

ILLINOIS POLLUTION CONTROL BOARD

April 24, 2007

MIDWEST GENERATION EME, LLC,)	
)	
Petitioner,)	
)	
v.)	
)	PCB 04-216
ILLINOIS ENVIRONMENTAL)	(Trade Secret Appeal)
PROTECTION AGENCY,)	
)	
Respondent.)	

HEARING OFFICER ORDER

On February 16, 2006, petitioner, Midwest Generation EME, LLC, (Midwest), filed a motion to compel responses to certain of its initial interrogatories and initial requests for the production of documents. (Motion, Ex 1). On March 2, 2006, respondent, Illinois Environmental Protection Agency (Agency) filed a memorandum in opposition to Midwest's motion. On March 16, 2006, Midwest filed a motion for leave to file an attached reply to the Agency's memorandum in opposition. The motion is denied as discussed below. On March 28, 2006, the Agency filed a memorandum in opposition to Midwest's motion for leave to file a reply to the Agency's memorandum in opposition to the motion.

On April 6, 2006, the Board granted Midwest's motion to stay the above-captioned matter to and including August 4, 2006. On August 17, 2006, the Board again granted Midwest's motion to stay, to and including December 4, 2006. On February 15, 2007, the Board denied Midwest's third request to stay this case.

On March 23, 2007, Midwest filed an amended motion to compel the Agency's discovery responses. On March 28, 2007, the Agency filed a memorandum in opposition to Midwest's amended motion to compel. On April 4, 2007, Midwest informed the hearing officer that it will not file a motion for leave to reply.

For the reasons set forth below, Midwest's motion to compel is denied.

Procedural Status of the Case

Midwest has appealed the Agency's April 23 2004, trade secret determination of the respondent pursuant to 415 ILCS 5/40(a)(1) (2004) and 35 Ill. Adm. Code 130.214(a). In its' determination, the Agency denied trade secret protection from public disclosure for certain information regarding coal-fired generating stations. On June 17, 2004, the Board accepted the petition for review.

The Agency denied trade secret protection for the stated reasons that Midwest failed to adequately demonstrate that the information has noncompetitive value, and/or that the

information does not constitute emissions data under Section 7 (b) of the Illinois Environmental Protection Act.

On June 17, 2004, the Board accepted the petition for review. Under the Board's procedural rules Midwest's information has received trade secret protection and will continue to do so until a final order is issued in this case. *See* 35 Ill. Adm. Code 130.210 (c).

Midwest's Motion To Compel

Midwest's motion to compel filed February 16, 2006, seeks an order allowing discovery in the following interrogatories. Interrogatory No. 13: Identify any determination you have made relating to the trade secret status of a business's financial information submitted to the IEPA. Interrogatory No. 14: Identify any determination you have made that information constitutes "emissions 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. sec. 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 determination and correspondence related to the same.

Midwest states that the information is needed for the Board's review of the Agency's trade secret determination where Midwest alleges that the Agency's denial is contrary to the Agency's past trade secret determinations and what information constitutes "emissions data." Midwest alleges further that the Agency has never before determined that accounting data is "emissions data", and that this information is relevant to a potential fair notice argument. Midwest's argues that the information sought is relevant or calculated to lead to relevant information. Midwest also alleges that the information sought is neither overbroad nor unduly burdensome, nor is the information sought vague.

Agency's Response In Opposition

In sum, the Agency's response in opposition, filed March 2, 2006, has two main arguments. The first is that the information sought by Midwest is irrelevant where hearings in trade secret matters at issue are to be held exclusively on the record, and that no non-record evidence would be admissible. The second is that Midwest's requested discovery is burdensome and overly broad. The Agency states that compliance with the requests would be impossible as a practical matter because "the IEPA Bureau of Air does not maintain any recordkeeping system specifically concerning trade secret matters. Trade secret determinations are stored in the file of the particular emission source concerning which they were made, and no separate record is kept of them." This assertion is supported by affidavit.

Midwest's Motion for Leave to File Reply to the Agency's Memorandum in Opposition and the Agency's Response in Opposition to Midwest's Motion for Leave to File a Reply

On March 16, 2006, Midwest filed a motion for leave to reply to the Agency's response in opposition. In sum, Midwest argues that the Agency has misrepresented Midwest's position and misquotes authority. On March 28, 2006, the Agency filed a memorandum in opposition to Midwest's motion for leave to file a reply. Section 101.500 (e) of the Board's procedural rules provides that the moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. 35 Ill. Adm. Code 101.500(e). The hearing officer finds that Midwest's reply offers no assistance and that by denying the reply, Midwest will suffer no material prejudice. Midwest's motion for leave to file a reply is denied.

Midwest's Amended Motion to Compel and Respondent's Response

On March 23, 2007, Midwest filed an amended motion to compel. In the motion, Midwest represents that subsequent to its initial motion to compel, deposition testimony of several Agency employees was taken that directly contravenes the Agency's objection that Midwest's discovery requests are overbroad and unduly burdensome. In sum, Midwest argues that the depositions reveal that some of the Agency's prior trade secret determinations in other matters can be retrieved with little effort.

On March 28, 2007, the Agency filed its response. The Agency argues that Midwest's amended motion to compel is untimely, overly burdensome and in any event, irrelevant. To buttress the overly burdensome argument, the Agency notes that its employee-deponents testified that at best, they may have "anecdotal" or "vague" recollections of other trade secret matters they have worked on. One of the deponents testified that some of the trade secret determinations involve "informal determinations" that are not documented.

Discussion and Ruling

Section 101.616(a) of the Board's procedural rules provides: All relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130 [protecting trade secrets and other non-discoverable information specified by the Act]. 35 Ill. Adm. Code 101.616(a).

In accordance with Section 130.214(a) of the Board's procedural rules (35 Ill. Adm. Code 130.214(a)), trade secret cases proceed under the procedures for permit appeals at 35 Ill. Adm. Code 105 Subparts A and B. Hearings are based exclusively on the record before the Agency at the time it issued its trade secret determination. *See* 35 Ill. Adm. Code 105.214(a). The Agency's determination frames the issue on the appeal. *See ESG Watts, Inc. v. PCB*, 286 Ill. App. 3d. 325, 676 N.E.2d 299 (3rd Dist. 1997). Therefore, though the Board hearing affords petitioner the opportunity to challenge the Agency's reasons for denial, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987)

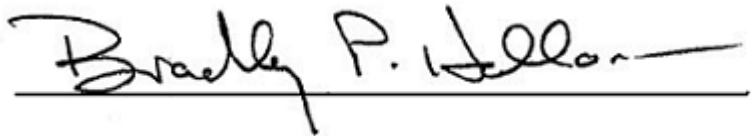
(disallowing introduction of new evidence not presented to the Agency in the permit proceeding); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom.* 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3d Dist. 2002).

Here, the Board's purpose is not to determine whether the Agency treated other companies differently. Indeed, it is long-settled that the Board has no jurisdiction to hear allegations of any Agency misfeasance, malfeasance, or nonfeasance in its enforcement of the Act and Board rules. People v. Packaging Personified, Inc., PCB 04-16 (Oct. 5, 2006), citing TTX Company v. Whitley, 295 Ill. App. 3d 548, 692 N.E.2d 790 (1st Dist. 1998); Landfill, Inc., v. PCB, 74 Ill. 2d 541, 367 N.E.2d 258 (1978).

Here, the administrative record in the above-captioned matter was filed July 13, 2004. It is noted that the requested discovery at issue, including information relating to the Agency's prior trade secret determinations regarding financial and operational data submitted by other businesses and electric utilities, are not included. The hearing officer finds that based on the Board's procedural provisions and the plethora of case law, the discovery in dispute is neither relevant, nor reasonably calculated to lead to relevant information. Midwest has not persuasively identified any additional discovery evidence. The hearing officer also finds that discovery of other trade secret determinations, some going back 17 years, of other unrelated businesses would be overly burdensome, overly broad, and would apparently yield incomplete or erroneous submissions based on "anecdotal" or "vague" recollection of the Agency personnel.

Midwest's motion to compel is denied.

IT IS SO ORDERED.

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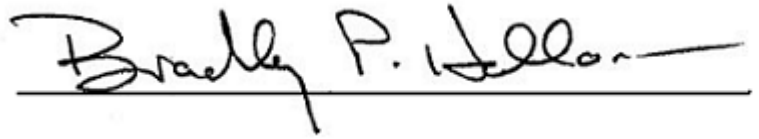
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on April 24, 2007, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 24, 2007:

Dorothy M. Gunn
Illinois Pollution Control Board
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A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath it.

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