

ILLINOIS POLLUTION CONTROL BOARD

July 23, 2009

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

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

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

On June 12, 2009, Commonwealth Edison Company (ComEd) and Midwest Generation EME, LLC (Midwest) filed a motion to consolidate these two trade secret appeals. Petitioners represent that respondent, the Illinois Environmental Protection Agency (IEPA), does not oppose the joint motion. For the reasons below, the Board grants the joint motion and consolidates the two appeals for purposes of hearing, but not necessarily for decision. In this order, the Board provides brief background on the cases before discussing and ruling on the joint motion.

BACKGROUND

ComEd and Midwest have separately appealed two trade secret determinations of IEPA. In each determination, IEPA denied trade secret protection from public disclosure for information about six coal-fired generating stations. The stations are formerly owned by ComEd and currently owned by Midwest. The information claimed to be trade secret in each appeal was submitted to IEPA by ComEd and some of the same information is at issue in each appeal.

Specifically, on June 2, 2004, ComEd timely filed a petition asking the Board to review an April 23, 2004 trade secret determination of IEPA. The Board docketed the ComEd appeal as PCB 04-215. On June 3, 2004, Midwest timely filed a petition asking the Board to review a

separate April 23, 2004 trade secret determination of IEPA. The Board docketed the Midwest appeal as PCB 04-216. ComEd's petition contested IEPA's determination regarding two documents: (1) excerpts of a "Continuing Property Record" (CPR Excerpts); and (2) excerpts of "Generating Availability Data System" data (GADS Excerpts). Midwest's petition contested IEPA's determination concerning the CPR Excerpts only.

Petitioners stated that ComEd submitted the CPR Excerpts and the GADS Excerpts in response to an information request made by the United States Environmental Protection Agency (USEPA) under Section 114 of the federal Clean Air Act (42 U.S.C. §7414). Petitioners further stated that ComEd submitted a "courtesy copy" of the information to IEPA at USEPA's suggestion. ComEd and Midwest had submitted to IEPA separate statements of justification for trade secret protection. Midwest's statement of justification did not address the GADS Excerpts.

On June 17, 2004, the Board issued an order accepting the petitions for hearing, granting petitioners' requests that any hearings be held *in camera*, and directing the parties to address whether the appeals should be consolidated. In the responsive pleadings, petitioners opposed consolidation and IEPA favored consolidation. The Board's July 7, 2005 order declined to consolidate the appeals at that time. In separate orders of August 18, 2005, in these appeals, the Board denied the motions to intervene of Sierra Club, which had made a Freedom of Information Act (FOIA) request to obtain from IEPA all of the information claimed to be protected from public disclosure. The August 18, 2005 orders provided, however, that Sierra Club may participate in these proceedings by making oral or written statements at hearing and by filing *amicus curiae* briefs or public comments.

Since then, among other things, both appeals have (1) had numerous status conferences conducted by the hearing officer who presides over both cases; (2) been stayed at the request of the parties for several limited periods of time while a related proceeding has pended before USEPA; and (3) entered into discovery. Neither case has been to hearing. Each case has pending a motion for interlocutory appeal of a hearing officer discovery ruling, neither of which will be addressed in this order. On June 12, 2009, petitioners filed the motion to consolidate (Mot.), which is the subject of today's order. Petitioners have respectively waived the decision deadline in each appeal to March 19, 2010. The Board meeting immediately before each decision deadline is scheduled for March 18, 2010.

DISCUSSION

In the joint motion to consolidate, ComEd and Midwest acknowledge that they previously opposed consolidation. Mot. at 2. Petitioners' former opposition to consolidation was due in part to their belief that Midwest "did not own or have access to the GADS Excerpts." *Id.* According to the motion, the GADS Excerpts were "generated by the North American Electric Reliability Council ('NERC') confidentially for ComEd." *Id.* at 1-2. Petitioners had understood that with consolidation, "it would be difficult to prevent inadvertent disclosure of this information." *Id.* at 2. However, petitioners have since learned that "as a matter of policy, NERC provides this information to current owners of the assets" and therefore Midwest "now has access to the GADS data from the period of time ComEd owned the Stations." *Id.* at 2-3.

ComEd and Midwest also maintain that as discovery has proceeded, it has “become evident that both proceedings will involve many of the same witnesses and legal issues.” Mot. at 3. Accordingly, petitioners continue, consolidation “will serve the interest of conveniently and expeditiously deciding the appeals.” *Id.*

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

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

All claimed information was submitted by ComEd and concerns the same generating stations. Both petitioners claimed trade secret protection of the CPR Excerpts. Only ComEd claimed trade secret protection of the GADS Excerpts. However, because NERC has since provided the GADS Excerpts to Midwest, the threat of inadvertent unauthorized disclosure of the GADS Excerpts to Midwest at a consolidated hearing is no longer present. Witnesses and issues apparently common to both appeals may be more efficiently addressed at a single hearing. The parties plainly do not believe that material prejudice will result from granting the motion, as ComEd and Midwest jointly seek to consolidate the appeals and state that IEPA does not oppose consolidation. Mot. at 3; *see also* 35 Ill. Adm. Code 101.500(d) (where there is no response to a motion within 14 days, as here, the non-movant waives objection to the motion being granted). The burden of proof in each appeal rests with petitioner. *See* 35 Ill. Adm. Code 130.214(a); *see also* 35 Ill. Adm. Code 105.112(a).

Under these circumstances, the Board grants the joint motion to consolidate the two trade secret appeals. The Board does so for purposes of hearing, but not necessarily for decision. *See* 35 Ill. Adm. Code 101.406 (may consolidate for “hearing or decision or both”). The joint motion does not propose excluding either petitioner from any portion of the hearing, and the hearing officer will proceed accordingly absent the grant of any petitioner motion for such measure. Consistent with the Board’s orders of June 17, 2004 and August 18, 2005 in both cases, the hearing will be held *in camera* but include an opportunity for Sierra Club, the FOIA requester, to make oral or written statements. Any other public participation at hearing will be permitted at the discretion of the hearing officer and only as time, facilities, and concerns for a clear and concise hearing record allow. *See* 35 Ill. Adm. Code 101.628; *see also* Devro-Teepak, Inc. v. IEPA, PCB 98-160 (Sept. 1, 1998) (Hearing officer order) (members of public “allowed to give testimony and be subject to examination by counsel, however, they will not be allowed in the hearing room during the presentation of evidence by either party.”).

The Board reminds the parties that a trade secret appeal hearing is generally limited to the administrative record before IEPA at the time IEPA issued its determination. *See* Midwest Generation EME, LLC v. IEPA, PCB 04-185 (Nov. 4, 2004), *appeal dismissed sub nom.*

Midwest Generation EME, LLC v. PCB, IEPA, No. 3-04-0945 (3rd Dist., Mar. 4, 2005). IEPA has previously represented to the Board that the IEPA administrative records of these two appeals, each over 1,600 pages, are “close to identical, with the only difference between them being the separate trade secret justification statements submitted by [ComEd] and [Midwest].” IEPA July 26, 2004 Filing at 1. The Board reiterates that ComEd and Midwest each bears the burden of proof in its respective appeals of separate IEPA determination letters, and that Midwest’s appeal concerns only the CPR Excerpts. The Board directs ComEd and Midwest to specify at hearing whether petitioner witnesses and exhibits, if any, are offered jointly or singly. IEPA is likewise directed to specify at hearing whether respondent witnesses or exhibits, if any, are offered for PCB 04-215 or PCB 04-216 or both cases.

The hearing transcript (with the exception of any public statements and related examination), the parties’ exhibits, and the parties’ post-hearing briefs will be protected from public disclosure in accordance with 35 Ill. Adm. Code 130. *See Devro-Teepak, Inc. v. IEPA*, 98-160, 98-161 (consol.), slip op. at 2 (Dec. 3, 1998). Sierra Club has already received permission in these appeals to file *amicus curiae* briefs, which, along with any public comments, will become part of the Board’s publicly-available records. Future filings must reflect the amended caption as shown on this order.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 23, 2009, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board