

ILLINOIS POLLUTION CONTROL BOARD

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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:

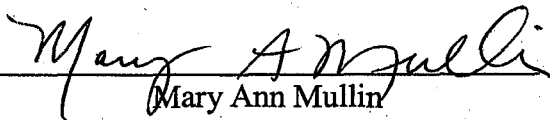
Dorothy Gunn, Clerk
Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601

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

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

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

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an original (1) and nine (9) copies of Midwest Generation's Motion for Leave to File the Attached Reply to Respondent's Opposition to Midwest Generation's Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of June 17, 2004, copies of which are herewith served upon you.


Mary Ann Mullin

Dated: October 6, 2004

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

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Midwest Generation's Motion for Leave to File the Attached Reply to Respondent's Opposition to Midwest Generation EME, LLC's Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of June 17, 2004, by U.S. Mail, upon the following persons:

Dorothy Gunn, Clerk
Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601

Robert A. Messina
Illinois Environmental Regulatory Group
3150 Roland Avenue
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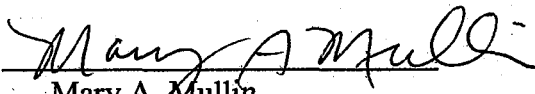
Keith Harley
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205 W. Monroe, 4th Floor
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Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

Dated: Chicago, Illinois
October 6, 2004

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
Mary A. Mullin

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

One of the Attorneys for
Midwest Generation EME, LLC

2. On June 3, 2004, Midwest Generation filed a Petition for Review of IEPA's Denial of Trade Secret Protection. On June 22, 2004, the Illinois Pollution Control Board (the "Board") accepted the Petition for Review and held, in part, that the Board hearing on this matter "will be based exclusively on the record before IEPA at the time it issued its trade secret determination." June 17, 2004 Order at 4. On August 17, 2004, Midwest Generation filed a Motion for Partial Reconsideration of the Board's Order of June 17, 2004 (hereinafter referred to as "Motion for Reconsideration") seeking reversal of the portion of the Board's Order requiring the Board hearing to be on IEPA's record.

3. In support of its Motion for Reconsideration, Midwest Generation argues that limiting the hearing to the record would deny Midwest Generation due process. Midwest Generation contends that the IEPA procedures for making trade secret determinations lacked fundamental due process protections because the procedures did not provide a meaningful opportunity for Midwest Generation to be heard. Specifically, Midwest Generation was not informed of the reasons for denial of trade secret protection and was not given an opportunity to offer evidence into the record rebutting the reasoning, whatever it may have been. Midwest Generation argues that a Board hearing limited to this deficient record would similarly deprive Midwest Generation of due process. Midwest Generation has asked that the Board partially reverse its Order and allow Midwest Generation to supplement the record once IEPA articulates the basis for its reasoning.

4. In its Opposition, IEPA, for the first time, articulates one of the reasons for its denial. In a novel and nonsensical position, IEPA claims the CPR, which is only a listing of hardware and equipment additions and retirements, is somehow "emissions data" which is not protectable as a trade secret. IEPA then argues that Midwest Generation should have somehow

guessed that this would have been the IEPA's reasoning and should have pre-emptorily addressed this issue in its Statement of Justification, the only opportunity Midwest Generation had to submit evidence into the record. Although the "emissions data" theory was not articulated until the Opposition, IEPA chastises Midwest Generation for not identifying documents in its Motion for Reconsideration that it would like to submit into the record rebutting this theory and the other, as of yet unarticulated theories, upon which it based its denial.

5. Midwest Generation will be materially prejudiced unless it is allowed to Reply to this Opposition. It is only in this Opposition that IEPA has first articulated any of the reasons for its denial of trade secret protection to the CPR. So, it only now, in the attached Reply, that Midwest Generation can explain why it would have been impossible, at the time it submitted its Statement of Justification, to guess that IEPA would consider the CPR "emissions data." It is only now in the attached Reply, that Midwest Generation can identify the types of documents it would like to submit into the record disputing the claim that the CPR is somehow "emissions data."

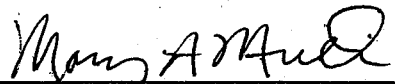
6. Further, in its Opposition, IEPA mischaracterized Board cases, claiming there is a long history of limiting hearings in trade secret appeals to the record before IEPA. In its Reply, Midwest Generation properly characterizes these cases as pertaining only to permit appeals, and demonstrates how authority cited by IEPA supports Midwest Generation's position that hearings on the record are improper if IEPA procedures violated fundamental due process requirements.

For the reasons stated here, Midwest Generation will be materially prejudiced unless it is allowed to file the attached Reply. WHEREFORE, Midwest Generation respectfully requests that the Board grant Midwest Generation's Motion for Leave to File the Attached Reply.

Dated: October 6, 2004

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Sheldon A. Zabel
Mary Ann Mullin
Andrew N. Sawula

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5687

Attorneys for
Midwest Generation EME, LLC

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PCB 04-216
(Trade Secret Appeal)

MIDWEST GENERATION'S REPLY TO RESPONDENT'S OPPOSITION TO
MIDWEST GENERATION'S MOTION FOR
PARTIAL RECONSIDERATION OF THE ILLINOIS POLLUTION
CONTROL BOARD'S ORDER OF JUNE 17, 2004

In its Motion for Partial Reconsideration, Midwest Generation EME, LLC ("Midwest Generation") has placed an issue before the Illinois Pollution Control Board (the "Board") that appears to be an issue of first impression. Midwest Generation moved for reconsideration of the portion of the Board's June 17, 2004 Order requiring the Board hearing in this trade secret appeal be based exclusively on the record before the Illinois Environmental Protection Agency ("IEPA") at the time it issued its trade secret determination. Midwest Generation argued that this portion of the Order violates Midwest Generation's right to due process. Midwest Generation identified facts, which IEPA has not contested, establishing that IEPA procedures did not provide Midwest Generation with the opportunity to offer evidence to rebut IEPA's findings. Midwest Generation argued that the right to offer evidence in rebuttal is a fundamental due process right that is not cured if the Board hearing is limited to the deficient IEPA record.

In its Opposition, IEPA argues that the Board regulations and precedent require the hearings to be on the record and that Midwest Generation is not entitled to offer evidence in rebuttal. Neither of these arguments is persuasive.

I. IEPA'S TRADE SECRET PROCEDURES DID NOT OFFER MIDWEST GENERATION AN OPPORTUNITY TO OFFER EVIDENCE IN REBUTTAL.

IEPA asserts that Midwest Generation had ample opportunity to submit information to IEPA, but it does not contest that Midwest Generation's only opportunity to submit information was when it submitted its initial Statement of Justification. The Statement of Justification is only required to address two issues – whether the materials have become publicly available and whether the materials have competitive value. 35 Ill. Adm. Code 130.208 The Statement of Justification is not required to guess or devine IEPA's reasoning. Here, of course, that reasoning remains largely unknown and IEPA does not contest that the denial failed to set forth its reasoning. IEPA also does not contest that Midwest Generation had no opportunity to respond to whatever IEPA's reasons were for the denial before it became final.

IEPA appears to argue, instead, that Midwest Generation had the obligation to anticipate IEPA's reasoning and should have pre-emptorily proffered evidence in response. Again, there is no requirement that Midwest Generation must guess at IEPA's reasoning and IEPA articulates no reason nor cites any authority for its position that the right to offer evidence in rebuttal is not a minimum right guaranteed by the due process clause. IEPA does not refute the authority cited by Midwest Generation establishing that the right to know the basis for an adverse decision and have an opportunity to offer evidence in rebuttal is a fundamental due process right. See, Memorandum in Support of Midwest Generation's Motion for Partial Reconsideration ("Midwest Generation's Memorandum") at 4-6.

IEPA argues that Midwest Generation's constitutional arguments should be rejected because Midwest Generation has not identified specific additional evidence it wishes to submit. But, apart from the position first articulated in the Opposition regarding IEPA's reasoning for determining that the Continuing Property Record ("CPR") constituted "emissions data," Midwest

Generation is still not on notice as to the IEPA's reasoning in denying its trade secret claims. Given that Midwest Generation did not even know why the claims were rejected, and that is still less than clear, it was hardly in a position to identify evidence it would introduce to rebut this reasoning.

IEPA's novel theory that the CPR is somehow "emissions data" perfectly illustrates the problems associated with the procedures at the IEPA level. The CPR is a financial accounting of hardware additions and retirements from Midwest Generation's six coal fired electric generating stations. The CPR does not contain information on pollutants emitted from the sources, and there is no information on the CPR that could be used to calculate emissions from the sources. In its Statement of Justification, Midwest Generation certified that the CPR had not been released to the public and explained why the information contained in the CPR has competitive value to the company. This certification creates a rebuttable presumption that the information has not been released to the public. 35 Ill. Adm. Code 130.208 As IEPA acknowledges in its Opposition, these are the only two showings required by the trade secret regulations. Opposition at 6. 35 Ill. Adm. Code 130.208 While the trade secret statute excludes certain types of information from protection, the regulations do not require submitters to demonstrate, at the outset, that the information does not fall within any of the statute's many exclusions, such as emissions data. See 35 Ill. Adm. Code 130 et seq. Midwest Generation was not required to guess that IEPA might conclude one of those exclusions applied and it certainly had no notice that IEPA had, or would post hoc come up with a nonsensical interpretation of the term "emissions data". Accordingly, Midwest Generation could not have dealt with this argument pre-emptorily in its Statement of Justification and had no opportunity to do so after learning of

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this new interpretation or to rebut IEPA's totally unanticipated and unjustified categorization of the CPR as "emissions data."

Although IEPA's position is still unclear, it seems to be taking the position that "emissions data" is any information relevant to determining how much a particular facility is "authorized to emit". IEPA's interpretation of "emissions data" is strained, leading it to an unauthorized and unjustified expansion of the definition to include the CPR. IEPA relies upon the following definition of "emissions 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).

40 CFR 2.301(a)(2)(i)(B). Pursuant to this definition, "emissions data" is the data necessary to determine the identity, amount, frequency, concentration or other characteristics of a source's emissions. The regulation says "under an applicable standard," it does not say "to determine what the applicable standard is." The regulation presumes knowledge of the applicable standard; "emissions data" is the information used to determine compliance with the standard – with the authorization – not the information used to determine what the standard or authorization is. Even if, as IEPA contends, the CPR will aid in determining "what the facility is authorized to emit," Opposition at 6-7, that is determining what regulatory limits may apply, but is not, itself, "emissions data."

Midwest Generation is fully aware that the United States Environmental Protection Agency ("USEPA") requested Commonwealth Edison's ("ComEd's") CPR in connection with an investigation of ComEd's compliance with the Clean Air Act's New Source Review ("NSR")

provisions.¹ These provisions require sources to apply for NSR permits if they undertake major modifications to the facility. See e.g. 40 CFR 52.21. In relevant part, a major modification is defined as a physical change that results in a significant net emissions increase. 40 CFR 52.21 (2)(i). Physical changes do not include routine maintenance, repair and replacement. 40 CFR 52.21 (2)(iii). USEPA requested the CPR to determine if ComEd had undertaken any non-routine physical changes, not to calculate ComEd's emissions. USEPA already has all of ComEd's emissions data. To determine if the projects identified on the CPR caused emissions increases, USEPA will use the actual emissions data ComEd has annually submitted to USEPA as required by its permit.

However, unless the Board reverses its ruling, Midwest Generation will be prevented from showing that it is impossible to calculate emissions data from the CPR, will be prevented from introducing evidence that ComEd has submitted all actual emissions data without a trade secret claim, will be prevented from introducing evidence that the USEPA and IEPA have never before considered the information contained in the CPR to be emissions data, and will be prevented from introducing evidence from experts that this interpretation is improper.

Midwest Generation does not know IEPA's other reasons, if any, for its denial of trade secret status to the CPR. If IEPA determined that release of the CPR would not cause competitive harm, Midwest Generation does not know the basis for that determination and does

¹ Even assuming the CPR is "emissions data", the trade secret provisions of the Environmental Protection Act only exclude from protection "emission data reported to or otherwise obtained by the Agency, the Board or the Department in connection with any examination, inspection or proceeding under this Act." 415 ILCS 5/7(c). The CPR was neither reported to IEPA nor was it obtained in a proceeding under the Act; rather, IEPA obtained a copy of the CPR after ComEd submitted the document in response to the USEPA's investigation under the federal Clean Air Act. Accordingly, even if the CPR can somehow be considered "emissions data," the trade secret provisions of the Environmental Protection Act do not automatically exempt the CPR from trade secret protection.

not concede that IEPA has any expertise in matters of competition. Given the opportunity, if Midwest Generation had known the basis of the denial, it would have submitted additional evidence on how the release of the CPR can cause competitive harm to Midwest Generation.

II. Board Precedent Does Not Support Limiting Hearings to the Agency Record in Trade Secret Appeals.

There is no basis for IEPA's claim that there is a long history of Board precedent limiting hearings in trade secret appeals to the record. IEPA has not cited a single case in support of this assertion. Instead, IEPA has cited cases concerning appeals of permit denials. These cases are inapposite for exactly the reason this issue is before the Board today. Permit applicants, unlike those seeking trade secret protection, are given an opportunity to respond to a potential denial before the denial is issued. As noted in Community Landfill:

A 'Wells letter', is a letter that the Agency is required to submit to a permit applicant under certain conditions pursuant to Wells Manufacturing Company v. IEPA, 195 Ill. App. 3d 593; 552 N.E. 2d 107 (1st Dist. 1990) The letter provides the permit applicants an opportunity to respond to potential denial reasons before a denial letter is issued.

Community Landfill v. IEPA, PCB 01-170, 2001 WL 1598282 at 5 (Ill. Pol. Control Bd. 2001).

As discussed in Midwest Generation's Memorandum, the Wells court found that the existing permit proceedings were flawed at the IEPA level because the permit applicant did not have the opportunity to proffer evidence in rebuttal to IEPA findings. Wells at 597. See also Midwest Generation's Memorandum at 4.

As a result of the Wells decision, IEPA has adopted procedures whereby it notifies permit applicants, the "Wells letter," of its intent to deny, accompanied by a detailed statement of basis. See, e.g., Ill. Adm. Code 705.141. The "Wells letter" was developed to cure, in permit proceedings, the very same due process problem Midwest Generation has raised here. As a result, permit applicants now have an opportunity to submit additional comments and data as

well as request a public hearing before the denial is final. See, e.g., 35 Ill. Adm. Code 705.181. Accordingly, in permit appeals, it may be appropriate to limit a Board hearing to the record before the IEPA because the permit applicant has had a meaningful opportunity to offer evidence in rebuttal, unlike those seeking trade secret protection. In fact, Wells is more indicative of the need for IEPA to provide Midwest Generation with the opportunity to proffer evidence in rebuttal to the denial of trade secret status for the CPR. Given Wells, IEPA's reference to the "long history of Board precedent limiting trade secret appeal hearings to the record" and its failure to cite any trade secret cases, particularly cases subsequent to Wells, is completely misplaced and supports Midwest Generation's position.

Further, many of the permit appeal cases relied on by IEPA actually support the proposition that the Board allows petitioners to supplement the record if the petitioners were denied that opportunity at the IEPA level. IEPA's argument that Community Landfill does not stand for an entitlement to a *de novo* hearing is largely irrelevant. In Community Landfill, the Board allowed petitioners to supplement the record to rebut IEPA findings, the precise remedy Midwest Generation is seeking. In Community Landfill, the Board cited the general proposition that hearings in denials of permit appeals are held on the record, but the Board made an exception to that general proposition and allowed the petitioner an opportunity to offer evidence in rebuttal, because the petitioner had been denied that opportunity at the IEPA level.² Community Landfill v. IEPA, at 4.

Similarly, in Environmental Site Developers, Inc v. EPA, an appeal of a denial of a solid waste disposal site development permit, the Board allowed petitioners to introduce new evidence

² There could be a serious question whether even this, or a hearing *de novo* is sufficient to satisfy due process; that the opportunity to rebut must occur at the initial decision-making stage, at the IEPA stage, not later. The Board could avoid this issue by remanding this case back to IEPA and requiring IEPA to follow procedures that comport with due process.

at the hearing. Environmental Site Developers v. Environmental Protection Agency, PCB 80-15,1980 WL 13571 *3 (June 12, 1980). During the hearing, IEPA testified that it denied the permit because of the water pollution potential of certain sludges, although this basis was not specified in the permit denial letter. Id. The Board allowed petitioners to introduce additional evidence, not included in its application, proving that the material was inert. Id. In reversing the IEPA's decision, the Board observed, "This case could have been handled more easily had the Agency fully complied with the requirements of Section 39(a) of the Act in issuing a denial letter and had ESD responded with a supplemental application." Id. Accordingly, in both Community Landfill and Environmental Site Developers, the Board did not restrict the hearing to the IEPA's record; rather it allowed permittees to supplement the record as fairness and due process required.

IEPA argues that the Board regulation requiring that appeals of IEPA trade secret determinations be heard exclusively on the record preserves IEPA's proper decisionmaking role and prevents forum shopping. Opposition at 1. Midwest Generation is not forum shopping. The company would have gladly provided IEPA with evidence in rebuttal had it known of IEPA's reasons for the denial and been given an opportunity to offer evidence in rebuttal. Midwest Generation is only seeking to exercise its fundamental right to due process, not to forum shop.

For the reasons set forth above, Midwest Generation respectfully requests that the Board partially reverse its order and find that the Midwest Generation be permitted to supplement the record in order to offer evidence in rebuttal.

Dated: October 6, 2004

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: Mary Ann Mullin

Sheldon A. Zabel
Mary Ann Mullin
Andrew N. Sawula

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5687

Attorneys for
Midwest Generation EME, LLC

CH2\1148471.4