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FEB 16 2006

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION EME, LLC
Petitioner,

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,**
Respondent.

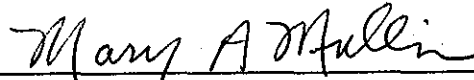
PCB 04-216
(Trade Secret Appeal)

NOTICE OF FILING

To: 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 an original (1) and nine (9) copies of Petitioner's Motion to Compel, a copy of which is herewith served upon you.



Mary Ann Mullin

Dated: February 16, 2006

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

2. Pursuant to the Hearing Officer's August 25, 2005 Discovery Scheduling Order, Midwest Generation served Respondent with interrogatories and document requests. Certain of these interrogatories and document requests sought information relating to Respondent's past trade secret determinations under 35 Ill Admin Code § 130 and Respondent's past determinations regarding what information constitutes "emissions data". The relevant interrogatories and document requests are set forth below:

Interrogatory No. 13: Identify any determination you have made relating to the trade secret status of a business's financial information submitted to IEPA.

Interrogatory No. 14: Identify any determination you have made that information constitutes "emission data" as that term is now or was in the past defined under Section 5/7 of the Illinois Environmental Protection Act, 415 ILCS 5/7, or Section 114(c) of the Clean Air Act, 42 U.S.C. § 7414(c), or their predecessors, and their implementing regulations.

Document Request No 4: All Statements of Justification that were submitted to IEPA from January 1, 1990 to the present.

Document Request No. 5: All agency responses to Statements of Justification submitted to IEPA from January 1, 1990 to the present, including preliminary and final agency determinations and correspondence related to the same.

See Petitioner's Initial Interrogatories and Initial Document Requests attached hereto as Exhibit 1.

3. Respondent has improperly refused to respond to these discovery requests asserting that the information and documents sought are irrelevant. See Respondent's Response to Petitioner's Initial Interrogatories and Initial Document Requests ("Resp't Resp") at 1, attached hereto as Exhibit 2. Respondent also stated, without explanation, that the discovery is overbroad, burdensome and vague. Resp't Resp at 2. Counsel for Petitioner has engaged in personal consultation with Respondent's counsel in a good faith attempt to resolve these issues. The parties have been unable to reach an accord with respect to these matters. See Affidavit of Mary Ann Mullin counsel for Petitioner ("Affidavit"), attached hereto as Exhibit 3.

**THE DISCOVERY SOUGHT IS REASONABLY CALCULATED TO
LEAD TO RELEVANT INFORMATION**

4. Respondent has refused to respond to this discovery on the insupportable grounds that Midwest Generation “seek[s] information that is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence.” Resp’t Resp. at 1. Respondent relies on an improper standard for refusing to respond to discovery. Under the Board’s rules, “all relevant information and information **calculated to lead to relevant information** is discoverable.” 35 Ill. Admin. Code § 101.616(a) (emphasis added). Whether the information sought will be admissible, or whether it will lead to admissible information, is simply not the Board’s standard for discovery. In fact, the Board’s rules state explicitly that “it is not a ground for objection that the testimony of a deponent or person interrogated will be inadmissible at hearing, if the information sought is reasonably calculated to lead to relevant information.” 35 Ill. Admin. Code § 101.616(e).

5. Further, the Board has found that discoverable matters need not in themselves be relevant or have been relied upon or considered by the Agency. Grigoleit Co. v. IEPA, PCB 89-184, 1990 WL 263955, at *7 (Ill. Pol. Control Bd. Nov. 29, 1990). In Grigoleit, the Board awarded sanctions against IEPA for failing to produce documents. In rejecting IEPA’s argument that the documents were not discoverable because they were not relevant or relied upon by the Agency, the Board held:

discovery in Illinois is designed to allow a broad and liberal transfer of information which may lead to the development of relevant evidence. Discoverable matters need not in themselves be relevant or have been relied upon or considered by the Agency. Moreover, although the Agency is required to file the Agency Record in permit appeals, there is limited regulatory guidance regarding what constitutes the Record. As a result, there have been instances where a petitioner introduces evidence that was not included in the Agency’s Record, even though the evidence was in the Agency’s files.

Grigoleit at *7. Similarly, there is limited regulatory guidance regarding what constitutes the Record in trade secret appeals. Respondent chose not to include in the record, past trade secret determinations and determinations regarding the definition of “emissions data,” although this information is in its files.

6. The documents and information Midwest Generation is seeking are relevant and reasonably calculated to lead to relevant information. Petitioner is seeking documents and information concerning Respondent’s interpretation of the term “emissions data” as that term is used in the context of the trade secret provisions of the Clean Air Act and Illinois Environmental Protection Act. In the Denial, Respondent asserted, without explanation, that the CPR was not entitled to trade secret protection because it constituted “emissions data”. See Denial at 1, attached hereto as Exhibit 4. Petitioner suspects that Respondent has never before considered accounting data to be “emissions data.” Information in Respondent’s files regarding its historic interpretation of the term “emissions data” would likely support Petitioner’s argument. An agency has the obligation during discovery to disclose evidence in its possession which might be helpful to an opponent. Wilson v. Norfolk & W. Ry. Co., 440 N.E.2d 238, 244 (Ill. App. Ct. 1982); Wegmann v. Dep’t of Registration & Educ., 377 N.E.2d 1297, 1301 (Ill. App. Ct. 1978). In discovery, Petitioner is entitled to agency guidance or past determinations regarding the meaning of the term “emissions data”. If, as Midwest Generation suspects, Respondent has never determined that accounting data is “emissions data”, this information is relevant to a potential fair notice argument. If Midwest Generation had no reason to know that Respondent considered accounting data “emissions data”, Midwest Generation could not be expected to address this issue in its statement of justification.

7. Further, the discovery sought is reasonably calculated to lead to evidence that Midwest Generation's statement of justification is adequate to establish that Midwest Generation will suffer competitive harm if the CPR is made public. Respondent's Denial letter summarily dismissed Midwest Generation's trade secret claims, stating:

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 had competitive value.

Denial at 1. It appears from the Denial letter that Respondent was simply not convinced that the CPR had competitive value. Midwest Generation does not believe the Respondent has any expertise in determining when business information has competitive value and the regulations not only fail to describe with specificity what a claimant needs to submit but are totally silent on the standard Respondent should use to make these determinations. The only way to determine what, if any, consistent standard Respondent uses in trade secret determinations is to review past determinations. If the discovery at issue is permitted, Midwest Generation anticipates that prior determinations will demonstrate that Respondent has granted trade secret protection to similar financial information and that successful statements of justification are equivalent in nature to Midwest Generation's statement of justification. By reviewing past trade secret determinations, Midwest Generation and the Board will be able to evaluate whether the Denial represents an arbitrary shift in agency practice.

8. The discovery sought is reasonably calculated to lead to relevant information on Respondent's standard for determining whether information has been made public. The trade secret regulations provide that Midwest Generation is entitled to a rebuttable presumption that the trade secret articles have not been published, disseminated, or otherwise become a matter of general knowledge, if Midwest Generation has taken reasonable measures to prevent the article

from becoming publicly available, and if the statement of justification contains a certification from the owner that the article has never been published or otherwise become a matter of general public knowledge. See 35 Ill Admin. Code §130.208(b). In its statement of justification, Midwest Generation set forth the extensive measures the company has used to safeguard the CPR and provided the necessary certification from the company. Again, the trade secret regulations do not set forth the standards for overcoming the presumption and Respondent did not cite any evidence or articulate any reasons for its determination that the presumption in favor of trade secret status was rebutted. By reviewing other determinations, Petitioner and the Board can evaluate whether Respondent has consistently applied this regulation.

9. In addition, Respondent's contention that the discovery sought will be inadmissible is without merit. The Board's statements in related case PCB 04-185, regarding the admissibility of evidence in trade secret hearings indicate that this information will be admissible. The Board held that "[t]he Board hearing is not necessarily limited to the record before IEPA at the time of the trade secret determination." November 4, 2004 Board Order at 22. ("Board Order") The Board found "the hearing affords the petitioner the opportunity to challenge the reasons given to the Board and the opportunity to receive testimony which would 'test the validity of the information (relied upon by the Agency)." Board Order at 21. In explaining their initial Order accepting Petitioner's Petition for Review, the Board explained: "The Board's Order therefore contemplated not only that Midwest Generation could use the Board hearing to challenge IEPA's reasoning, but also that there may be situations where new evidence could be admitted; i.e. evidence that was not before IEPA at the time of its trade secret determination. Indeed, the Board has long held that new evidence may be considered in trade secret appeals under particular circumstances." Board Order at 21.

10. In order to challenge Respondent's conclusion that CPR is "emissions data," Midwest Generation is entitled to learn of Respondent's past interpretation of that term. In order to challenge Respondent's conclusion that Midwest Generation's statement of justification inadequately demonstrated the trade secret articles have competitive value and are not publicly available, Midwest Generation is entitled to review past trade secret determinations. Accordingly, Respondent should be compelled to respond to Midwest Generation's discovery requests.

**THE DISCOVERY SOUGHT IS NOT OVERBROAD AND
BURDENSOME**

11. Respondent has objected to all of the above-enumerated discovery requests as overbroad and burdensome. During conversations between counsel for the parties, Respondent stated that its primary objection was to the relevancy of the discovery sought. See Affidavit at 1. As to the discovery being burdensome, Respondent contends that trade secret determinations are not kept in a central file and therefore would be impossible to find. Respondent admits that apart from obtaining this information, it has done nothing to identify and collect the determinations. See Affidavit at 1. In order to comply with this discovery obligation, Respondent must do what is "reasonably practicable". See People v. Williford, 649 N.E.2d 941, 944 (Ill. App. Ct. 1995). At the least, Respondent must perform a search for the determinations. Respondent is further obligated to respond to the request to the extent possible or by initially limiting the scope of its response, even where it is true that a response to the entire scope of an overly broad request would be unduly burdensome. See Welton v. Ambrose, 35 Ill. App. 3d 627, 633 (2004). Petitioner remains willing to discuss a refinement of the scope of certain requests.

THE DISCOVERY SOUGHT IS NOT VAGUE

12. Respondent has objected to all of the above enumerated discovery requests as vague. Respondent has not identified any ambiguity in the questions. Once an ambiguity is identified, Petitioner remains willing to clarify the discovery.

WHEREFORE, Midwest Generation respectfully requests that the Board grant Petitioner's Motion to Compel.

Dated: February 16, 2006

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

EXHIBIT 1

**PETITIONER'S INITIAL INTERROGATORIES
AND
INITIAL DOCUMENT REQUESTS**

contracts, tables, tabulations, graphs, charts, diagrams, plans, schedules, appointment books, calendars, diaries, time sheets, reports, studies, analyses, drafts, telegrams, teletype, or telecopy messages, files, telephone logs and messages, checks, microfilms, microfiche, pictures, photographs, printouts, electronic data compilations, tapes, diskettes, computer drives, removable media, notes, minutes or transcripts of proceedings. "Document" and "documents" shall each include originals and non-identical copies (whether different from original because of notes made in or attached to such copy or different for any other reason), all other data compilations from which information can be obtained or translated, if necessary, and any preliminary versions, drafts and revisions of the foregoing.

3. "All documents" means every document within the custody, possession or control of the Respondents, their attorneys, representatives, agents, affiliates, consultants, divisions, and all other persons or entities of any kind now or at anytime acting or purporting to act on their behalf.

4. "Communicate" and "communication" mean every type or form of communication, including but not limited to all oral or verbal communication face to face, by telephone, or otherwise, all written communication by letter, correspondence, notes, memos, messages, or otherwise, all electronic communication, such as e-mail, telefaxes, or otherwise, and all other methods and manners of transmitting information. The terms "communicate" and "communication" shall be given the broadest construction possible.

5. "Midwest Generation Determination" means the April 23, 2004, letter from Chris Pressnall of IEPA to Andrew N. Sawula of Schiff Hardin LLP (f/k/a Schiff Hardin &

Waite) regarding Midwest Generation's trade secret justification, attached hereto as Exhibit 1.

6. "ComEd Determination" means the April 23, 2004, letter from Chris Pressnall of IEPA to Byron Taylor of Sidley Austin Brown & Wood, attached hereto as Exhibit 2.

7. The "Record" means the Administrative Record as filed in this action on July 13, 2004, by IEPA.

8. "Sierra Club's FOIA Requests" means all requests, whether written or oral, formal or informal, made by the Sierra Club to the IEPA or the United States Environmental Protection Agency ("USEPA") for information Commonwealth Edison or Midwest Generation submitted in response to the 2003 Section 114 Information Requests USEPA issued to ComEd and Midwest Generation.

9. "Statement of Justification" means any information submitted to IEPA to support a person's claim that information he submitted to IEPA is exempt from disclosure under Section 5/7 of the Illinois Environmental Protection Act 415 ILCS § 5/7 or under the Illinois Freedom of Information Act, 5 ILCS 140/1 et. seq., because the information constitutes confidential or proprietary business information or trade secrets.

10. "Midwest Generation's Statement of Justification" means the March 11, 2004 letter from Andrew N. Sawula to Chris Pressnall, regarding Midwest Generation's claims that certain information submitted to IEPA by Commonwealth Edison constitutes trade secrets, attached hereto as Exhibit 3.

11. "Related to" and "relating to" mean, in addition to the customary and usual meanings, directly or indirectly mentioning or describing, comprising, containing,

mentioning, discussing, criticizing, contradicting, evidencing, concerning, embodying, containing, pertaining to, referring to, connected with, based upon, or reflecting upon a stated subject matter to any extent, whether logically or factually.

12. The conjunctions "and," "or" and "and/or" shall be interpreted either disjunctively or conjunctively so as to bring within the scope of each definition, instruction and document request any information you might otherwise construe as outside the scope of that definition, instruction or document request. Similarly, the singular shall include the plural and the plural shall include the singular. A masculine, feminine or neuter pronoun or description shall not exclude and shall include all other genders.

13. The term "person" means the plural as well as the singular, and shall include without limitation, individuals, associations, partnerships, corporations and other forms of legal entity.

14. "All" and "any" mean "any and all" and shall be inclusive.

15. "Identify" when used with respect to a document means to state the nature of the document (e.g. letter, memorandum, etc), the date such document was signed, prepared, sent and/or received, the identities of the sender and recipient(s) or addressee(s), and the present location and custodian of such document. In lieu of such document identification, you may produce a legible copy of the document you are asked to identify, indicating the Interrogatory to which the document is responsive or referring to the bates number or other identifying information in your answer to the Interrogatory.

16. "Identify" when used with respect to an individual means to state such individual's name, address, telephone number, occupation or profession, job title, and the name, address and telephone number of such individual's employer.

17. "Identify" when used with respect to an organization (e.g. a corporation, partnership, or association) means to state the name of such organization, type of such organization, and the address and telephone number of its principal place of business.

18. "Describe" and "Identify" when used with respect to a statement or communication mean to identify the persons making the statement or communication, the date it was made, the person or persons to whom the communication was made, the person or persons who witnessed the communication, the substance of the communication and the place it was made.

19. "Describe" and "identify" when used with respect to a fact or facts mean, in addition to the recitation of each specific fact, the identification of all documents which substantiate any fact or from which a fact is drawn, and the identification of any oral communication upon which your knowledge of a fact is founded, or which supports the fact, including between whom and when the oral communication occurred, and the substance of the communication,

20. "Describe" when used in connection with an act shall mean to identify the actor, the specific nature of the act, the date and place of the act and the individuals present.

21. The "CPR" shall mean the document bates numbered COM000001 through COM000086 that ComEd submitted to the USEPA in response to USEPA's 2003 Section 114 Information Request.

22. Any word contained in the Definitions and Instructions herein, or in the following Initial Request for Production, which is not defined above, shall have its plain and ordinary meaning as applied to the form of the word (noun, verb, etc.) and context in which it is used. For your reference, the plain and ordinary meaning of any word used herein may be found in Webster's Third New International Dictionary of the English Language, Copyright 1966.

INSTRUCTIONS

1. In construing these Interrogatories:
 - (a) the singular includes the plural and the plural includes the singular;
 - (b) the masculine includes the feminine and neuter genders;
 - (c) "and" and "or" shall mean and/or;
 - (d) the word "including" shall be construed without limitation;
 - (e) the use of the past tense shall include the present tense and the use of the present tense shall include the past tense so as to make the Interrogatories inclusive rather than exclusive.
2. Pursuant to 35 Ill. Adm. Code 101.616 (e), these Interrogatories are continuing. Therefore, if at any time prior to the hearing on this matter, Respondent obtains additional responsive information, it shall immediately provide that information to the undersigned.
3. Each paragraph and subparagraph of these Initial Interrogatories shall be construed independently and no other paragraph or subparagraph shall be referred to or relied on for the purpose of limiting its scope.
4. For each Interrogatory, identify the person or persons who provided any information relied upon in the formulation of the response.

INTERROGATORIES

1. Identify each person who participated in the Midwest Generation Determination or the ComEd Determination, including those present for any discussions of the Midwest Generation or the ComEd Determination.

2. Identify each person having knowledge of facts relevant to the subject matter of this appeal, other than those persons already identified in Interrogatory #1 above.

3. Identify each person you intend to call as a fact witness at the hearing on this matter and for each person identify and describe the facts to which each such witness is expected to testify.

4. Identify each person you intend to call as an opinion witness at the hearing on this matter and for each person identify: the subject matter which each such witness is expected to testify; the conclusions and opinions of each such witness and the bases therefore; the qualifications of each such witness; the identity of any reports or analyses that have been prepared by each such witness relating to this matter; and the curriculum vitae and resume for each such witness.

5. Identify and describe all communications between the Sierra Club and the IEPA or the Illinois Attorney General, relating to any matters relating to IPCB 04-185, IPCB 04-215, IPCB 04-216 or related to the Sierra Club's FOIA Requests.

6. Identify and describe all communications between IEPA or the Illinois Attorney General and any other person, relating to any matters relating to IPCB 04-185, IPCB 04-215, IPCB 0-216 or related to the Sierra Club's FOIA Requests.

7. Identify and describe all communications between IEPA, or the Illinois Attorney General, and the Sierra Club, relating to Midwest Generation's or

Commonwealth Edison's compliance with the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq., or the Clean Air Act, 42 U.S.C. § 7401 et seq.

8. Describe in detail the reasons you relied on to support the following statement in the Midwest Generation Determination: "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."

9. Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR has been published, disseminated, or otherwise become a matter of general public knowledge.

10. Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR lacks competitive value.

11. Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR constitutes emission data.

12. If you contend that the CPR constitutes emissions data, describe in detail the reasons supporting this contention.

13. Identify any determination you have made relating to the trade secret status of a business's financial information submitted to IEPA.

14. Identify any determination you have made that information constitutes "emission data" as that term as it is now or was in the past defined under Section 5/7 of the Illinois Environmental Protection Act, 415 ILCS 5/7, or Section 114(c) of the Clean Air Act, 42 U.S.C. § 7414(c), or their predecessors, and their implementing regulations.

15. Identify any documents or communications not otherwise identified in response to these Interrogatories that you will present or otherwise reply upon at the hearing in this matter.

CH2\ 1307141.1

or communication is recorded, reproduced or represented, including, but not limited to books, records, correspondence, reports, memoranda, electronic mail (i.e., "e-mail"), contracts, tables, tabulations, graphs, charts, diagrams, plans, schedules, appointment books, calendars, diaries, time sheets, reports, studies, analyses, drafts, telegrams, teletype, or telecopy messages, files, telephone logs and messages, checks, microfilms, microfiche, pictures, photographs, printouts, electronic data compilations, tapes, diskettes, computer drives, removable media, notes, minutes or transcripts of proceedings. "Document" and "documents" shall each include originals and non-identical copies (whether different from original because of notes made in or attached to such copy or different for any other reason), all other data compilations from which information can be obtained or translated, if necessary, and any preliminary versions, drafts and revisions of the foregoing.

3. "All documents" means every document within the custody, possession or control of the Respondents, their attorneys, representatives, agents, affiliates, consultants, divisions, and all other persons or entities of any kind now or at anytime acting or purporting to act on their behalf.

4. "Communicate" and "communication" mean every type or form of communication, including but not limited to all oral or verbal communication face to face, by telephone, or otherwise, all written communication by letter, correspondence, notes, memos, messages, or otherwise, all electronic communication, such as e-mail, telefaxes, or otherwise, and all other methods and manners of transmitting information. The terms "communicate" and "communication" shall be given the broadest construction possible.

5. "Midwest Generation Determination" means the April 23, 2004, letter from Chris Pressnall of IEPA to Andrew N. Sawula of Schiff Hardin LLP (f/k/a Schiff Hardin & Waite) regarding Midwest Generation's trade secret justification, attached hereto as Exhibit 1.

6. "ComEd Determination" means the April 23, 2004, letter from Chris Pressnall of IEPA to Byron Taylor of Sidley Austin Brown & Wood, attached hereto as Exhibit 2.

7. The "Record" means the Administrative Record as filed in this action on July 13, 2004, by IEPA.

8. "Sierra Club's FOIA Requests" means all requests, whether written or oral, formal or informal, made by the Sierra Club to the IEPA or the United States Environmental Protection Agency ("USEPA") for information Commonwealth Edison or Midwest Generation submitted in response to the 2003 Section 114 Information Requests USEPA issued to ComEd and Midwest Generation.

9. "Statement of Justification" means any information submitted to IEPA to support a person's claim that information he submitted to IEPA is exempt from disclosure under Section 5/7 of the Illinois Environmental Protection Act 415 ILCS 5/7 or under the Illinois Freedom of Information Act, 5 ILCS 140/1 et seq., because the information constitutes confidential or proprietary business information or trade secrets.

10. "Midwest Generation's Statement of Justification" means the March 11, 2004 letter from Andrew N. Sawula to Chris Pressnall, regarding Midwest Generation's claims that certain information submitted to IEPA by Commonwealth Edison constitutes trade secrets, attached hereto as Exhibit 3.

11. "Related to" and "relating to" mean, in addition to the customary and usual meanings, directly or indirectly mentioning or describing, comprising, containing, mentioning, discussing, criticizing, contradicting, evidencing, concerning, embodying, containing, pertaining to, referring to, connected with, based upon, or reflecting upon a stated subject matter to any extent, whether logically or factually.

12. The conjunctions "and," "or" and "and/or" shall be interpreted either disjunctively or conjunctively so as to bring within the scope of each definition, instruction and document request any information you might otherwise construe as outside the scope of that definition, instruction or document request. Similarly, the singular shall include the plural and the plural shall include the singular. A masculine, feminine or neuter pronoun or description shall not exclude and shall include all other genders.

13. The term "person" means the plural as well as the singular, and shall include without limitation, individuals, associations, partnerships, corporations and other forms of legal entity.

14. "All" and "any" mean "any and all" and shall be inclusive.

15. Any word contained in the Definitions and Instructions herein, or in the following Initial Request for Production, which is not defined above, shall have its plain and ordinary meaning as applied to the form of the word (noun, verb, etc.) and context in which it is used. For your reference, the plain and ordinary meaning of any word used herein may be found in Webster's Third New International Dictionary of the English Language, Copyright 1966.

INSTRUCTIONS

1. In construing this Initial Request for Documents:
 - (a) the singular includes the plural and the plural includes the singular;
 - (b) the masculine includes the feminine and neuter genders;
 - (c) "and" and "or" shall mean and/or;
 - (d) the word "including" shall be construed without limitation;
 - (e) the use of the past tense shall include the present tense and the use of the present tense shall include the past tense so as to make the document requests inclusive rather than exclusive.
2. Pursuant to 35 Ill. Adm. Code 101.616 (e), this Initial Request for Documents is continuing. Therefore, if at any time prior to the hearing on this matter, Respondent obtains additional responsive documents, they shall produce immediately to the undersigned such additional responsive documents.
3. All documents necessary for a correct understanding of any document responsive to the following requests shall be produced with the responsive document.
4. The documents produced shall be produced as they are kept in the usual course of business or organized and labeled to correspond to a specific request.
5. Each paragraph and subparagraph of this Initial Request for Documents shall be construed independently and no other paragraph or subparagraph shall be referred to or relied on for the purpose of limiting its scope
6. If any of these requests cannot be complied with in full, produce as many of the responsive documents as possible, identify the documents that cannot be produced, and specify the reason why those documents cannot be produced.
7. If any document described herein is withheld on the basis of any claim of privilege or otherwise, provide in writing the following information about each document:

(1) its date, (2) the name, position and address of its author, (3) the name, position and address of each person who received, read or saw the document or copies thereof, (4) the subject matter and type of document (e.g. memorandum, letter etc.), (5) the nature of the privilege claimed (e.g. attorney/client privilege, work product doctrine, etc.) and (6) the grounds for the claimed privilege in sufficient detail to allow a ruling on the appropriateness of the claimed privilege.

DOCUMENT REQUESTS

Produce:

1. All documents as to which Midwest Generation has requested or will request "identification" in any Interrogatory served or to be served upon Respondent.
2. All documents identified by Respondent in any response to any Interrogatory that has been or will be served upon Respondent by Midwest Generation or Commonwealth Edison.
3. All documents relating to your interpretation of the term "emission data" as that term as it is now or was in the past defined in Section 5/7 of the Illinois Environmental Protection Act, 415 ILCS 5/7 or Section 114(c) of the Clean Air Act, 42 U.S.C. § 7414(c), or their predecessors, and implementing regulations of either act, including determinations that certain information constitutes emissions data.
4. All Statements of Justification that were submitted to IEPA from January 1, 1990 to the present.
5. All agency responses to Statements of Justification submitted to IEPA from January 1, 1990 to the present, including preliminary and final agency determinations and correspondence related to the same.

6. All documents relating to the Midwest Generation Determination or the ComEd Determination, including all documents reflecting communications relating to these determinations.

7. All documents relating to each communication between the Sierra Club and IEPA, or the Illinois Attorney General, relating to any matters relating to IPCB 04-185, IPCB 04-215, IPCB 04-216 or the Sierra Club's FOIA Requests.

8. All documents relating to each communication between IEPA, or the Illinois Attorney General, and any other person, relating to any matters relating to IPCB 04-185, IPCB 04-215, IPCB 04-216 or the Sierra Club's FOIA Requests.

9. All documents relating to each communication between IEPA, or the Illinois Attorney General, and the Sierra Club, relating to Midwest Generation's or Commonwealth Edison's compliance with the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq., or the Clean Air Act, 42 U.S.C. § 7401 et seq.

EXHIBIT 2

**RESPONDENT'S RESPONSE TO
MIDWEST GENERATION EME, LLC'S
INITIAL INTERROGATORIES
AND
INITIAL DOCUMENT REQUESTS**



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 22, 2005

Via overnight mail


Sheldon A. Zabel
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

Re: PCB 4-216

Dear Mr. Zabel:

Enclosed please find a copy of Respondent's Response to Midwest Generation EME, LLC's Initial Interrogatories and Initial Request for Production of Documents.

Very truly yours,


Ann Alexander

Enc.

cc: Mary A. Mullin ✓
Andrew N. Sawula ✓

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by LISA MADIGAN, Attorney General of the State of Illinois, and in response to Petitioner MIDWEST GENERATION EME, LLC's Initial Request for the Production of Documents ("Document Requests"), answers and objects as follows:

I. GENERAL OBJECTIONS

A. Respondent objects to the Document Requests on the ground that they seek information that is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. In particular, although the Pollution Control Board ("Board") specified in its June 17, 2004 order that hearings in this matter "will be based exclusively on the record before IEPA at the time it issued its trade secret determination" pursuant to 35 Ill. Admin. Code 105.214(a), and that "information developed after IEPA's decision typically is not admitted at hearing or considered by the Board"; and although the Board denied a motion in related case PCB 04-185 for reconsideration of this evidentiary restriction and a de novo hearing, Petitioner is seeking information not in or directly pertinent to the administrative record, and/or developed after Respondent IEPA's decision.

B. Respondent objects to the Document Requests on the ground that they call for information that is protected by, inter alia, the attorney-client privilege, the work product privilege, the joint prosecution privilege, and the deliberative process privilege.

C. Respondent objects to the Document Requests on the ground that they are overbroad and burdensome.

D. Respondent objects to the Document Requests on the ground that they are vague.

Responses to the Document Requests shall not be construed as a waiver of these objections.

Document Request No. 1: All documents as to which Midwest Generation has requested or will request "identification" in any Interrogatory served or to be served upon Respondent.

Response to Document Request No. 1:

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C and D, and the grounds specified in response to the interrogatories. Without waiving such objection, Respondent provides herewith the documents identified in response to Interrogatory No. 5. Respondent further states that Petitioner is already in possession of the record documents identified in response to the interrogatories.

Document Request No. 2: All documents identified by Respondent in any response to any Interrogatory that has been or will be served upon Respondent by Midwest Generation or Commonwealth Edison.

Response to Document Request No. 2:

Please see response to Document Request No. 1.

Document Request No. 3: All documents relating to your interpretation of the term "emission data" as that term as it is [sic] now or was in the past defined under Section 5/7 of the Illinois Environmental Protection Act, 415 ILCS 5/7, or Section 114(c) of the Clean Air Act, 42 U.S.C. § 7414(c), or their predecessors, and implementing regulations

of either act, including determinations that certain information constitutes or does not constitute emissions data.

Response to Document Request No. 3:

Respondent objects to this request on the grounds specified in General Objections A, B, C, and D. Without waiving such objections, Respondent states that documents in the administrative record supporting Respondent's determination that the information that is the subject of this proceeding constitutes emission data are identified in response to Petitioner's Initial Interrogatories.

Document Request No. 4: All Statements of Justification that were submitted to IEPA from January 1, 1990 to the present.

Response to Document Request No. 4:

Respondent objects to this request on the grounds specified in General Objections A, C, and D.

Document Request No. 5: All agency responses to Statements of Justification submitted to IEPA from January 1, 1990 to the present, including preliminary and final agency determinations and correspondence related to the same.

Response to Document Request No. 5:

Respondent objects to this request on the grounds specified in General Objections A, C, and D.

Document Request No. 6: All documents relating to the Midwest Generation determination or the ComEd Determination, including all documents reflecting communications relating to that determination.

Response to Document Request No. 6:

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D, except to the extent that the requested documents are contained in the administrative record. Without waiving such objection, Respondent

states that to its knowledge, it is not in possession of any documents reflecting communications relating to the Midwest Generation determination or the Com Ed determination prior to the date of that determination other than those contained in the record and those identified in response to Interrogatory No. 5.

Document Request No. 7: All documents relating to each communication between the Sierra Club and IEPA, or the Illinois Attorney General, relating to any matters relating to IPCB 04-185, IPCB 04-215, IPCB 04-216 or the Sierra Club's FOIA requests.

Response to Document Request No. 7:

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D. Without waiving such objections, Respondent states that to its knowledge, there were no communications between IEPA or the Illinois Attorney General and any other person, other than those identified in response to Interrogatory No. 5, relating to IPCB 04-185, IPCB 04-215, IPCB 04-216 or the Sierra Club's FOIA requests prior to the date of the Com Ed and Midwest Generation determinations.

Document Request No. 8: All documents relating to each communication between IEPA, or the Illinois Attorney General, and any other person, relating to any matters relating to IPCB 04-185, IPCB 04-215, IPCB 04-216 or the Sierra Club's FOIA requests.

Response to Document Request No. 8:

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D. Without waiving such objections, Respondent states that to its knowledge, there were no communications between IEPA or the Illinois Attorney General and any other person, other than those identified in response to Interrogatory No. 5, relating to IPCB 04-185, IPCB 04-215, IPCB 04-216 or the Sierra Club's FOIA requests prior to the date of the Com Ed and Midwest Generation determinations.

Document Request No. 9: All documents relating to each communication between IEPA, or the Illinois Attorney General, and the Sierra Club, relating to Midwest Generation's or Commonwealth Edison's compliance with the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq., or the Clean Air Act, 42 U.S.C. § 7401 et seq.

Response to Document Request No. 9:

Respondent objects to this interrogatory on the grounds specified in General

Objections A, B, C, and D.

Dated: Chicago, Illinois
November 28, 2005

Respectfully submitted,

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental
Enforcement/
Asbestos Litigation Division

BY: Ann Alexander

Ann Alexander, Assistant Attorney
General and Environmental Counsel
Paula Becker Wheeler, Assistant
Attorney General
188 West Randolph Street, Suite 2001
Chicago, Illinois 60601
312-814-3772
312-814-2347 (fax)



**SIERRA
CLUB**
FOUNDED 1892

MIDWEST OFFICE - Chicago

October 27, 2003

Ms. Marilyn Clardy, FOIA Officer
Illinois Environmental Protection Agency
Bureau of Air
1340 North Ninth Street
P.O. Box 19506
Springfield, IL 62794

RECEIVED

NOV 03 2003

IEPA-DAPC-SPFLD.

SENT BY FAX AND CERTIFIED MAIL

Re: FOIA Request For Records Relating To All Coal-Fire Generating Facilities That Have Been Reported To Illinois Environmental Protection Agency Pursuant To Section 114 (a) Of The Clean Air Act.

~~CONFIDENTIAL~~

Dear Ms. Clardy:

I have received your response to Sierra Club's FOIA request concerning Midwest Generation coal-fire generating facilities, dated August 27, 2003. Thank you for your attention to that matter. Unfortunately Midwest Generation has provided very little relevant information that is responsive to IEPA oversight.

Sierra Club now requests all records relating to any coal-fire generating facilities that have reported to the IEPA, pursuant to Section 114 (a) of the Clean Air Act, 42 U.S.C. Section 7414 (a), excluding the Illinois Power/Dynergy Baldwin power plant.

Such records may have been originally requested by the EPA in order to determine compliance with the Illinois State Implementation Plan and applicable provisions of the New Source Performance Standards at 40 C.F.R. Part 60.

This request is intended to be inclusive of any coal-fire facilities owned by any power company in Illinois, and not limited to only Midwest Generation, L.I.C.

Pursuant to the Illinois Freedom of Information Act, please provide all records relating to the above request that the IEPA is in receipt of.

Please see the attached "Appendix A" enumerating the specific information requested.



**SIERRA
CLUB**
FOUNDED 1892

MIDWEST OFFICE - Chicago

This request is eligible for a fee waiver for the following reasons:

1. Request concerns identifiable operations or activities of government.

The Sierra Club's request relates to the IEPA oversight and regulation of coal-fired power plants in Illinois and possible violations of federal and state clean air act New Source Review requirements. The request includes information about the compliance history of the facilities in question and the IEPA's response to ongoing compliance issues.

2. Disclosure likely to contribute to public understanding of government operations.

The Sierra Club is seeking these records because such records, including their compliance with all applicable requirements, and the IEPA's role in ensuring compliance, will contribute to the public's understanding of IEPA's operations. I am not aware of these records being already in the public domain.

3. Disclosure will not serve Sierra Club's commercial interests.

Sierra Club has no commercial interest in the requested records. Sierra Club is a non-profit organization.

4. The identifiable public interest in disclosure outweighs any commercial interest.

The public interest in disclosing how the IEPA has enforced regulations on this large source of air pollution far outweighs any commercial interest in these records and Sierra Club is a non-profit organization.

Please let me know if you need any additional information in order to grant Sierra Club a fee waiver for the information I requested. Thank you for your time and attention to this matter.

Sincerely,


Adam Quader
Sierra Club

Appendix A

1. Provide a list of all coal-fired generating units for which you are owner or operator which are currently operational or have been retired in the past 10 years. For each such unit, identify the generating station location, the boiler and turbine unit identification number, the date or year commercial operation began, the original design and current boiler heat input capacity (mmbtu/hr), the original design and current gross and net generating capacity (MWg/MWn), the original design and current steam flow output capacity (lbs steam/hr), the current operating status, for any unit retired or inactive the applicable date or year, current fuel(s) being fired, type of particulate emissions control and year installed, type of sulfur dioxide emissions control and year installed, type of nitrogen oxides emissions control and year installed.
2. For all currently active coal-fired generating units provide monthly and annual total gross and net generation (MW-hr), monthly and annual average heat rate (BTU/KW-hr) and monthly and annual average coal heat content (BTU/lb) and percent sulfur for all years from 1975 through 2002.
3. For all currently active coal-fired generating units provide a list of all capital projects; of an amount greater than \$100,000.00, approved or completed between January 1, 1975 and the date of this request. For each such capital project identify the work performed, the date completed or projected to be completed, the project work order number and the dollar amount approved and/or expended.
4. Provide a copy of the Generating Availability Data System (GADS) data for the period 1/1/75 through 12/31/02 identifying all boiler and turbine related forced, maintenance and planned outages and curtailments for all currently active coal-fired generating units.
5. Provide copies of the summary results page of all stack tests for particulate matter, sulfur dioxide, nitrogen oxides, mercury, lead and hydrogen chloride for the period 1/1/75 through 6/30/02 for all currently active coal-fired generating units.
6. Provide copies of all PSD/NSR permits received and permit applications submitted for the period 1/1/75 to present.
7. Provide copies of all reports, correspondences, memoranda.

and phone discussion summaries, etc. regarding PSD/NSR/NSPS applicability for any modification between 1975 and present.

8. Provide copies of all life extension/life optimization/reliability enhancement, etc. studies, evaluations, assessments, reports related to extending the life of or increasing the reliability of any generating unit since 1/1/75.
9. Provide copies of original design and current boiler cross-sectional diagrams.
10. Provide a list of the dates of replacement of pulverizers, cyclones, economizers, reheaters and superheaters for each operating unit.



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

RENEE CIPRIANO, DIRECTOR

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

November 13, 2003

Adam Qhader
Sierra Club
200 North Michigan
Suite 505
Chicago, Illinois 60601-5908

Re: Freedom of Information Act Request

Dear Mr. Qhader:

This letter responds to your October 27, 2003, request for information pursuant to the Illinois Freedom of Information Act ("FOIA") received by the Illinois Environmental Protection Agency ("Illinois EPA") on November 3, 2003, relative to coal-fire generating facilities in Illinois. Specifically, you request that the Illinois EPA provide all records relating to any coal-fire generating facilities that have reported to the Illinois EPA, pursuant to Section 114(a) of the Clean Air Act, 42 U.S.C. Section 7414(a), excluding the Illinois Power Dynegy Baldwin power plant.

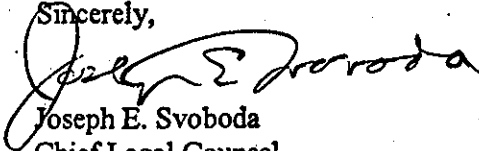
On November 10, 2003, the Illinois EPA received Midwest Generation EME, LLC's ("Midwest Generation") response to the USEPA Request for Information pursuant to Section 114 of the Clean Air Act dated February 13, 2003. Midwest Generation has claimed a considerable amount of the information in the response confidential. The Illinois EPA is providing all documents not marked "confidential". The Illinois EPA will evaluate all information marked "confidential" in accordance with "Procedures for Claiming and Determining that Public Information Records are Exempt From Disclosure", 2 Ill. Adm. Code 1828, Subpart D to determine whether the claim is valid. Should the Illinois EPA determine that the information was not properly claimed confidential and/or does not qualify as confidential information pursuant to 2 Ill. Adm. Code 1828.202(a)(1)(F), the Agency will supplement this FOIA response.

Given the Illinois EPA's decision not to provide to you some of the information requested, you have the right to appeal this matter by sending, to the Director of the Illinois EPA, a written notice of appeal pursuant to 2 Ill. Adm. Code 1826.406(b)(3). The notice should be mailed to the Illinois EPA at 1021 North Grand Avenue, East, Springfield, Illinois 62794.

Enclosed are the non-exempt documents.

Should you have questions or comments with regard to this matter, please contact Illinois EPA Assistant Counsel, Chris Pressnall.

Sincerely,



Joseph E. Svoboda
Chief Legal Counsel

w/enclosures

From: b-nilles@mindspring.com
To: "Marilyn Clardy" <marilyn.clardy@epa.state.il.us>
Date: 2/12/2004 3:43:38 PM
Subject: FOIA: Midwest Generation

Hi Marilyn,

Pursuant to the state's Freedom of Information Act, please provide me with a copy of all records that the agency has received from either Midwest Generation and/or Commonwealth Edison in response to the USEPA Section 114 request these companies received in February 2003.

Sincerely,

Bruce Nilles
Senior Midwest Representative
Sierra Club
200 N. Michigan Ave., Ste 505
Chicago, IL 60601
p. 312.251.1511
c. 312.217.9725
f. 312.251.1780
e. bruce.nilles@sierraclub.org
w. www.illinois.sierraclub.org

CC: "Julie Armitage" <jarmitage@epa.state.il.us>, "Dave Kolaz" <dkolaz@epa.state.il.us>, "Keith Harley" <Kharley@kentlaw.edu>

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IEPA-DAPC-SPFLD.

determinations, in particular the basis for IEPA's conclusion that Com Ed and/or Midwest Generation 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.

Interrogatory No. 4: Identify each person you intend to call as an opinion witness at the hearing on this matter and for each person identify: the subject matter which each such witness is expected to testify; the conclusions and opinions of each such witness and the bases therefore; the qualifications of each such witness; the identity of any reports or analyses that have been prepared by each such witness relating to this matter; and the curriculum vitae and resume for each such witness.

Response to Interrogatory No. 4:

Respondent objects to this interrogatory on the grounds specified in General Objection C to the extent it calls for an overbroad and burdensome level of detail concerning the anticipated testimony of witnesses. Without waiving this objection, Respondent states that it has not yet made a determination as to whether it will call an opinion witness, and reserves the right to supplement this response when such determination is made in the future.

Interrogatory No. 5: Identify and describe all communications between the Sierra Club and the IEPA or the Illinois Attorney General, relating to any matters relating to IPCB 04-185, IPCB 04-215, IPCB 04-216 or related to the Sierra Club's FOIA requests.

Response to Interrogatory No. 5:

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D. Without waiving such objections, Respondent identifies the following communications between Sierra Club and IEPA concerning the Sierra Club's FOIA requests:

1. Letter dated October 27, 2003 to Marilyn Clardy, IEPA FOIA Officer, from Adam Qhader, Sierra Club, setting forth FOIA request.

2. Letter dated November 13, 2003 to Adam Qhader, Sierra Club from Joseph E. Svoboda, IEPA Chief Legal Counsel, regarding FOIA request.
3. E-mail dated February 12, 2004 to Marilyn Clardy, IEPA FOIA Officer, from Bruce Nilles, Sierra Club Senior Midwest Representative, setting forth FOIA request.

Respondent further states that to its knowledge, there were no other communications between IEPA or the Illinois Attorney General and Sierra Club prior to the Com Ed and Midwest Generation determinations.

Interrogatory No. 6: Identify and describe all communications between IEPA or the Illinois Attorney General and any other person, relating to any matters relating to IPCB 04-185, IPCB 04-215, IPCB 04-216 or related to the Sierra Club's FOIA requests.

Response to Interrogatory No. 6:

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D. Without waiving such objections, Respondent states that to its knowledge, there were no communications between IEPA or the Illinois Attorney General and any other person other than those identified in response to Interrogatory No. 5 prior to the Com Ed and Midwest Generation determinations.

Interrogatory No. 7: Identify and describe all communications between IEPA, or the Illinois Attorney General, and the Sierra Club, relating to Midwest Generation's or Commonwealth Edison's compliance with the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq., or the Clean Air Act, 42 U.S.C. § 7402 et seq.

Response to Interrogatory No. 7:

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D.

Interrogatory No. 8: Describe in detail the reasons you relied on to support the following statement in the Midwest Generation Determination: "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.”

Response to Interrogatory No. 8:

Respondent objects to this interrogatory on the grounds specified in General Objection C to the extent it calls for an overbroad and burdensome level of detail concerning the anticipated testimony of witnesses. Without waiving this objection, Respondent states that it relied on, inter alia, the following reasons in support of the identified statement:

1. Petitioner’s statement of justification is vague and lacking in detail, and provided insufficient information to support Petitioner’s contentions that the information has not been published, disseminated, or otherwise become a matter of general public knowledge, and that the information has competitive value.

2. There was insufficient evidence that Petitioner “has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access to the article for limited purposes” per 35 Ill. Admin. Code 130.208(b), and that the information has been in fact protected from disclosure, because Petitioner failed to demonstrate, in its Statement of Justification or otherwise, that the information, in its compiled form or otherwise, was specifically designated and/or treated as confidential or proprietary in accordance with its general internal policies and procedures.

3. There was insufficient evidence that Petitioner “has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access to the article for limited purposes” per 35 Ill. Admin. Code 130.208(b), and that the information has been in fact protected from

disclosure, because the information, in its compiled form or otherwise, is of a type that was or may have been known by or submitted to government agencies (e.g., the Department of Energy or the Illinois Commerce Commission) or third parties (e.g., contractors), but Petitioner failed to demonstrate, in its Statement of Justification or otherwise, that this information was protected from disclosure by such government agencies or third parties, or that Petitioner ever requested such protection from disclosure (e.g., by contract or pursuant to the Illinois Commerce Commission rules at 80 Ill. Admin. Code 200.430). Thus, while Petitioner stated in its Statement of Justification that it had never provided the CPR to any third party, it failed to demonstrate that the information contained in the CPR had not been provided to a third party.

4. Petitioner provided insufficient information concerning the purported competitive value of the information, and in particular failed to provide convincing reason to believe that information that is more than five years old, with some of it more than three decades old, is of competitive value to Petitioner.

5. Some of the projects listed in the CPR were the subject of Respondent's permitting, and information concerning such projects set forth in permit applications submitted to Respondent is public, as Petitioner did not seek to protect such information as a trade secret.

6. Respondent is mindful of the public's right to know information concerning Clean Air Act compliance of sources of air pollution, including the electric generating industry, and was unwilling to withhold such information from Freedom of Information Act requestors based on inadequate evidence that such withholding is legally necessary and appropriate.

Interrogatory No. 9: Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR has been published, disseminated, or otherwise become a matter of public knowledge.

Response to Interrogatory No. 9:

Please see response to Interrogatory No. 8.

Interrogatory No. 10: Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR lacks competitive value.

Response to Interrogatory No. 10:

Please see response to Interrogatory No. 8.

Interrogatory No. 11: Identify the specific information in the record, if any, that supports your claim, if any, that the CPR constitutes emission data.

Response to Interrogatory No. 11:

Please see response to Interrogatory No. 12. The status of the CPR as emission data is supported by, inter alia and in addition to legal definitions and interpretations of what constitutes emission data and the contents of the CPR itself, record documents Bates stamped 869 – 1527 and 1543 – 1554.

Interrogatory No. 12: If you contend that the CPR constitutes emissions data, describe in detail the reasons supporting this contention.

Response to Interrogatory No. 12:

Clean Air Act § 114 and federal regulations pursuant thereto, and counterpart Illinois regulations, provide that “emission data” includes any documents containing information necessary to determine how much a particular source was “authorized to emit” – i.e., that would determine whether the facility’s emissions comply with the Clean Air Act. 40 C.F.R. 2.301(a)(2)(i)(B), promulgated pursuant to § 114 of the Clean Air Act, 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.

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 facilities it regulates were in compliance with the Clean Air Act New Source Review programs. The CPR contains a list of capital projects at Midwest Generation (previously ComEd) facilities, including activities at those facilities that may constitute modifications that triggered New Source Review. The GADS Data contains information concerning facility outages and restricted operation, which is relevant to the operational condition of the facilities and to assessing whether activities that were undertaken at the facilities should be considered modifications. Accordingly, since the information is necessary to determine whether modifications have occurred at Petitioner's facilities and the amount they were "authorized to emit" relative to New Source Review requirements, this information constitutes emission data.

This response is intended solely as a summary. Respondent reserves the right to clarify or elaborate upon it at any time during the course of this proceeding.

Interrogatory No. 13: Identify any determination you have made relating to the trade secret status of a business's financial information submitted to IEPA.

Response to Interrogatory No. 13:

Respondent objects to this interrogatory on the grounds specified in General Objections A, C, and D.

Interrogatory No. 14: Identify any determination you have made that information constitutes "emission data" as that term as it is [sic] now or was in the past defined under Section 5/7 of the Illinois Environmental Protection Act, 415 ILCS 5/7, or Section 114(c) of the Clean Air Act, 42 U.S.C. § 7414(c), or their predecessors, and their implementing regulations.

Response to Interrogatory No. 14:

Respondent objects to this interrogatory on the grounds specified in General Objections A, C, and D.

Interrogatory No. 15: Identify any documents or communications not otherwise identified in response to these Interrogatories that you will present or otherwise reply [sic] upon at the hearing in this matter.

Response to Interrogatory No. 15:

At this time, Respondent has not yet made a determination to present or rely on at the hearing any documents or communications not otherwise identified in response to Petitioner's interrogatories.

Dated: Chicago, Illinois
November 28, 2005

Respectfully submitted,

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental
Enforcement/
Asbestos Litigation Division

BY: 

Ann Alexander, Assistant Attorney
General and Environmental Counsel

Paula Becker Wheeler, Assistant
Attorney General
188 West Randolph Street, Suite 2001
Chicago, Illinois 60601
312-814-3772
312-814-2347 (fax)

EXHIBIT 3

**AFFIDAVIT OF
MARY ANN MULLIN**

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

AFFIDAVIT OF MARY ANN MULLIN

I, Mary Ann Mullin, depose and state as follows:

1. I am one of the attorneys with the law firm of Schiff Hardin, LLP representing Petitioner, Midwest Generation EME, LLC (“Midwest Generation”) in this case. I have personal knowledge of the matters set forth below.

2. Pursuant to the Hearing Officer’s August 25, 2005 Discovery Scheduling Order (“Scheduling Order”), Midwest Generation served Respondent, Illinois Environmental Protection Agency (“IEPA”), with Initial Interrogatories and Initial Document Requests. Certain of these Initial Interrogatories and Initial Document Requests sought information relating to IEPA’s past trade secret determinations under 35 Ill. Admin. Code § 130 and Respondent’s past determinations regarding what information constitutes “emissions data” (hereafter the “Disputed Discovery”).

3. As set forth more completely in the accompanying Motion to Compel, Respondent objected to and refuse to answer the Disputed Discovery. Respondent asserted three

grounds for its objections to the Disputed Discovery: the Disputed Discovery sought “information that is irrelevant to (the) proceeding and not reasonably calculated to lead to the discovery of admissible evidence”, the Disputed Discovery was overbroad and burdensome, and the Disputed Discovery was vague. See Respondent’s Response to Initial Interrogatories and Initial Document Requests, attached to the accompanying Motion to Compel.

4. On or about January 5, 2006, I called IEPA’s counsel, Ann Alexander, in an attempt to resolve this discovery issue. Ms. Alexander stated that Respondent would not produce documents and information in response to the Disputed Discovery because Respondent believed the information was outside the scope of discovery. Ms. Alexander stated that Respondent’s primary objection to the Disputed Discovery was to the perceived lack of relevance of the material. Ms. Alexander and I discussed our relative positions on the relevancy and discoverability of the Disputed Discovery, but were unable to resolve our differences or reach a compromise.

5. When asked for the basis for the objection that the discovery was overbroad and burdensome, Ms. Alexander stated that the trade secret determinations were not kept in a central file. Ms. Alexander opined that looking for the past trade secret determinations was fruitless because she believed they were irrelevant and therefore not discoverable. Ms. Alexander acknowledged that other than finding out the past trade secret determinations were not kept in a central file, she took no actions to identify or collect the determinations.

6. In response to Respondent’s contention that the past determinations are difficult to find, I suggested we attempt to narrow the scope of the request. Ms. Alexander indicated that this exercise would be fruitless because she believed the Disputed Discovery was outside the scope of discovery and Respondent did not intend to produce any of the Disputed Discovery.

7. To date, Respondent has not produced any of the Disputed Discovery.

By: Mary A. Mulca

STATE OF ILLINOIS

)

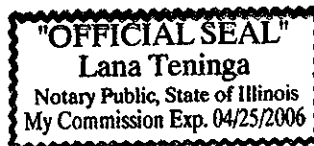
) ss.

COUNTY OF COOK

)

Subscribed and sworn to before me
this 16th day of February, 2006.

Lana Teninga
Notary Public



CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Midwest Generation EME, LLC's Petitioner's Motion to Compel by U.S. Mail, upon the following persons:

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

Dated: February 16, 2006

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Mary A. Mullin

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

One of the Attorneys for
Midwest Generation EME, LLC