 – (847) 294-4000
ELGIN – 595 South State, Elgin, IL 60123 – (847) 608-3131 • PEORIA – 5415 N. University St., Peoria, IL 61614 – (309) 693-5463
BUREAU OF LAND - PEORIA – 7620 N. University St., Peoria, IL 61614 – (309) 693-5462 • CHAMPAIGN – 2125 South First Street, Champaign, IL 61820 – (217) 278-5800
SPRINGFIELD – 4500 S. Sixth Street Rd., Springfield, IL 62706 – (217) 786-6892 • COLLINSVILLE – 2009 Mall Street, Collinsville, IL 62234 – (618) 346-5120
MARION – 2309 W. Main St., Suite 116, Marion, IL 62959 – (618) 993-7200

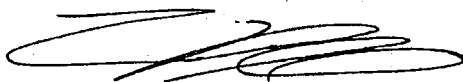
Attachment G of ComEd's response addresses information request number 4 and contains information from the Generating Availability Data System (GADs). Generally, the GADs identifies boiler and turbine related forced, maintenance and planned outages. Midwest's response failed to provide a justification addressing the GADs data thus the Illinois EPA is denying trade secret protection to the information submitted by ComEd in response to information request number 4.

Midwest (or any requestor who is adversely affected by this determination) may petition the Illinois Pollution Control Board ("Board") pursuant to 35 Ill. Adm. Code 105, Subparts A and B to review the Illinois EPA's final determination within 35 days after service of the determination. Furthermore, Midwest (or any requestor who is adversely affected by a final determination of the Board) may obtain judicial review from the appellate court by filing a petition for review pursuant to Section 41 of the Illinois Environmental Protection Act [415 ILCS 5/41]. (35 Ill. Adm. Code 130.214)

Should Midwest or any requestor petition the Board or obtain judicial review from the appellate court, the Illinois EPA will continue to protect all information for which trade secret protection has been granted until it receives official notification of a final order by a reviewing body with proper jurisdiction that reverses this determination and that is not subject to further appeal. (35 Ill. Adm. Code 130.214)

The Illinois EPA will cease protecting all information not subject to trade secret protection as discussed herein unless the Agency is served with notice of the filing of a petition for review of its determination within 35 days after service of this notice of denial on Midwest and any requestor.

If you have any questions or concerns regarding this matter please do not hesitate to contact me.



Chris Pressnall
Assistant Counsel
Division of Legal Counsel

cc: Adam Quader, Sierra Club

ATTACHMENT 2

Andrew N. Sawula
(312) 258-5577
Email: asawula@schiffhardin.com

March 11, 2004

VIA FEDERAL EXPRESS

Chris Pressnall
Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Ave. East
P.O. Box 19276
Springfield, IL 62794-9276

CONFIDENTIAL

**Re: Midwest Generation EME, LLC
FOIA Request from Sierra Club -- Midwest Generation's Statement of
Justification**

Dear Mr. Pressnall:

I am writing on behalf of Midwest Generation EME, LLC ("Midwest Generation") to provide a Statement of Justification for its claim of business confidentiality concerning information (the "Confidential Information") that Commonwealth Edison ("ComEd") submitted in response to a request for information (the "Information Request Response") from the United States Environmental Protection Agency ("U.S. EPA"). In this Statement of Justification, as required by 35 Ill Admin. Code § 130.203, Midwest Generation describes the procedures it uses to safeguard the Confidential Information, explains the competitive value of the Confidential Information and identifies the people to whom the Confidential Information has been disclosed. I attach a certification by Fred McCluskey, on behalf of the Company, that upon information and belief, the Confidential Information has not been published or disseminated, and has not otherwise become a matter of general public knowledge. (See Attachment A)

I. Procedures for Safeguarding Information (35 Ill. Admin. Code § 130.203(a))

Since Midwest Generation's incorporation, Midwest Generation's corporate policies have required all employees to closely guard confidential and proprietary information. From its incorporation until January 5, 2000, Midwest Generation followed the policy of its parent, Edison Mission Energy ("EME"), which is attached to this letter as Attachment B (the "EME Confidentiality Policy"). On January 5, 2000, Midwest Generation implemented its own policy, which is attached to this letter as Attachment C (the "Midwest Generation Confidentiality

Policy"). In accordance with these policies, confidential and proprietary information could only be disclosed to Midwest Generation employees and outside contractors "who need to know the information to carry out their duties." The policies explain how to identify confidential and proprietary information, and what steps employees are required to take to safeguard the information.

In Spring 2002, Midwest Generation implemented an additional confidentiality program that is managed by Edison International ("EIX"), which is the parent corporation of both Midwest Generation and EME. This program is known by the acronym ACT - Assess, Classify, Take Action. Currently, both ACT and the Midwest Generation Confidentiality Policy safeguard the Confidential Information from public disclosure. When ACT went into effect, each employee was required to attend a training session to learn how to (1) Assess the information he or she handles, (2) Classify that information as *public*, *internal*, or *confidential* and (3) Take appropriate action, based on the information's classification. A brochure detailing the policy and procedures of the ACT program is attached as Attachment D. Under this policy, confidential information may be communicated to employees only when they "need the information to perform their business duties." Confidential information, further, may be communicated to non-employees only if "(1) the person or entity needs the confidential information to conduct its business with or for the company, and (2) a non-disclosure agreement is executed by the person or entity or if other appropriate steps, approved by the company law department, are taken to ensure that confidentiality is maintained."

In July 2003, the Company implemented a new electronic mail retention policy (the "Email Retention Policy") to supplement ACT and the Midwest Generation Confidentiality Policy. Under the Email Retention Policy, each employee's electronic mail is automatically deleted 60 days after creation of the file, unless the employee saves the file to his or her hard drive. Once saved to a hard drive, that file is subject to the Company's standard record retention policy, which is attached as Attachment E.

II. Discussion of Competitive Value and Identification of People to whom Information has been Disclosed (35 Ill. Admin. Code §§ 130.203 (b), (d))

In its Information Request Response, ComEd submitted excerpts from ComEd's Continuing Property Record ("CPR"), which ComEd identified as "Confidential Business Information." These portions of the CPR pertain to several Midwest Generation Power Stations (namely, Crawford, Fisk, Will County, Joliet, Powerton and Waukegan). These portions of the CPR serve dual functions. To ComEd, the CPR provides information necessary for financial reporting, tax and regulatory purposes. Moreover, the CPR records many sensitive aspects of ComEd's historical business practices. To Midwest Generation, the CPR is the most

Chris Pressnall

March 11, 2004

Page 3

comprehensive source of information about the equipment installed at the fossil plants and the dates of installation, and relates to the ongoing operation and maintenance of the plants. This portion of the CPR possesses competitive value for Midwest Generation because, by looking at the nature of the projects, competitors can accurately assess Midwest Generation's environmental control strategies and can assess whether the projects will shift Midwest Generation's cost position in the marketplace. Further, if this information is released, competitors may be able to predict the Company's future maintenance costs, giving other power producers and utilities a competitive advantage.

Pursuant to the Asset Sale Agreement between ComEd and Edison Mission Energy as to Fossil Fuel Generating Assets, ComEd provided Midwest Generation a copy of the portions of the CPR that relate to Midwest Generation's stations. While ComEd retains a copy, as it is legally required to, it uses these portions of the CPR solely for financial reporting, tax and regulatory purposes and is contractually bound not to use it to Midwest Generation's competitive disadvantage. Midwest Generation only recently received the CPR from ComEd and has never provided it to any third party. Internally, key personnel in the following departments have access to pieces of information from this portion of the CPR on an as-needed basis: operations, operations engineering, accounting and finance.

Thank you for safeguarding the Confidential Information. Please feel free to contact me if you have any questions.

Very truly yours,

Andrew N. Sawula

ANS:dm

Enclosures

cc: Sabrina Argenti
Becky Lauer, Midwest Generation
Fred McCluskey, Midwest Generation
Byron Taylor
Jane Montgomery

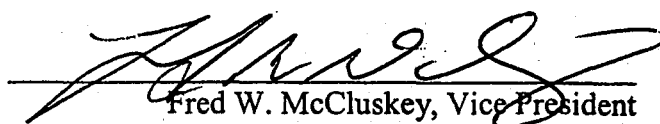
ATTACHMENT A

Certification

I, Fred W. McCluskey, do state as follows:

1. I am the Vice President, Technical Services, for Midwest Generation EME, LLC (the "Company") and I am authorized to execute this certification on behalf of the Company.
2. The Company is the owner of the information described in the Statement of Justification, for which information the Company claims trade secret protection (the "Confidential Information").
3. Upon information and belief, the Confidential Information has not been published or disseminated, and has not otherwise become a matter of general public knowledge.

Dated: March 10, 2004


Fred W. McCluskey, Vice President

ATTACHMENT B

Edison Mission Energy

Date Approved 02/14/1997	Corporate Policy Statement	Number 1000.013
Approved By E. R. Muller	CONFIDENTIAL AND PROPRIETARY INFORMATION	Supersedes 1000.013 Dated 08/09/1990

EME is engaged in the independent power production industry, which is highly competitive. Accordingly, certain aspects of EME's business operations are confidential and proprietary and must be disclosed only to EME employees who need to know the information to carry out their duties.

In particular, access to confidential and proprietary information that is not generally known to EME's competitors and that concerns:

- EME's business strategy, development plans, finances, or operating procedures;
- the detailed structure or financing of EME's business deals; or
- other EME information with actual or potential economic value

must be restricted to those EME employees with a need to know.

Before they gain access to confidential and proprietary information, EME employees must agree in writing not to misappropriate or improperly disclose such information either during or after their EME employment. After they gain access to confidential information, employees must take every reasonable step to keep it confidential. In addition, employees are forbidden from disclosing to EME or otherwise misappropriating any confidential, proprietary or trade secret information belonging to a former employer.

Confidential and proprietary information may be contained in verbal communications, employees' unwritten knowledge, traditional written or printed materials, or electronic databases. Because so much confidential information is stored in them, EME employees should treat all computer files as confidential. No employee should ever grant unauthorized access to a company computer, disclose his or her password to someone other than an EME information technology employee, or compromise any computer security device.

Employees should refrain from copying any document or computer file labelled "confidential" unless the EME vice president responsible for the matters addressed in the document or file approves the copying.

Likewise, employees must get approval from the responsible vice president before sharing confidential information with anyone outside EME -- including suppliers, customers, or partners -- or with any EME employee whose need to know the information is not readily apparent.

Finally, employees should resolve any doubts about disclosing confidential or proprietary information in favor of nondisclosure, and should refer the disclosure question to either the responsible vice president or the legal department.

Edison Mission Energy reserves the right and retains full discretion to revise, supplement or rescind this policy at any time.



EDISON
MISSION ENERGY

An *EDISON INTERNATIONAL*™ Company

Office: Americas
Section: Section 2: BUSINESS CONDUCT AND ETHICS

ATTACHMENT C

Midwest Generation EME, LLC

Date Approved 01/05/2000	Corporate Policy Statement	Number 1000.013
Approved By G. R. Nelson	CONFIDENTIAL AND PROPRIETARY INFORMATION	Supersedes Dated

Midwest Generation is engaged in the independent power production industry, which is highly competitive. Accordingly, certain aspects of Midwest Generation's business operations are confidential and proprietary and must be disclosed only to Midwest Generation employees who need to know the information to carry out their duties.

In particular, access to confidential and proprietary information that is not generally known to Midwest Generation's competitors and that concerns:

- Midwest Generation's business strategy, development plans, finances, or operating procedures;
- the detailed structure or financing of Midwest Generation's business deals; or
- other Midwest Generation information with actual or potential economic value

must be restricted to those Midwest Generation employees with a need to know.

Before they gain access to confidential and proprietary information, Midwest Generation employees must agree in writing not to misappropriate or improperly disclose such information either during or after their Midwest Generation employment. After they gain access to confidential information, employees

must take every reasonable step to keep it confidential. In addition, employees are forbidden from disclosing to Midwest Generation or otherwise misappropriating any confidential, proprietary or trade secret information belonging to a former employer.

Confidential and proprietary information may be contained in verbal communications, employees' unwritten knowledge, traditional written or printed materials, or electronic databases. Because so much confidential information is stored in them, Midwest Generation employees should treat all computer files as confidential. No employee should ever grant unauthorized access to a company computer, disclose his or her password to someone other than a Midwest Generation Information technology employee, or compromise any computer security device.

Employees should refrain from copying any document or computer file labelled "confidential" unless the Midwest Generation vice president responsible for the matters addressed in the document or file approves the copying.

Likewise, employees must get approval from the responsible vice president before sharing confidential information with anyone outside Midwest Generation -- including suppliers, customers, or partners -- or with any Midwest Generation employee whose need to know the information is not readily apparent.

Finally, employees should resolve any doubts about disclosing confidential or proprietary information in favor of nondisclosure, and should refer the disclosure question to the responsible vice president.

Midwest Generation EME, LLC reserves the right to modify, supplement, rescind or revise any provision of this policy as it deems necessary or appropriate in its discretion except the arbitration and employment-at-will

policies.



**MIDWEST
GENERATION EME, LLC**

An EDISON INTERNATIONALSM Company

Office: Chicago

Section: Section 2: BUSINESS CONDUCT AND ETHICS

ATTACHMENT D



Information Management

Resources

Information Management Web site	https://myedison.net/cpi/policies/act/act.shtml
Information Management Answer Lines	1-800-249-5989 (U.S. only) 1-626-302-1787 (outside U.S.)
Specific company information	Your manager or supervisor

Dear Fellow Employee:

Information is one of our company's most valuable assets — one that we all have a responsibility to manage and protect. To help carry out our responsibility, we established the Information Management Program.

The program's policy and procedures are detailed in this brochure. I urge you to read it to learn how to ACT:

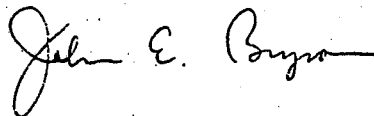
Assess the information you handle.

Classify that information as public, internal, or confidential.

Take appropriate action, based on the information's classification.

If you have questions, contact one of the Answer Lines listed above.

Protecting information depends on all of us.



John E. Bryson
Chairman, President and Chief Operating Officer
Edison International

What Is It?

Information that, if inappropriately disclosed, could provide an opportunity to gain an unwarranted economic advantage over others or would have a significant adverse impact on the company's business, legal, financial, or competitive position, or on its shareholders or employees.

Confidential information includes all information acquired or generated by the corporation that is protected by privacy laws, confidentiality agreements, and legal privileges, including trade secrets.

Examples

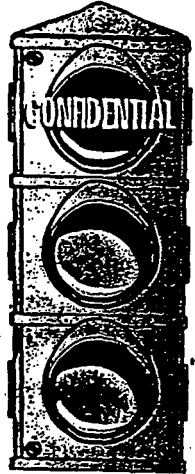
- Information on development/acquisition activity
- Strategic plans and information
- Plant availability and power marketing data
- Terms and structure of commercial contracts and financing agreements
- Many employee records

Who May Have Access?

Internally: Confidential information should be communicated only to Edison International employees who need to know it to perform their business duties.

Externally: Confidential information may be communicated to a non-employee only if the person or entity needs to know the information to conduct its business with or for Edison International; and only if a non-disclosure agreement is executed by the person or entity or if other appropriate steps, approved by the Law Department, are taken to ensure that confidentiality is maintained.

Confidential Information continued on next page



Confidential Information

Confidential Information *(continued)*

How Can It Be Communicated?

- Verbally
 - Paper copy
 - Faxes: All sheets, including the cover sheet, must be labeled "confidential."
 - E-mail: Can be transmitted internally and externally to qualified receivers. Encryption and password protection are preferred.
 - Transmitting by voice mail, cellular phone, or two-way radio is discouraged.
-

How Can It Be Protected?

- Label each page of a hard copy document "confidential."
 - Workstations must have security features to prevent unauthorized access when the authorized user is absent.
 - Electronic documents must have an on-screen notation identifying the information as "confidential."
-

How Should It Be Stored?

All confidential information should be stored in a manner that prevents access by unauthorized people who do not have a need to know.

Are There Retention/ Destruction Requirements?

Confidential information should be retained only for as long as needed for business, legal, tax, audit, or archival purposes; hard copy confidential information should then be shredded, and confidential information in electronic form should then be deleted. All confidential customer information must be shredded when it is no longer needed. Electronic confidential customer information, which is no longer needed, must be deleted by erasing or otherwise modifying the personal information in the records so that it is unreadable or indecipherable through any means.

What is it?

Information that is neither *public* nor *confidential*.

Examples

- Organization charts
- Employee lists and internal telephone directories
- Activity reports
- Training manuals and handbooks
- Procedure and policy statements
- Drafts of material that is intended for release to the public but is not final and has not yet been released.

Who May Have Access?

Internally: Internal information may be communicated to Edison International employees.

Externally: Internal information may be communicated to outside parties only if those parties need access to it to conduct business for or with Edison International.

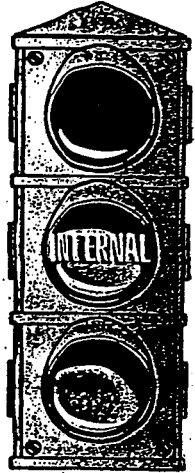
How Can It Be Communicated?

- Verbally
- Paper copy
- Fax
- E-mail

Are Protective Marks Needed?

Internal documents don't need to be marked "internal," but faxes should be marked with a notice stating that the document is for internal use and, if received in error, the sender should be notified immediately.

Internal Information continued on next page



Internal Information *(continued)*

How Should It
Be Stored?

Internal documents should be stored in a manner that reasonably prevents access by non-employees.

Are There
Retention/
Destruction
Requirements?

- Paper copies of internal documents may be recycled or otherwise discarded as appropriate.
 - Electronic files should be deleted.
-

What Is It?

Information that is created or received by the company that was developed and intended for public distribution and that has been *released to the public.*

Examples

- Company brochures and marketing materials
- Edison International Annual Report and most SEC filings (10-Ks and 10-Qs)
- *Edison News*
- Press releases

Caution

Drafts and interim versions of documents intended to be made public, but which have not yet been released, are NOT public information.

Who May Have Access?

Anyone may have access to public information.

How Can It Be Communicated?

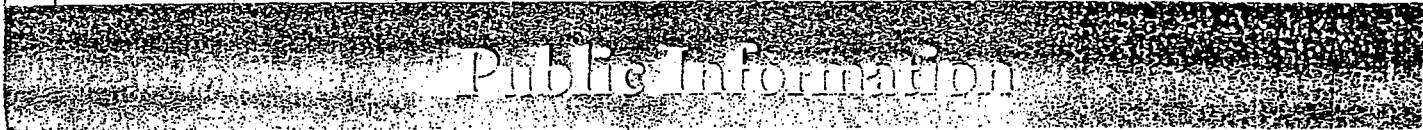
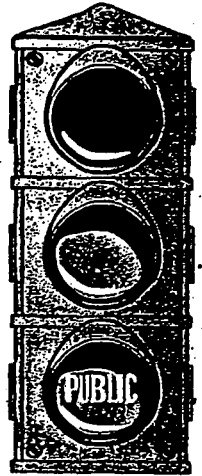
- Verbally
- Paper copy
- E-mail
- Fax
- There are no restrictions on handling public information.

Are Protective Marks Needed?

No.

How Should It Be Stored?

There are no restrictions on storing public information.





Q 1. What are the three information classifications used by Edison International?

A All information in the company falls into one of three classifications: *confidential*, *internal*, or *public*.

Q 2. Who is responsible for classifying information?

A The employee who generates or initially receives the information is responsible for classifying it.

Q 3. Who actually "owns" the information?

A All information that an employee generates or acquires through the performance of his or her business duties is the property of Edison International. It does not belong to any individual, department, or business unit; it belongs to the corporation.

CONFIDENTIAL INFORMATION ISSUES

Q 4. What is considered confidential information?

A Confidential information is that which, if inappropriately disclosed, could provide an opportunity to gain an unwarranted economic advantage over others or would have a significant impact on our business, legal, financial or competitive position, or on our shareholders or employees.

Confidential information includes all information acquired or generated by the corporation that is protected by its privacy laws, confidentiality agreements, and legal privileges, including trade secrets.

Q 5. What are some examples of confidential information?

- A • Plant availability and power marketing data
- Strategic plans and information
- Information on development/acquisition activity
- Terms and structure of commercial contracts and financing agreements
- Many employee records

Q 6. Am I required to label every page of every document with its appropriate classification?

A No. Only *confidential* information must have its classification clearly labeled on each page.

Q 7. The policy states that fax transmission of confidential information is permitted as long as the sender takes steps to ensure that the confidential information will reach only the intended recipient. What are those steps?

A There are many steps you can take to ensure that a confidential fax goes only to the intended recipient and its confidentiality is protected. The steps you take will depend on the circumstances surrounding its sending, the recipient, and the sensitivity of the confidential information involved. Here are some general examples and guidelines:

- *Always* send the fax to a particular individual, not to a general location, address, or company.
- *Always* double-check the accuracy of fax transmittal numbers before sending, and carefully enter the number on the machine.
- *Always* use a fax cover sheet and clearly mark the cover sheet "confidential."
- *Always* note on your fax cover sheet that the attached information is intended only for the

FAQs continued on next page

Frequently Asked Questions

FAQs (continued)

indicated recipient, and must be delivered promptly to that individual. It is also a good idea to request that if the fax is received by someone else, that the sender be contacted and the inadvertently received fax and any copies be returned by mail. (In that case, your fax cover sheet should also include the sender's mailing address and a contact phone number.)

Where the receiving end of the fax is a busy location and the information to be sent is particularly sensitive, one reasonable approach is to contact the recipient ahead of time to ensure that he or she can immediately pick up the fax as soon as it is sent, and contact the sender to confirm its receipt.

Q 8. Can I e-mail confidential information?

A Confidential information may be transmitted by e-mail to a recipient inside and outside of the company. However, encryption and/or password protection of such messages, if available, is preferred for both internal and external e-mail transmittal, to help protect against unauthorized interception of confidential e-mail messages. Your IT department can give you information about the availability of encryption and password protection. You should be aware, however, that even these protections aren't foolproof, and that there are more secure methods than e-mail that may be better for transmitting highly sensitive information under many circumstances.

Q 9. I will be contracting with an outside vendor for a project in our department. This project requires that the vendor have access to certain confidential information in order to complete the work

identified in the contract. Does this policy prevent me from disclosing that information?

A No. You may provide the vendor with the required confidential information so long as:

- 1) the vendor needs to know the specific information in order to conduct his or her business with Edison International, and
- 2) the vendor signs a nondisclosure agreement or takes other appropriate action, approved by the Law Department, to ensure that the information remains confidential.

Q 10. Can I use a cellular phone to discuss confidential information with an authorized person?

A Use of a cellular phone to transmit confidential information is discouraged, because cellular phone communications can be intentionally or unintentionally intercepted by outsiders.

INTERNAL INFORMATION ISSUES

Q 11. What is considered internal information?

A Internal information is all information that doesn't fall into the public category and doesn't fall into the confidential category.

Q 12. What are some examples of internal information?

- Organization charts
- Employee lists and telephone directories
- Activity reports
- Training manuals and handbooks
- Procedure and policy statements
- Drafts of material that is intended for release to the public but is not final and has not yet been released

FAQs (continued)

Q 13. May I communicate internal information to other employees of Edison International?

A Yes, *internal* information may be communicated to any employee of Edison International without restriction.

Q 14. When may I communicate internal information to a non-employee outside of Edison International?

A You may communicate internal information to outside parties if they need to know it in order to conduct business with or for Edison International.

Q 15. Does internal information have to be locked up at night?

A If your work site has restricted building access (e.g., a security guard), *internal* information may be stored in any appropriate location, like a file cabinet, bookshelf, desk drawer, or the like. These receptacles do not have to be locked, because in restricted access buildings, steps have been taken to ensure that only employees and authorized visitors have access. In facilities without restricted access (that is, where non-employees have easy access to the building and its contents) *internal* information should be stored in a manner that reasonably prevents access by non-employees. Under these circumstances, locked cabinets or drawers may be the best option.

Q 16. Am I required to shred paper copies of internal information when it is no longer needed?

A No. Paper (hard) copies of *internal* information may be recycled or otherwise discarded as

appropriate; electronic information should be deleted. Only the paper (hard) copies of *confidential* information must be shredded when they are no longer needed.

PUBLIC INFORMATION ISSUES

Q 17. What is considered public information?

A Any information created or received by the corporation that was developed and intended for public distribution and that has been released to the public. Please note that drafts and interim versions of documents intended to be public, *but which have not yet been released*, are NOT public information.

Q 18. What are some examples of public information?

- A • Company brochures and marketing materials
- Annual reports and most SEC filings like 10-Ks and 10-Qs
- *Edison News*
- Press releases

"MIXED" CLASSIFICATIONS

Q 19. Do I have to segregate hard copies of confidential information from internal information in separate files or areas?

A No. If there is a practical, business reason to file differently classified information together, you may do so. Remember, however, that confidential documents and information must be labeled "confidential," so that later reviewers of the file will be alerted to its classification.

FAQs continued on next page



EDISON
INTERNATIONAL®

Information Asset and Technology Management INFORMATION MANAGEMENT POLICY

Policy Statement

Information created or acquired by the Company's employees while performing their business duties is considered company property. Employees are responsible for protecting company property and must therefore classify all company information created or obtained in the course of their employment as public, internal, or confidential. Further, this information must be handled in a manner consistent with such classification. Additional information-handling requirements may be designated by responsible organizations under certain circumstances.

Disseminating company information outside of the Company is solely the responsibility of officers and specifically designated employees. Information that is not publicly available may only be used for legitimate company business purposes.

Policy Detail

Company Information

Information is a valuable company asset and must be treated as such. Its value can be diminished or lost if it is disclosed inappropriately. Under current law, a company's proprietary information may be protected as a trade secret if it derives economic value from not being generally known to the public, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Definition: Information

Includes oral, written, or electronically recorded information (in any form or medium) created or received by the Company in the course of its business. Information subject to this policy includes, but is not limited to, material contained in oral communications, documents, records, databases, computer files, e-mail, voice mail, or any other digital or analog medium. Any procedures governing access or use of information apply to all copies or versions of the information, regardless of format.

Classifying Information

Employees or departments that generate or acquire information for the first time must assign to that information a classification of public, internal, or confidential. New documentation containing previously classified information should be assigned the same classification as the most sensitive information contained within.

Definition: Public Information

Any information created or received by the Company that was developed and intended for public dissemination, and which actually *has been released* to the public. There are no restrictions on handling public information.

Note: Drafts and interim versions of documents that are *intended* for public release, but which *have not yet been released*, filed, or disclosed publicly, are *not* public documents.

Definition: Internal Information

All information that is neither *public* nor *confidential*. Internal information must be handled as follows:

Access: Internal information may be communicated (orally, electronically, or in writing) to the Company's employees. Internal information may be communicated (orally, electronically, or in writing) to a non-employee only if the person needs the information to conduct business for or with the company.

Policy continued on next page

Policy

Policy (continued)

Storage and Physical Security: In on-site facilities with restricted building access (security), internal information can be stored in any appropriate location. In facilities without physical restrictions on building access, internal information should be stored in a manner that reasonably prevents access by non-employees.

Retention and Destruction: Paper copies of internal documents may be recycled or otherwise discarded as appropriate. Electronic files should be deleted.

Definition: Confidential Information

Information that, if disclosed to or used by an unauthorized person, could provide an opportunity to gain an unwarranted economic advantage over others, or would have a significant adverse impact on the company's business, legal, financial, or competitive position, or on its shareholders or employees. This includes all information acquired or generated by the corporation that is protected by privacy laws, confidentiality agreements, and legal privileges, including trade secrets. Confidential information must be handled as follows:

Access: Confidential information may be communicated (orally, electronically, or in writing) to only the Company's employees who need the information to perform their business duties. Confidential information may be communicated (orally, electronically, or in writing) to a non-employee only if (1) the person or entity needs the confidential information to conduct its business with or for the company, and (2) a non-disclosure agreement is executed by the person or entity or if other appropriate steps, approved by the company law department, are taken to ensure that confidentiality is maintained.

Protective Marks and Electronic Security: Each page of a hard copy confidential document must be prominently labeled "confidential." Electronic versions of documents, records, and databases containing confidential information should contain an on-screen notation identifying the displayed information as "Confidential."

Transmittal Protocols: Facsimile transmittal is permitted as long as the sender takes steps to ensure that the confidential information will reach only the intended recipient. Facsimile cover sheets and each page of the document must identify the transmittal as "Confidential." E-mail transmittal internally and externally is permitted, but where available and practical, a higher level of protection, such as encryption and/or password protection, is preferred. Transmitting confidential information by voice mail, cellular phone, or two-way radio is discouraged.

Storage and Physical Security: All confidential material should be stored in a manner that reasonably prevents access by unauthorized people, i.e., those who do not have a "need to know." Workstations where confidential information is maintained or displayed must have security features to prevent access to confidential information when the authorized user is absent.

Retention and Destruction: Confidential information should be retained only for as long as needed for business, legal, tax, audit, or archival purposes. Confidential information should be shredded when it is no longer needed for any business purpose. All confidential customer information must be shredded when it is no longer needed. Electronic confidential customer information, which is no longer needed, must be deleted by erasing or otherwise modifying the personal information in the records so that it is unreadable or indecipherable through any means.

Additional Information Handling Requirements

From time to time and for valid business or legal reasons, responsible organizations may designate additional, more stringent handling requirements for a specific information item or project. Such requirements must be communicated to all affected employees and followed accordingly.

Revised Date: 06/20/2002

ATTACHMENT E

Midwest Generation EME, LLC

Date Approved 01/05/2000	Corporate Policy Statement	Number 1000.046
Approved By G. R. Nelson	RECORDS RETENTION	Supersedes Dated

Each department of Midwest Generation generates business information daily in the form of paper documents and computer disk files, all of which comprise one of the company's key assets. Being able to draw on this valuable resource is important to our success. It is equally important to protect this resource from possible loss or misuse by third parties. Accordingly, in order to facilitate record management both departmentally and company-wide, to effectively control document production discovery, and to manage the sheer volume of paperwork, each department within Midwest Generation shall adopt a formal records retention program to ensure that records are retained for the period required by applicable laws and business needs, and deleted promptly thereafter in order to reduce the high cost of storing, indexing and managing the data.

Contact the legal department regarding specific record retention requirements.

Midwest Generation EME, LLC reserves the right to modify, supplement, rescind or revise any provision of this policy as it deems necessary or appropriate in its discretion except the arbitration and employment-at-will policies.



Office: Chicago
Section: Section 3: BUSINESS POLICIES AND PRACTICES

RECEIVED
CLERK'S OFFICE

AUG 17 2004

STATE OF ILLINOIS
Pollution Control Board

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Midwest Generation EME, LLC's Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of June 17, 2004 and Memorandum in Support of Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of June 17, 2004, by U.S. Mail, upon the following persons:

To: Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

Robert A. Messina
General Counsel
Illinois Environmental Regulatory
Group
3150 Roland Avenue
Springfield, IL 62703

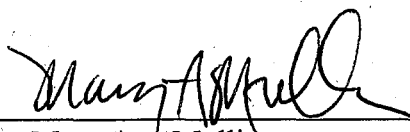
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

Keith Harley
Chicago Legal Clinic
205 W. Monroe, 4th Floor
Chicago, Illinois 60606

Dated: August 17, 2004

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
Mary Ann Mullin

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5540

One of the Attorneys for
Midwest Generation EME, LLC