

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: Dorothy Gunn, Clerk	Sheldon A. Zabel
Illinois Pollution Control Board	Mary A. Mullin
100 West Randolph	Andrew N. Sawula
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Brad Halloran
Hearing Officer
Illinois Pollution Control Board
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Please take notice that today we have filed with the Office of the Clerk of the Pollution Control Board Respondent's Memorandum in Opposition to Midwest Generation's Amended Motion to Compel. A copy is herewith served upon the assigned Hearing Officer and the attorneys for the Petitioner, Midwest Generation EME, LLC.

Dated: Chicago, Illinois
March 28, 2007

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
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BY:  _____

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**MEMORANDUM IN OPPOSITION TO
MIDWEST GENERATION'S AMENDED MOTION TO COMPEL**

Preliminary Statement

Respondent Illinois Environmental Protection Agency (IEPA or the "Agency") submits this memorandum in response to Petitioner Midwest Generation EME, LLC's ("Midwest Generation") Amended Motion to Compel Respondent's Discovery Responses. The Amended Motion, filed March 23, 2007, is intended to supplement Midwest Generation's original Motion to Compel filed in February, 2006, based on information obtained in depositions taken in March, 2006.

The Amended motion is frivolous on three levels. First, it is woefully delayed, based on "new" information that is more than a year old, suggesting its real purpose is to further delay the hearing examiner's decision in the pending motion. Second, it is substantively without merit. All three IEPA deponents confirmed exactly what IEPA had stated in its response to the motion to compel: that trade secret determinations are not kept separately filed, and the only way to locate even a small portion of them is by polling employees regarding their anecdotal recollections. Third, the Amended Motion fails to even acknowledge the primary ground for IEPA's opposition to the original motion, which has nothing to do with burdensomeness: the requested materials are not

even remotely relevant in view of the Board's determination that the hearing will be held exclusively on the record. That ground alone is more than sufficient for denial of Midwest Generation's motion.

Point I

MIDWEST GENERATION'S MOTION IS UNTIMELY

As noted above, Midwest Generation's original motion to compel was filed in February, 2006, and the depositions containing the purportedly new information on which the Amended motion is based were taken in March, 2006. Although a temporary stay was in effect from April 6, 2006 until December 4, 2006, there is no reason Petitioner needed to wait until late March, 2007 to file this motion. The deposition transcripts were signed and made available to Petitioner many months before the stay was lifted in December, and Petitioner could easily have prepared this relatively simple motion during the stay period in anticipation of its specified end date. Even if it chose to wait until the stay ended to do work on this matter, there is no reason it should have taken four months to prepare this motion. Midwest Generation is aware from status conference discussions that the hearing officer is in the course of deciding the original motion to compel, yet made no previous reference to any intention to file the Amended Motion. It appears that the primary purpose of Petitioner's woefully belated amended filing is to further delay the hearing officer's decision. Since, as described below, the Amended Motion offers nothing new on the merits, it should be disregarded and a decision on the original motion issued promptly.

Point II

ALL THREE MARCH, 2006 DEPOSITIONS FULLY SUPPORT IEPA'S ARGUMENTS IN OPPOSITION TO PETITIONER'S MOTION TO COMPEL

In its opposition to Petitioner's original Motion to Compel filed more than a year ago, IEPA pointed out that the three decades worth of IEPA trade secret determinations from unrelated matters requested by Petitioner are not only irrelevant to this on-the-record proceeding, but would be impossible to produce. IEPA documented, through the affidavit of (then) Bureau of Air permit section manager Donald Sutton, that trade secret determinations are not kept in a separate collective repository for such determinations, but rather are kept in the case files of the matters to which they pertain. Specifically, he stated:

Compliance with these requests would be for all practical purposes impossible, for the simple reason that IEPA keeps no separate record of its trade secret determinations. All records pertaining to those determinations – including statements of justification and responses – are kept in the file of the source that was the subject of the determination. As such, there is no way to call up only those files for sources for which trade secret determinations or emission data determinations were made. Furthermore, the files of sources no longer operating in Illinois are archived and eventually destroyed.

Affidavit of Donald E. Sutton ("Sutton Aff."), executed March 2, 2006, at ¶ 3.

Mr. Sutton acknowledged that Agency staff might have "anecdotal" recollections of trade secret matters they had worked on, but stated that polling current staff to obtain such recollections would collect only a very incomplete subset of the vast amount of information defendants requested. Mr. Sutton pointed out that, leaving aside the inherently spotty nature of such recollections, such polling would not capture the

recollections of former staff, who cumulatively far outnumber current staff over the 36 year time frame at issue in a portion of plaintiff's requests. Specifically, he stated:

Polling current permitting and enforcement staff to determine whether they recall any trade secret and/or emission data determinations would be burdensome and disruptive, and would accomplish little. Even assuming current staff would actually recall every case or some subset of matters in which a trade secret and/or emission data determination was made, seeking such anecdotal recollection would not capture trade secret matters handled by staff no longer with the BOA permit section or the Division of Legal Counsel enforcement unit – which, in view of the extraordinarily long time frame of Midwest Generation's discovery, is a much larger category of people than current staff.

Sutton Aff. ¶ 4. As pointed out in IEPA's memorandum in opposition to the original motion, an incomplete set of records would have no evidentiary value even if it were relevant and admissible (which it is not) given the nature of the facts Petitioner claims it would try to prove with them. IEPA's Memorandum In Opposition to Midwest Generation's Motion to Compel at 14.

The three depositions on which Petitioner relies in its Amended Motion wholly support these arguments made by IEPA a year ago. Indeed, statements in the depositions add further reason to believe that Petitioner's requests are absurdly burdensome.

The sole basis for the Amended Motion is that the deponents were able to cite by name a handful of matters in which they were personally involved on some level in trade secret or emission data determinations. Petitioner's Amended Motion ¶¶ 6-8. These purely anecdotal recollections, as Mr. Sutton correctly dubbed them, are entirely consistent with Mr. Sutton's affidavit and IEPA's previous opposition to Petitioner's motion to compel, and are unhelpful to Petitioner for all of the reasons stated therein. The deponents expressly confirmed Mr. Sutton's statement that the trade secret matters are not filed separately and hence cannot be collectively retrieved. Armitage Dep. March

15, 2006 (Petitioner's Ex. A) at 23:8-23; Presnall Dep. March 15, 2006 (Petitioner's Ex. C) at 41:15-19. They also confirmed his assumption that anecdotal recollections of staff would be spotty at best.

Indeed, what is significant to this motion is not how much the deponents were able to recall about previous trade secret matters, but how little. In almost every instance, their recollections were admittedly limited and heavily hedged with qualifiers that they were "vague" and possibly mistaken. In the portion of the transcript of Chris Presnall's deposition cited by Petitioner, after estimating that he had reviewed "less than 10" trade secret determinations during the course of his employment at IEPA, he clarified that "when I said that less than 10, I vaguely recall at some point looking at a statement of justification in perhaps one of these other [than Midwest Generation or Com Ed] matters...." He then stated, "I believe there was a matter called WITCO, but I didn't work on that and I'm only vaguely familiar with it." In response to a question regarding his recollection of specific matters involving emission data, Mr. Presnall was able to recall only, "I believe one of them was Fleischmann's vinegar, something similar to that." Presnall Dep. March 15, 2006 (Petitioner's Exhibit C) at 20:2-10, 32:1-5, 107:6-7. Similarly, Chris Romaine recalled that he was "peripherally" involved in a trade secret matter involving Clorox bleach, but couldn't remember when beyond a vague time frame; recalled a trade secret matter involving a facility in Danville but didn't know if there had been a trade secret justification submitted; and recalled the name of a third matter, "[m]aybe Conoco Phillips in Hartford." Romaine Dep. March 16, 2006 (Petitioner's Ex. B) at 25:17-19, 27:4-7, 28:4-6.

In addition, some of deponents' statements suggest even further difficulties with the already proven-impossible task of retrieving the decades worth of records requested by Petitioners. Chris Presnall pointed out that every bureau at IEPA has its own policies and procedures for handling FOIA requests and exemptions from FOIA disclosure. Presnall Dep. March 15, 2006 (Petitioner's Exhibit C) at 35:20-36:10. Thus, no one retrieval method or set of parameters would necessarily capture all of the documents requested by Petitioner, since the requests apply to all IEPA bureaus across the board. In addition, Mr. Presnall pointed out that, in addition to its "formal" trade secret determinations of the type at issue in this matter, *i.e.*, those involving a statement of justification and a written determination, some IEPA staff spend a significant portion of their time – 10 to 15 percent in Mr. Presnall's case – making informal determinations in trade secret matters that result in resolutions with the claimant before any formal determination becomes necessary. Presnall Dep. March 15, 2006 (Petitioner's Ex. B) at 17:20-20:21. Petitioner's vague and broadly-worded discovery request fail to distinguish between formal written determinations and informal determinations – the latter being undocumented and hence untraceable – and thus can be read to encompass both.

Point III

**MIDWEST GENERATION'S AMENDED MOTION FAILS TO
ACKNOWLEDGE THE PRIMARY BASIS FOR IEPA'S OPPOSITION**

In its Amended Motion, Midwest Generation correctly states that IEPA objected to its discovery requests on the ground that they were overbroad, burdensome, and vague. What it does not state is that there was a fourth, and primary, objection to those requests: that they are for information that is wholly irrelevant in a proceeding conducted on the administrative record. Petitioner will not reiterate all of its previous arguments here,

which occupied the first 12 pages of its original 14 page memorandum in opposition filed last year. It is sufficient to state that the Board has squarely ruled, twice, on the evidentiary boundaries of this proceeding. This proceeding is to be held solely and exclusively on the administrative record of IEPA's trade secret denial in this matter. Trade secret denials in other unrelated matters are, quite simply, 100 percent irrelevant.

Conclusion

For the foregoing reasons, IEPA respectfully requests that petitioner's Amended Motion to Compel Respondent's Discovery Responses be denied.

Dated: Chicago, Illinois
March 28, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE


I hereby certify that I did on the 28th day of March, 2007 send by United States mail a copy of Respondent's Memorandum in Opposition to Midwest Generation's Amended Motion to Compel, the Affidavit of Donald E. Sutton, and the Affidavit of Ann Alexander,, to:

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Dated: Chicago, Illinois
March 28, 2007

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