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STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION EME, LLC

Petitioner,

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,**

Respondent.

PCB 04-185

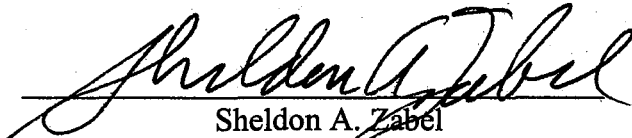
(Trade Secret Appeal)

NOTICE OF FILING

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

Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
Office of the Attorney General
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 Midwest Generation EME, LLC's Motion to Strike the Attorney General's Clarification of IEPA's Trade Secret Determination, a copy of which is herewith served upon you.


Sheldon A. Zabel

Dated: December 9, 2004

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

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**MIDWEST GENERATION EME, LLC'S MOTION
TO STRIKE THE ATTORNEY GENERAL'S
CLARIFICATION OF IEPA'S TRADE SECRET DETERMINATION**

Pursuant to 35 Ill. Adm. Code § 101.500, Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Motion to Strike the Attorney General's Clarification of IEPA's Trade Secret Determination, or alternatively, portions thereof, and hereby states as follows:

1. On November 4, 2004, the Illinois Pollution Control Board (the "Board") ordered the Illinois Environmental Protection Agency (the "IEPA") to file a supplemental trade secret decision "that states the reasoning behind IEPA's March 10, 2004 denial of trade secret protection" to certain business information Midwest Generation provided to IEPA. November 4, 2004 Order at 34. The Board specified that the matter was being sent "to IEPA for the limited purpose of having IEPA state the reasoning for its March 10, 2004 denial of trade secret protection". November 4, 2004 Order at 1-2.

2. On November 30, 2004 the Attorney General submitted a letter to the Board, on Attorney General letterhead, which purported to be IEPA's "clarification" of IEPA's trade secret determination. (the "AG's Letter"). The AG's Letter does not constitute compliance with the

Board's Order and should be stricken. The Board directed IEPA, not the Attorney General, to clarify its decision. Putting aside the propriety of the Board's Order, it was directed to the IEPA which has the exclusive legislative authority to decide such trade secret matters. See 415 ILCS 5/7.1 While IEPA may surely seek advice of its counsel, it cannot abdicate its statutory duties, nor can IEPA's counsel assume decision-making authority for its client.¹ The Board did not, nor could it, authorize the Attorney General to supplement IEPA's decision because that office has no independent statutory authority to issue IEPA's trade secret determinations. On its face, this letter should be rejected as non-compliant with the Board's order.

3. Alternatively, Midwest Generation moves to strike portions of the AG's Letter as being beyond the scope of the Board's Order. First, the AG's Letter articulates a new ground for denying trade secret protection rather than merely "stating the reasons for [the] March 10, 2004 denial." as required by the November 4, 2004 Order. The Board did not authorize the Attorney General, or IEPA, to revisit IEPA's determination to create new grounds for denying protection to Midwest Generation. Rather, IEPA was limited to its original decision and only ordered to explain the reasons that supported its March 10, 2004 Denial. November 4, 2004 Order at 29-31. The March 10, 2004 Denial specified the following basis for denying protection to the business information contained on pages MWG 0024 – MWG 0056 of the submittal to IEPA (hereafter the "Generation Chart"):

Midwest 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.

¹ In this regard, the letter was on the Attorney General's letterhead, mailed from the Attorney General's Chicago office, and signed by an Assistant Attorney General on behalf of an IEPA employee.

March 10, 2004 Denial at 1. The AG's Letter, however, goes beyond explaining why these conclusions were made by adding a new basis for the denial; the Attorney General now asserts, for the first time, that the Generation Chart constitutes emissions data. AG's Letter at 4-5. The Board did not authorize the Attorney General, or IEPA, to issue a new denial, the Board only authorized IEPA to explain the reasoning supporting the March 10, 2004 Denial. Accordingly, the portions of the letter pertaining to the new argument that the Generation Chart is emissions data is contrary to the Board's Order and should be stricken.

4. Second, Midwest Generation moves to strike the portions of the AG's Letter that contain false and irrelevant statements regarding conversations between the IEPA and Midwest Generation. The Attorney General claims that prior to making its trade secret determination, the IEPA had discussions with Midwest Generation about purported deficiencies in Midwest Generation's Statement of Justification. See AG's Letter at 2. This assertion is false. As set forth in the attached affidavit of Mary Ann Mullin, an attorney for Midwest Generation, Midwest Generation did not have conversations with IEPA about alleged deficiencies in its Statement of Justification before the March 10, 2004 Denial was issued. After receipt of the March 10, 2004 Denial, Midwest Generation did have conversations with IEPA to discuss the denial. The representation that IEPA had pre-decisional conversations with Midwest Generation is false and should be stricken from the record.

5. In addition, even if this paragraph were true, it still should be stricken because it is not relevant to the limited purpose of the November 4, 2004 Order. The Board ordered IEPA to explain the reasoning behind its determination. This paragraph does not explain IEPA's reasoning, it is only a self-serving, belated and misguided attempt to create the false impression with the Board, and in the record, that Midwest Generation had an opportunity to know, discuss

and respond to the reasoning for the IEPA's decision in advance of it becoming final in the March 10, 2004 Denial. This obvious attempt to bolster the IEPA's position on the due process issue is not before the Board at this time. The time to make this argument, if at all, was when this issue was briefed this past summer.

WHEREFORE, Midwest Generation respectfully requests that the Board enter an order striking the AG's Letter in its entirety. Alternatively, Midwest Generation respectfully requests that the Board strike (1) the portions of the AG's Letter on pages 3, 4, and 5 relating to the newly created argument that the Generation Chart contains emissions data; and (2) the false and irrelevant paragraph on page 2 of the AG's Letter alleging that Midwest Generation and IEPA had conversations about Midwest Generation's Statement of Justification before the IEPA issued its March 10, 2004 Denial be stricken.

Dated: December 7, 2004

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Sheldon A. Zabel

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

Attorney for
Midwest Generation EME, LLC

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AFFIDAVIT OF MARY ANN MULLIN

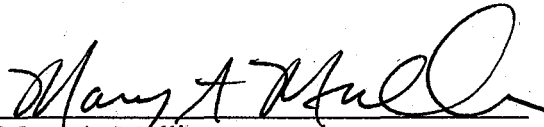
I, Mary A. Mullin, being duly sworn, testify to the following facts of which I am personally aware:

1. I am an attorney with Schiff Hardin, LLP. Schiff Hardin, LLP has represented Midwest Generation, EME, LLC in connection with the assertion of Midwest Generation's trade secret claims pertaining to certain business information provided to IEPA on November 6, 2003. I assisted in drafting Midwest Generation's Statement of Justification submitted to IEPA on January 23, 2004.


2. On or about March 15, 2004, Schiff Hardin received the IEPA's March 10, 2004 denial of trade secret protection as to this business information. ("March 10, 2004 Denial"). On March 18, 2004, I had my first conversation with IEPA regarding the March 10, 2004 Denial and Midwest Generation's Statement of Justification. I did not discuss Midwest Generation's Statement of Justification with IEPA before the March 10, 2004 Denial was issued.

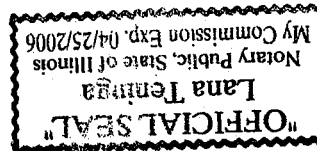
3. After appropriate investigation, I have no knowledge of any Schiff Hardin attorney who had discussions with IEPA regarding the sufficiency of Midwest Generation's Statement of Justification before the March 10, 2004 Denial was issued.

4. Even during the post-decisional discussions I had with IEPA, IEPA never discussed Midwest Generation's "apparent failure to follow its own procedures for ensuring protection of trade secret information" or the failure "to address the complete chain of custody for the information in dispute" as alleged in the Attorney General's letter of November 30, 2004.


Mary A. Mullin

Signed and subscribed to before me
On this 9th day of December, 2004


Notary Public



CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Midwest Generation EME, LLC's Motion to Strike the Attorney General's Clarification of IEPA's Trade Secret Determination, by U.S. Mail, upon the following persons:

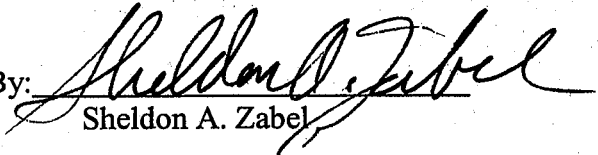
Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
Office of the Attorney General
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

Dated: Chicago, Illinois
December 9, 2004

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

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
Sheldon A. Zabel

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
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One of the Attorneys for
Midwest Generation EME, LLC