

ILLINOIS POLLUTION CONTROL BOARD

July 7, 2005

COMMONWEALTH EDISON COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 04-215
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

MIDWEST GENERATION EME, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 04-216
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	(Not Consolidated)
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by A.S. Moore):

In this order, the Board determines only that the above-captioned trade secret appeals will not be consolidated and that documents related solely to one appeal are not to be docketed in both.

Commonwealth Edison Company (ComEd) and Midwest Generation EME, LLC (Midwest) have separately appealed two trade secret determinations of the Illinois Environmental Protection Agency (IEPA). In each determination, IEPA denied trade secret protection from public disclosure for information about six coal-fired generating stations. The stations are formerly owned by ComEd and currently owned by Midwest. The information claimed to be trade secret in each appeal was submitted to IEPA by ComEd and some of the same information is at issue in each appeal. The Board docketed ComEd's appeal as PCB 04-215 and Midwest's appeal as PCB 04-216.

In a June 17, 2004 order, the Board accepted the two appeals for hearing. In that order, the Board also directed the parties to address whether the appeals should be consolidated for purposes of hearing and decision. IEPA, ComEd, and Midwest each filed initial and responsive pleadings on the question of consolidation. For the reasons below, the Board is not consolidating

the appeals at this time. The Board today is also granting ComEd's motion to strike from the PCB 04-215 record those pleadings relating only to Midwest's appeal, PCB 04-216.

In this order, the Board first provides background on the two appeals. The Board then discusses the pleadings on consolidation, decides whether to consolidate the two appeals, and rules on ComEd's motion to strike.

BACKGROUND

On June 2, 2004, ComEd timely filed a petition asking the Board to review an April 23, 2004 IEPA trade secret determination. On June 3, 2004, Midwest timely filed a petition asking the Board to review a separate April 23, 2004 IEPA trade secret determination. On June 17, 2004, the Board accepted the appeals for hearing and granted each petitioner's request that any hearings be held *in camera* to avoid unauthorized disclosure of information claimed to be trade secret.

As the Board noted in its June 17, 2004 order, ComEd states that it submitted to IEPA information claimed to be trade secret. According to ComEd, the information was submitted in response to an information request made by the United States Environmental Protection Agency (USEPA) under Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). The information requested by USEPA allegedly included excerpts from a "Continuing Property Record" (CPR) and "Generating Availability Data System" (GADs) data relating to the six coal-fired generating stations formerly owned by ComEd and currently owned by Midwest: the Crawford, Fisk, Joliet, Powerton, Will County, and Waukegan power stations. Midwest states that it purchased the six stations in December 1999 and received a copy of the CPR pursuant to an asset sale agreement.

According to ComEd, IEPA asked ComEd to provide a statement justifying the trade secret claims, and ComEd accordingly submitted a statement of justification to IEPA. Midwest maintains that after it was informed of IEPA's request that ComEd provide a statement justifying the trade secret claims, Midwest submitted an independent statement of justification to IEPA concerning the CPR. Midwest's statement of justification did not address the GADs data.

Therefore, based on the petitions for review, all of the information claimed to be trade secret in these appeals was submitted by ComEd, and concerns the same six coal-fired generating plants. Unlike ComEd, however, Midwest does not appeal IEPA's trade secret determination on the GADs data. Both petitioners do appeal IEPA's determination that the CPR submitted does not constitute trade secret.

The Board, in its June 17, 2004 order, directed the parties to address whether it would be appropriate to consolidate the two appeals for purposes of hearing, if any, and decision. After the Board hearing officer extended the filing deadline, ComEd, on July 26, 2004, filed its "Opposition to Consolidation" (ComEd Opposition). On the same date, Midwest filed its "Opposition to Consolidation" (Midwest Opposition). Also on July 26, 2004, IEPA filed a document supporting consolidation entitled "Response to the Board's June 17 Order Concerning Consolidation" (IEPA Support). On August 5, 2004, ComEd filed a "Reply to the IEPA's Response" (ComEd Response) and Midwest filed a "Reply to IEPA's Response" (Midwest

Response). On August 6, 2004, IEPA filed a “Response to [ComEd’s and Midwest’s] Opposition to Consolidation” (IEPA Response).

In addition, on September 21, 2004, ComEd filed a “Motion to Strike Pleadings Unrelated to PCB 04-215 from the Docket” (Motion to Strike). IEPA did not respond to ComEd’s Motion to Strike.¹

DISCUSSION

Consolidation

ComEd

ComEd asks the Board to maintain the two appeals as “separate and independent proceedings.” ComEd Opposition at 2. ComEd states that “consolidation of PCB No. 04-215 and PCB 04-216 will cause material prejudice, administrative confusion, and inconvenience to each company.” *Id.* ComEd incorporates by reference Midwest’s initial filing, discussed below, opposing consolidation. *Id.*

Additionally, ComEd notes that contrary to IEPA’s assertion, the two appeals do not involve the same set of documents: “PCB 04-215 concerns excerpts from the CPR and GADs data. PCB 04-216 only concerns excerpts from the CPR.” ComEd Response at 2. Moreover, according to ComEd, the interests in the excerpts from the CPR “differ between ComEd, as former owner of the coal-fired generating stations, and Midwest Generation, as the current owner of the coal-fired generating stations.” *Id.* Further, each company “maintains its own set of corporate policies and procedures protecting the information, and the information has competitive value to the companies for different reasons.” *Id.*

ComEd concludes that consolidation would result in a proceeding that is “inconvenient and confusing” and would “not alleviate the time, resources or expenses incurred by any party or the Board.” ComEd Response at 2.

Midwest

Midwest argues that consolidation “will cause administrative confusion.” Midwest Opposition at 2. Midwest states that it does not have an interest in the GADs data and that ComEd’s appeal, unlike Midwest’s appeal, concerns claims of trade secret protection for the GADs data. Midwest only appeals IEPA’s trade secret determination concerning the CPR. Midwest further notes that while both it and ComEd have an interest in the CPR, “each company’s interest is different.” *Id.*; Midwest Response at 1-2.

¹ There are several other motions pending in these proceedings, including Midwest’s motion for partial reconsideration in PCB 04-216 and Sierra Club’s motions to intervene in both appeals, all of which the Board will rule on at a later date.

According to Midwest, even though “both companies claim that the same document is trade secret, there are not sufficient common issues of fact to warrant consolidation.” Midwest Opposition at 2. Both companies, Midwest continues, are owners of the CPR and each has the right to claim trade secret protection, requiring the Board to make separate factual determinations for each petitioner in evaluating their claims. Specifically, before the Board can decide whether the article is a trade secret, Midwest maintains that the Board must determine:

1) whether the petitioner properly complied with the procedures for making a claim and justification; 2) whether the petitioner has published or disseminated the CPR; and 3) whether the CPR has competitive value to that petitioner. These determinations will rest upon entirely different facts. *Id.*

Midwest notes that it and ComEd submitted independent statements of justification to IEPA and that the CPR “possesses competitive value to petitioners for different reasons.” Midwest Opposition at 3. According to Midwest, consolidation will not decrease the amount of evidence presented to the Board; “rather, it will expand the hearing time for each petitioner, as they will need to be present for each other’s cases.” Midwest Opposition at 3; Midwest Response at 2. Midwest concludes that consolidation is further unwarranted because the burdens of proof vary in that each petitioner will “have to prove a different set of facts.” Midwest Opposition at 4.

IEPA

IEPA supports consolidation, noting that the two appeals concern “the same set of documents” submitted by ComEd to USEPA with a copy to IEPA. IEPA Support at 1. Accordingly, IEPA continues, the IEPA administrative records of the two appeals are “close to identical, with the only difference between them being the separate trade secret justification statements submitted by [ComEd] and [Midwest].” *Id.* IEPA argues therefore that consolidating the two appeals is in the interest of conveniently, expeditiously, and completely determining the claims. *Id.* at 2.

IEPA also asserts that the burdens of proof in the two proceedings “do not vary.” IEPA Support at 2. According to IEPA, “[r]egardless of the particular factual claim at issue, the burden remains on appellants to prove those claims in accordance with the Board’s June 17 order and authorities cited therein.” *Id.* at 4.

IEPA further argues that ComEd and Midwest “disregard entirely the fact that the salient issue in this proceeding will be the legal, not factual, issue of whether the information for which trade secret protection is claimed constitutes emission data that is exempt from trade secret protection under the [federal] Clean Air Act.” IEPA Response at 1. This legal issue is “identical” with respect to both petitioners, according to IEPA. *Id.* at 2. IEPA states that the Board’s decision on whether this information constitutes emission data will have “wide-reaching precedential impact,” so it is critical that the Board issue a “unified ruling rather than running the risk of conflicting rulings in separate proceedings.” *Id.*

IEPA maintains that despite the “small number of differences” between the two appeals, neither petitioner shows how the differences “justify entirely separate proceedings.” IEPA Response at 1. According to IEPA, absent consolidation, the resources of the Board and IEPA will be significantly wasted in “identical parallel proceedings on the major issue that both appeals share.” *Id.* at 1, 3. IEPA asserts that Midwest could simply be given “permission to decline to appear for those portions of the proceeding that do not concern it.” *Id.* at 3.

According to IEPA, the alleged differing factual issues between the two proceedings raised by Midwest are “illusory.” IEPA Response at 3. First, IEPA points out that it is uncontested that both petitioners complied with the procedures for making a trade secret claim. Second, IEPA argues that Midwest misstates the relevant standard for whether an article is a trade secret: the issue is whether the article in question has been published or disseminated *by anyone*, not necessarily by the particular petitioner before the Board. *Id.* The facts relevant to whether the information is public or not are “identical” for both petitioners, IEPA maintains. *Id.* Finally, according to IEPA, issues of competitive value are relevant only to Midwest “[g]iven ComEd’s clear lack of any direct interest in information pertaining to the plants it no longer owns.” *Id.* at 4.

Board Ruling on Consolidation

The Board’s procedural rules allow for consolidating proceedings. Section 101.406 of those rules provides:

The Board, upon the motion of any party or upon its own motion, may consolidate two or more proceedings for the purpose of hearing or decision or both. The Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary. 35 Ill. Adm. Code 101.406.

The Board need not reach all of the myriad issues raised by the parties. At bottom, the Board cannot find at this time that consolidation would serve the interest of conveniently, expeditiously, and completely deciding the two appeals. ComEd claims that the CPR and GADS data are trade secret, but Midwest has no interest in the GADS data. Midwest claims only that the CPR is trade secret, so the GADS data is not at issue in the Midwest appeal. Petitioners also submitted separate statements of justification to IEPA, resulting in separate IEPA determination letters, all of which are part of separate IEPA records. Therefore, though *some* of the claimed information overlaps, the appeals are significantly divergent. Additionally, the Board’s hearing in each appeal is generally limited to the IEPA record in that appeal. *See Midwest Generation EME, LLC v. IEPA*, PCB 04-185 (Nov. 4, 2004), *appeal dismissed sub nom. Midwest Generation EME, LLC v. PCB, IEPA*, No. 3-04-0945 (3rd Dist., Mar. 4, 2005).

Under these circumstances, the Board finds that consolidating the two trade secret appeals into one hearing runs the risks of not only potential confusion and waste, but prejudice though inadvertent unauthorized disclosures. These risks outweigh any apparent benefits that

may flow from consolidation. The Board also finds that keeping these proceedings separate will provide a clearer record for the appellate court should any party exercise its independent right to appeal the Board's final trade secret decision. *See* 415 ILCS 5/41(a) (2004).

In addition, IEPA's concerns over unnecessarily expending State resources on two separate proceedings can be largely addressed through efficaciously scheduling the two hearings, as discussed below. Nor is there any prospect, as IEPA suggests, of the Board issuing inconsistent rulings in the two appeals. The Board, of course, is mindful of its own precedent and can take administrative notice of occurrences in another of its proceedings as needed. *See* 35 Ill. Adm. Code 101.630. Accordingly, the Board declines to consolidate PCB 04-215 and PCB 04-216 at the present time.

Motion to Strike

ComEd states that filings pertaining only to PCB 04-216 have been included in the electronic docket for PCB 04-215 on the Board's Web site, "leading to confusion and misrepresenting the activity in PCB No. 04-215." Motion to Strike at 2. ComEd identifies several allegedly "improperly posted" filings made by Sierra Club, which seeks to intervene in both appeals. *Id.* at 2-3. ComEd asks the Board to "enter an order providing that only documents related to PCB 04-215 be included in that appeal's docket, electronic and otherwise, and providing that all parties filing matters in PCB 04-215 and PCB 04-216 include the correct captions and titles." *Id.* at 3.

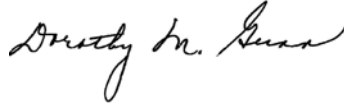
IEPA did not respond to ComEd's motion and therefore waives any objection to the Board granting it. *See* 35 Ill. Adm. Code 101.500(d). Especially in light of today's ruling against consolidation, the Board grants ComEd's motion to strike from the PCB 04-215 docket pleadings related only to PCB 04-216. Consistent with this decision, the Board directs the Clerk to remove from the respective records of these two appeals any filings that pertain only to the other proceeding, and to modify the docket sheets accordingly. Future filings in each appeal therefore should not use the joint caption appearing in today's Board order, but instead should use the caption of *either* PCB 04-215 *or* PCB 04-216, as appropriate.

CONCLUSION

The Board declines to consolidate these two trade secret appeals, PCB 04-215 and PCB 04-216, at this time. Though the proceedings are not consolidated, the Board directs the hearing officer to consider holding the two hearings consecutively and to otherwise manage these cases so as to allow for the most efficient use of the resources of the Board and the parties. In addition, the Board grants ComEd's motion to strike from the PCB 04-215 docket pleadings unrelated to that appeal, and directs the Clerk to amend the records of each appeal as needed to ensure that neither record contains any filing related solely to the other appeal.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 7, 2005, by a vote of 4-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board