

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
CLERK'S OFFICE

MAR 16 2006

STATE OF ILLINOIS  
Pollution Control Board

Midwest Generation EME, LLC, )  
)  
Petitioner, )  
)  
v. )  
)  
Illinois Environmental Protection Agency, )  
)  
Respondent. )

PCB No. 04-216  
(Trade Secret Appeal)

NOTICE OF FILING

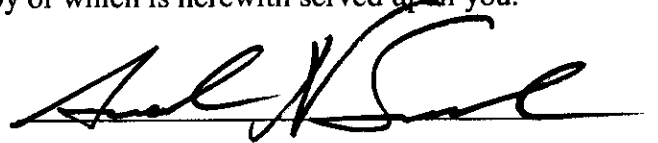
To:

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

Dorothy Gunn, Clerk  
Illinois Pollution Control Board  
100 West Randolph  
Suite 11-500  
Chicago, Illinois 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 we have today filed with the Office of the Clerk of the Pollution Control Board Midwest Generation EME, LLC's Motion for Leave to file the Attached Reply to Respondent Illinois Environmental Protection Agency's Memorandum in Opposition to Petitioner's Motion to Compel, a copy of which is herewith served upon you.



Dated: March 16, 2006

Sheldon A. Zabel  
Mary Ann Mullin  
Andrew N. Sawula  
Schiff Hardin LLP  
6600 Sears Tower  
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**MOTION FOR LEAVE TO FILE THE ATTACHED REPLY TO  
RESPONDENT'S MEMORANDUM IN OPPOSITION  
TO MIDWEST GENERATION'S MOTION TO COMPEL**

Pursuant to 35 Ill. Adm. Code 101.500(e), Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Motion for Leave to File the Attached Reply to Respondent Illinois Environmental Protection Agency's ("IEPA's" or the "Agency's") Memorandum in Opposition to Midwest Generation's Motion to Compel. In support of this motion, Midwest Generation states as follows:

1. This matter concerns IEPA's denial of trade secret protection to a document referred to as the Continuing Property Record ("CPR"). The CPR contains a listing of hardware and equipment that has been added or retired from six coal-fired generating stations formerly owned by Commonwealth Edison ("ComEd") and currently owned by Midwest Generation. ComEd submitted the CPR to the United States Environmental Protection Agency ("USEPA") in response to a USEPA information request under the Clean Air Act; at USEPA's suggestion, ComEd submitted a courtesy copy to IEPA.

2. On June 3, 2004, Midwest Generation filed a Petition for Review of IEPA's Denial of Trade Secret Protection. On June 17, 2004, the Illinois Pollution Control Board (the

“Board”) accepted the Petition for Review. Pursuant to the Hearing Officer’s August 25, 2005 Discovery Scheduling Order, Midwest Generation served Respondent with interrogatories and document requests, but Respondent improperly refused to answer much of this discovery. On February 16, 2006, Midwest Generation moved to compel answers to these interrogatories and document requests. Respondent filed a Memorandum in Opposition to this motion on March 2, 2006.

3. Midwest Generation will be materially prejudiced unless it is allowed to Reply to Respondent’s Memorandum in Opposition. In its Opposition, Respondent misrepresents Midwest Generation’s position and misquotes authority. In the Reply, Midwest Generation responds to these inaccuracies.

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

Dated: March 16, 2006

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Sheldon A. Zabel  
Mary Ann Mullin  
Andrew N. Sawula

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Attorneys for  
Midwest Generation EME, LLC

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PCB No. 04-216  
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**MIDWEST GENERATION EME, LLC'S REPLY IN SUPPORT OF  
MOTION TO COMPEL**

Petitioner Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Reply to Respondent Illinois Environmental Protection Agency's ("IEPA's" or the "Agency's") Memorandum in Opposition ("Opposition Memorandum") to Midwest Generation's Motion to Compel, which Midwest Generation filed with the Illinois Pollution Control Board ("IPCB" or "the Board") on February 16, 2006. In addition to the legal and factual bases for compelling IEPA's responses to discovery previously set forth in Midwest Generation's Motion to Compel, Midwest Generation further states as follows:

**I.**

Pursuant to the Hearing Officer's Scheduled Discovery Order, Midwest Generation served IEPA with written discovery related to this trade secret appeal. Midwest Generation's written discovery was designed to obtain information relevant to: (1) the issues central to this appeal—namely, the reasons and evidence supporting IEPA's denial of Midwest Generation's trade secret claim (the "Denial"); and (2) the extent to which IEPA's

Administrative Record was complete and was properly compiled. The Board's regulations, and its written opinions concerning the scope of discovery, provide that such discovery requests in advance of the hearing are permissible. Nevertheless, the Agency refused to produce any information responsive to several of Midwest Generation's requests and, in fact, refuses to even look for certain responsive information. IEPA's unilateral determination that it need only selectively participate in discovery is unsupportable.

Although IEPA acknowledges in its Opposition Memorandum that discovery may be conducted to "determine whether the record filed by the Agency is complete," Res'p Mem. at 10, it argues nevertheless that Midwest Generation's request for certain documents that were before the Agency when the Denial was issued calls for "irrelevant" information. *Id.* In support of its refusal to produce documents, IEPA relies on selected excerpts from early Board cases resolving permit appeals<sup>1</sup>, including the Board's statement from Oscar Mayer & Co. v. Environmental Protection Agency, PCB 78-14 (June 8, 1978) that "[h]ow or why the Agency arrived at a different conclusion on the same facts is simply not relevant to the Board determination." This quotation, however, does not relate to the parameters of discovery. *Id.* Rather, the Board was discussing the appropriate standard of review of Agency permit decisions and stated that it would conduct its own review of the facts without deference to Agency legal interpretations of the same information. *Id.* Oscar Mayer, in fact, establishes that discovery

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<sup>1</sup> Appeals of permit denials and appeals of trade secret denials are governed by the same Board rules concerning appeals of final agency decision. 35 Ill. Admin. Code 105.Subpart B. An important distinction exists, however, between permit and trade secret determinations, in the initial permitting determinations the agency was required to rely only on the permit application submitted by the emission source. See e.g., Oscar Mayer & Co. v. Environmental Protection Agency, PCB 78-14 (June 8, 1978). By contrast, no such proscription requires agency determinations of trade secret claims to be limited to the information contained in the requestor's statement of justification. See 35 Ill. Admin. Code 130.Subparts B and C.

“*should be allowed* to insure that the record ... contains all of the material concerning the [] application that was before the Agency when the denial statement was issued.” *Id.* (emphasis added).

IEPA appears to suggest that the only information relevant to this inquiry is “communications regarding the subject Sierra Club FOIA request,” since those were the only documents it produced.<sup>2</sup> Res’p.at 10. How the Agency arrived at such a narrow interpretation is not clear. The “subject” at issue here is Midwest Generation’s request that the excerpts from the Continuing Property Record (“CPR”) be afforded trade secret protection. As such, materials before the Agency when it issued its Denial fall within the proper purview of Midwest Generation’s discovery requests on appeal. If one follows IEPA’s logic, the Agency can refuse to proffer any document in discovery if it chooses not to include the document in the Record. The net effect of such reasoning is that there can be no meaningful documentary discovery into whether the Administrative Record is, in fact, complete.

The Board has already ruled that “the Board hearing affords petitioner the opportunity to challenge IEPA’s reasons for denial.” June 17, 2004 Board Order at 4. Consequently, the limitation imposed by the Board is that “information developed *after* IEPA’s decision typically is not admitted at hearing or considered by the Board.” *Id.* (emphasis added). No such limitation was imposed on the traditional scope of discovery into the adequacy of the Record.<sup>3</sup>

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<sup>2</sup> IEPA even claims that its other trade secret determinations for data similar to the CPR excerpts are irrelevant, Res’p Mem. at 10, yet the Agency has packed the record with irrelevant judicial opinions involving other utilities from other states. Adm. Record at 869-1205, PCB 04-215 (July 13, 2004).

<sup>3</sup> IEPA asserts that Midwest Generation misrepresents the November 4, 2004 Board Order in PBC 04-185. Midwest Generation acknowledges and apologized for a typographical

## II.

IEPA cannot avoid compliance with Midwest Generation's discovery requests on the ground that its paper files are organized by emission source, not by type of determination or subject matter. First, IEPA has failed to indicate why a search of its files, particularly its electronic files, could not be easily accomplished. Additionally, IEPA suggests that circulating a request among Agency employees for recollections of trade secret determinations would be "disruptive." Res'p Mem. at 12. Although it may be true that reviewing files and identifying responsive information in furtherance of discovery may disrupt normal work routines, such considerations do not provide a legally cognizable excuse for a party served with discovery to avoid any attempt at compliance. For example, polling of current IEPA employees by circulation of a simple e-mail message to the Agency's relevant divisions likely would yield information that would direct the Agency to specific files in lieu of reviewing every file. IEPA fails to note in its Opposition Memorandum that Midwest Generation offered to narrow the scope of the requests, but the Agency declined the offer.

In short, IEPA does not appear to claim that no responsive documents exist, nor does it state that such documents cannot be located. Rather, IEPA argues that because it cannot with certainty locate *all* responsive documents, it need not bother locating *any* responsive documents. As a result, Midwest Generation has been preparing for upcoming depositions and other discovery without the benefit of these responsive documents.

\* \* \*

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error in one quote which omitted an intended ellipsis. The typographical error, however, had no effect on the meaning of the quote.

WHEREFORE, for the reasons set forth above, Midwest Generation respectfully requests that the Hearing Officer grant its Motion to Compel.

Dated: March 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, IL 60606

Attorneys for  
Midwest Generation EME, LLC



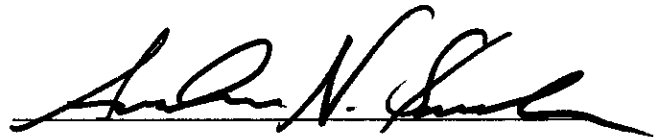
**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served the Motion for Leave to file the attached Reply to Respondent's Memorandum in Opposition to Petitioner's Motion to Compel by U.S. mail on this 16<sup>th</sup> day of March, 2006, 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

Brad Halloran  
Hearing Officer  
Illinois Pollution Control Board  
100 West Randolph  
Suite 11-500  
Chicago, Illinois 60601

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

A handwritten signature in black ink, appearing to read "Paula Becker Wheeler", written over a horizontal line.