BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC,	)	
Petitioner	)	**PCB 04-216**
	)	**Trade Secret Appeal**
v.	)	
	)	
Illinois Environmental Protection Agency,	)	
Respondent	)	

NOTICE OF FILING

To: Dorothy Gunn, Clerk
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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 Respondent's Memorandum in Opposition to Midwest Generation's Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of June 17, 2004. A copy is herewith served upon the assigned Hearing Officer, the attorneys for the Petitioner, Midwest Generation EME, LLC, and the attorneys for the Sierra Club.

Dated: Chicago, Illinois
September 21, 2004

LISA MADIGAN, Attorney General of the
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MEMORANDUM IN OPPOSITION TO MIDWEST GENERATION'S MOTION FOR PARTIAL RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S ORDER OF JUNE 17, 2004

Preliminary Statement

Respondent Illinois Environmental Protection Agency ("IEPA") submits this memorandum in opposition to the motion by Appellant Midwest Generation EME, LLC ("Midwest Generation") for reconsideration of the portion of the Board's order requiring that the hearing in this matter be held exclusively on the IEPA record pursuant to 35 Ill. Adm. Code 105.214(a), requesting that the issues be reviewed de novo.

Midwest Generation's request contravenes not only the Board's regulations but more than three decades of consistent Board precedent requiring that hearings be held on the agency record, to preserve IEPA' proper decisionmaking role and prevent forum shopping. Nothing in Midwest Generation's motion provides any cognizable basis for such wholesale overthrow of precedent. While Midwest Generation, like all who come before IEPA and the Board, is clearly entitled to due process, the type and level of process that is due is commensurate with the right being protected. Here, the process afforded by IEPA gave Midwest Generation ample opportunity to protect its rights and submit pertinent information. Indeed, nowhere in its motion does Midwest Generation even provide a clue as to what particular extra-record information it would like to now

introduce, and why such information could not have been provided to IEPA in the first place based on the clear delineation of relevant issues in the regulations governing trade secrets.

Point I

BOARD REGULATIONS AND PRECEDENT UNAMBIGUOUSLY REQUIRE THAT HEARINGS BE HELD ON THE RECORD

The relevant regulatory provision governing Board hearings, 35 Ill. Adm. Code 105.214(a), expressly provides,

> The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact.

This provision expressly applies to "any appeal to the Board of the Agency's final permit decisions and other final decisions of the Agency." 35 Ill. Adm. Code. 105.200. Accordingly, the Board held in the challenged order,

> 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).

Board Order, PCB 04-185 (May 6, 2004).

Notwithstanding the unambiguous nature of the applicable regulation and the precedent cited by the Board, Midwest Generation attempts to create room to accommodate its unusual request by arguing that neither the regulation nor the precedent

are definitive statements on the matter. It argues that the second sentence of the regulation should effectively be read to cancel out the first; that the lack of an express statutory provision applicable here in addition to the regulation diminishes the force of the regulation; and that the cases cited by the Board do not actually support the requirement that hearings be held on the agency record. Midwest Generation Brief at 6-7.

None of these arguments withstand scrutiny. With respect to Midwest Generation's reading of the regulation, its argument was expressly raised and dismissed in one of the matters cited by the Board, Community Landfill – indeed, by the same hearing officer presiding here, Brad Halloran. In Community Landfill, the petitioner had argued before the hearing officer, as Midwest Generation does here, that the second sentence of § 105.214(a) – "If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact" – should be read to allow it to introduce non-record evidence into the proceeding, notwithstanding the first sentence requiring hearings to be held on the record. Hearing Officer Halloran held, consistently with basic principles of interpretation, that rather than negating the first sentence, the second sentence should be read as modifying only the clause in the first sentence regarding agreements under 40(d) (which does not apply here) to supplement the record – i.e., such that the separate hearing is allowed only to address evidence brought into the proceeding through such 40(d) agreements. See Community Landfill, PCB 01-170, Transcript Volume 1 at 233-37 and December 6, 2001 Order.

Regarding the relationship between the statute and the regulations, Midwest Generation appears to suggest that the regulation lacks force as it applies to proceedings such as this one – essentially implying that inclusion of such proceedings in the on-the-record requirement was less than intentional and well thought out. See Midwest Generation brief at 6. However, this assertion is belied by the fact that the applicable regulations, which have since been amended, previously provided expressly for a de novo hearing using non-record evidence in certain circumstances. See former section 105.103(b)(8).[1] Clearly, the Board is cognizant of how to craft regulations calling for de novo proceedings when it so chooses, and it chose not to do so here.

As to the question of whether the cases cited by the Board support the board's ruling, nothing in the Board's decision in Community Landfill suggests an entitlement to a de novo hearing.[2] That case involved a specific type of procedure below that is unique to permit proceedings (a "Wells letter"), which prompted the Board to make a very

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[1] That section applied only to NPDES permit appeals, and provided in its entirety (emphasis added),

> The hearings before the Board shall extend to all questions of law and fact presented by the entire record. The Agency's findings and conclusions on questions of fact shall be prima facie true and correct. If the Agency's conclusions of fact are disputed by the party or if issues of fact are raised in the review proceeding, the Board may make its own determination of fact based on the record. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, *the Board shall conduct a de novo hearing and receive evidence with respect to such issue of fact.*

Even this express de novo provision was construed narrowly when it was in effect in order not to distort the respective roles of the board and the agency as defined in the statute. The Board held in Dean Foods v. IEPA, PCB 81-151 (August 22, 1984), quoting Olin Corp. v. IEPA, PCB 80-126 (February 17, 1982),

> The hearing de novo provisions must be construed narrowly; otherwise permit applicants will be tempted to withhold facts at the Agency level in hopes of a more friendly reception before the Board. This would encourage appeals and would place the Board in a position of being the first agency to evaluate the factual submissions. This would distort the separation of functions in the Act.

[2] Midwest Generation's citation to the appellate court decision in Community Landfill is entirely beside the point. Midwest Generation brief at 8. The Appellate court affirmed on the ground that it lacked sufficient information to determine whether the particular document that appellants wanted considered by the Board had in fact been part of the agency record. 331 Ill.App.3d at 1063.

narrow allowance for certain supplemental witness testimony that had been presented at the hearing. Nothing in that decision suggests that a wide-open de novo hearing was even considered, much less considered appropriate.[3]

Even more importantly, the purported "dicta" contained in the Board's other citation, Alton Packaging Corp., both directly and indirectly references a long and consistent line of court and Board decisions, dating back to 1972, expressly holding that hearings must be conducted solely on the agency record. 162 Ill. App. 3d at 738, citing IEPA v. PCB and Alburn, Inc., 118 Ill.App.3d 772, 780-81 (1983), citing Soil Enrichment Materials Corp. v. Environmental Protection Agency (1972), 5 Ill.P.C.B.Op. 715 and Peabody Coal Co. v. Environmental Protection Agency (1979), 35 Ill.P.C.B.Op. 380. See, e.g., Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112 (August 9, 2001) (citing numerous authorities); County of LaSalle v. IEPA, PCB 81-10 (March 4, 1982); Amax Coal Co. v. IEPA, PCB 80-63, -64 (December 19, 1980); Environmental Site Developers, Inc. v. IEPA, PCB 80-15 (June 12, 1980). Clearly, the authority supporting the Board's ruling requiring an on-the-record hearing is overwhelming; and the authority supporting Midwest Generation's proposition that there is ambiguity on this point is essentially nil.

Point II

THE REQUIREMENTS OF DUE PROCESS ARE SATISFIED BY THE PROCEDURES MANDATED BY THE BOARD'S ORDER AND SUPPORTING PRECEDENT

[3] Notwithstanding other representations by Midwest Generation, the Board's decision in Environmental Site Developers, Inc. v. EPA, PCB 80-15 (June 12, 1980) is also not to the contrary. In that case, the Board strongly reaffirmed that the issue in an appeal to the Board "is whether the Agency erred and not whether new material which was not before the Agency persuades the Board that a permit should be granted." It allowed in testimony before the Board only to "verify the facts of his application as submitted to the Agency."

Midwest Generation's argument that the long-standing hearing procedures codified in the regulations and recognized in the Board's order deprive it of due process is without basis. Although, as Midwest Generation states, procedural rules are not finally definitive of due process requirements, such rules "are a useful reference because they represent standards that the General Assembly and the Department concluded were sufficient." Lyon v. Department of Children and Family Services, 209 Ill.2d 264 (2004).

Here, Midwest Generation had ample opportunity to make its views known to IEPA, and did so. The limited basis for a trade secret claim is unambiguously laid out in the statute and regulations. See 415 ILCS 3/490; 35 Ill. Adm. Code 130.208. Under these provisions, a trade secret claimant must prove (i) that the article has not been published or disseminated or otherwise become a matter of general public knowledge, and (ii) that it has competitive value. The statute also exempts from trade secret protection all "emission data" as expressly defined under Clean Air Act § 114, 42 U.S.C. 7414 and associated regulations. See 415 ILCS 5/7, 40 C.F.R. 2.301(a)(2)(i)(B), 35 Ill. Adm. Code 130.110. Under the applicable regulations, a trade secret claimant may present the basis for its claim in a Statement of Justification, provided either at the outset or in response to a request from the agency. 35 Ill. Adm. Code 130.200 et seq.

Midwest Generation submitted information in its Statement of Justification pertinent to both statutory prongs of the trade secret definition – i.e., public availability and competitive value. IEPA's subsequent denial of trade secret protection was grounded specifically in these two prongs. Midwest Generation nowhere states either what specific additional information regarding these prongs it would have submitted upon learning of IEPA's unsurprising reliance upon them, nor why it could not have submitted that

information before receiving the denial.

IEPA's denial of protection was based additionally in the status of the documents as § 114 emission data. Midwest Generation states in its brief that it "thought it obvious" that the information in question does not constitute emission data. Midwest Generation brief at 6. However, the definitions cited above ought to have made obvious exactly the opposite proposition: that emission data includes any documents containing information necessary to determine how much a particular facility was "authorized to emit" – i.e., that would determine whether the facility's emissions constitute a violation of the Clean Air Act.[4] Here, as Midwest Generation is well aware, the United States Environmental Protection Agency ("USEPA") information requests, the responses to which are the subject of this proceeding, were all directed specifically toward determining whether its facilities were emitting pollutants in violation of the Clean Air Act New Source Review standards, which require heightened pollution controls in connection with certain types of non-routine modifications that have the effect of increasing emissions.[5] The information that Midwest Generation seeks to protect includes, among other things, a list of capital

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[4] 40 C.F.R. 2.301(a)(2)(i)(B), promulgated pursuant to § 114, includes in the definition of emission data "Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions 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)." The Illinois definition at 35 Ill. Admin. Code. 130.110 is substantially the same.

[5] The New Source Review provisions of the Clean Air Act define a plant modification that triggers heightened pollution control standards as follows:

> The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any pollutant not previously emitted."

Clean Air Act § 111(a)(4), 42 U.S.C. 7411(a)(4). In the § 114 information request, USEPA sought information concerning, inter alia, capital projects undertaken at Midwest Generation facilities (some of which may constitute § 111(a)(4) modifications) and net generation, coal heat content, and net heat rate for each plant, which is necessary for a determination of whether emissions have increased.

projects at Midwest Generation facilities (the continuing property record, or "CPR"), including modifications to those facilities. That Midwest Generation may not have put two and two together to recognize that connection is not a problem of due process.[6]

Where, as here, an agency has provided a procedural opportunity to submit information in connection with a decision, due process does not require in every circumstance that a hearing be provided with a full panoply of procedural rights. On the contrary, as observed by the Illinois Supreme Court in Lyon, "what due process entails is a flexible concept in that not all situations calling for procedural safeguards call for the same kind of procedure." 209 Ill.2d at 272 (citing various United States Supreme Court decisions). Clearly there are circumstances – e.g., criminal proceedings, license deprivations, etc. – where every available procedural right must be in place and adhered to rigorously, including the right to cross-examine and rebut unfavorable testimony. But the Board has appropriately determined that, in a trade secret matter, the Statement of Justification process outlined in the regulations at 35 Ill. Adm. Code 130.200 et seq. is sufficient to protect the interest of trade secret claimants.

Conclusion

For the foregoing reasons, IEPA respectfully requests that Midwest Generation's request for reconsideration of the Board's Order and review of this matter de novo be denied.

Dated: Chicago, Illinois
September 21, 2004

Respectfully submitted,

[6] In any event, given that the question of whether information constitutes "emission data" according to the Clean Air Act definition is essentially a legal one, it is unlikely that Midwest Generation would have had any pertinent factual information to submit.

LISA MADIGAN, Attorney General of the State of Illinois

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CERTIFICATE OF SERVICE

I hereby certify that I did on the 21st Day of September 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 Memorandum in Opposition to Midwest Generation's Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of June 17, 2004, to

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

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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