

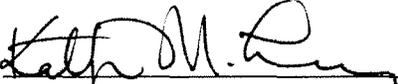
**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

Midwest Generation EME, LLC,	)	
Petitioner,	)	
	)	
v.	)	PCB No. 04-185
	)	(Trade Secret Appeal)
Illinois Environmental Protection Agency,	)	
Respondent.	)	
	)	

**NOTICE OF FILING**

To: Brad Halloran	Stephen J. Sylvester
Hearing Officer	Ann Alexander
Illinois Pollution Control Board	Office of the Attorney General
100 West Randolph	69 West Washington Street
Suite 11-500	Suite 1800
Chicago, Illinois 60601	Chicago, Illinois 60602

PLEASE TAKE NOTICE that I have filed today with the Office of the Clerk of the Pollution Control Board **Midwest Generation EME, LLC's Response to Respondent's Motion to Clarify, Reconsider and/or Modify the Board's April 7, 2011 Order**, copies of which are herewith served upon you.

  
Kathryn McCollough Long

Dated: May 27, 2011

SCHIFF HARDIN LLP  
One Westminster Pl.  
Lake Forest, Illinois 60045  
(847) 295-4324

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

	)	
	)	
Midwest Generation EME, LLC,	)	
Petitioner,	)	
	)	
	)	PCB No. 04-185
v.	)	(Trade Secret Appeal)
	)	
Illinois Environmental Protection Agency,	)	
Respondent.	)	
	)	

**MIDWEST GENERATION EME, LLC'S RESPONSE TO  
RESPONDENT'S MOTION TO CLARIFY, RECONSIDER  
AND/OR MODIFY THE BOARD'S APRIL 7, 2011 ORDER**

Petitioner Midwest Generation EME, LLC ("Petitioner") hereby responds to Respondent Illinois Environmental Protection Agency's ("IEPA" or "Respondent's") Motion to Clarify, Reconsider and/or Modify the Board's April 7, 2011 Order ("Respondent's Motion"), which Respondent filed with the Illinois Pollution Control Board (the "Board") on May 13, 2011.

1. On April 7, 2011, the Board entered an order granting Petitioner's Motion to Vacate IEPA's Trade Secret Determination and to Dismiss the Petition for Review as Moot (the "Order"). The trade secret determination which is the subject of this matter (the "Trade Secret Determination") concerns documents Petitioner submitted to IEPA and claimed to be trade secrets (the "CBI Materials"). In 2003, a third party sought these documents through a Freedom of Information Act ("FOIA") request. After seeking and obtaining a justification from the Petitioner regarding its claims that the CBI Materials constituted trade secrets, IEPA determined that the documents were not trade secrets. Petitioners appealed the Trade Secret Determination to the Board. In its Order, the Board found that the matter was moot because the third party FOIA request for the CBI Materials had been withdrawn, there was no other request for public disclosure of the CBI Materials and IEPA had not articulated any other reason to release the CBI

Materials into the public domain. (Order at p. 8.) The Board further found that the public interest exception to the mootness doctrine was inapplicable because IEPA failed to demonstrate that the question of whether the CBI Materials constituted trade secrets was likely to recur.

(Order at p. 9.) Finally, the Board vacated the Trade Secret Determination in order to avoid the risk of a future public disclosure of the CBI Materials. (Order at p. 9.)

2. In its Motion, IEPA seeks clarification from the Board as to whether IEPA's November 30, 2004, "Clarification of the Trade Secret Determination," which was subsequently modified by Board Order on April 19, 2007, and Petitioner's May 29, 2007, "Amended Petition for Review" have been vacated. Obviously, the Clarification of the Trade Secret Determination, which is premised on the existence of the Trade Secret Determination, was vacated at the same time that the Trade Secret Determination was vacated; and the Amended Petition for Review was dismissed as moot at the same time that the Board dismissed the Petition for Review, and hence this entire proceeding, as moot. This conclusion is inherent in the Board's Order. The fact that the Board references both documents in the portion of the Order describing the background of this matter indicates that the Board intended that both documents—along with the rest of the filings by the parties in this matter—be disposed of by the Order. Any other reading of the Order would be illogical. Although Petitioner does not think it is necessary, Petitioner would not object to the Board's making an explicit statement clarifying the status of the Clarification of the Trade Secret Determination and the Amended Petition for Review.

3. IEPA also seeks clarification from the Board as to whether IEPA's 2004 request to substantiate the Petitioner's claims that the CBI Materials constituted trade secrets (the "Request for Substantiation") and Petitioner's response to the Request for Substantiation ("Petitioner's Response") are still pending before the IEPA. Of course they are not. The entire matter has been dismissed as moot. The necessary consequence of the Board's Order is that the Request for

Substantiation and Petitioner's Response are no longer pending before the IEPA. When the Board vacated the Trade Secret Determination, it did not remand the matter to IEPA for further action. Rather, it dismissed the entire proceeding as moot because the underlying reason for the IEPA's Request for Substantiation and Petitioner's Response—the FOIA request—has been withdrawn. Thus, IEPA need not take any further action with regard to the Requests for Substantiation or Petitioner's Response. Indeed, if this were not the case, it would lead to the absurd result suggested in Respondent's Motion, i.e. that IEPA would merely make the same determinations that it made in 2004, which would result in the parties coming before the Board again. If that had been the Board's intent, it would not have found that IEPA failed to show that the question of whether the CBI Materials constituted trade secrets was likely to recur. (Order at 9.) While Petitioner does not believe any clarification of the Order is necessary, Petitioner does not object to the Board providing an explicit statement clarifying the status of the Requests for Substantiation and Petitioners' Responses.

4. Petitioner is perplexed by Respondent's statement that, in the event of a new request for the public disclosure of the CBI Materials, IEPA could be "foreclosed" from issuing a new request that the Petitioner substantiate its claims that the CBI Materials constitute trade secrets under the doctrine enunciated in Reichhold Chemicals, Inc. v. Illinois Pollution Control Board, 204 Ill.App.3d 674, 677 (3rd Dist. 1990). (Respondent's Motion at pp. 5-6.) Reichhold dealt with IEPA's denial of a permit, a final determination which was subject to appeal. Id. In contrast, the Request for Substantiation was not a final determination by IEPA. Therefore, Reichhold would have no bearing on IEPA's authority to make a new request for substantiation if some new reason to publically disclose the CBI Materials arises in the future. In any event, it appears to Petitioner that, in raising this point, Respondent is improperly seeking an advisory opinion from the Board as to how it should handle a hypothetical future request for the disclosure

of the CBI Materials. Insofar as that is the case, the Respondent's Motion should be denied.

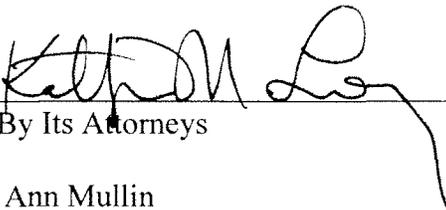
5. Although styled as a "Motion to Clarify, Reconsider and/or Modify the Order," Respondent's Motion neither meets the standard for a motion for reconsideration nor requests that the Board reconsider its decision. Section 101.902 of the Title 35 of the Illinois Administrative Code states, "[i]n ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." Respondent's Motion does not allege the existence of any new evidence or a change in the law. Respondent's Motion does not even aver that the Board's decision was in error. Therefore, to the extent that Respondent's Motion could be read to request that the Board reconsider the Order, that motion for reconsideration should be denied.

**CONCLUSION**

Petitioner would not object to the Board's modification of the Order or making an explicit statement clarifying that the Order applies to the entire matter, including the Clarification of the Trade Secret Determination and the Amended Petition for Review. However, for the foregoing reasons, to the extent that Respondent's Motion seeks reconsideration of the Order or an advisory opinion, the Respondent's Motion should be denied.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By:   
By Its Attorneys

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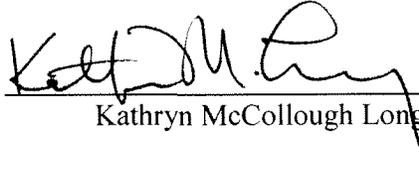
Dated: May 27, 2011

**CERTIFICATE OF SERVICE**

I, the undersigned attorney, certify that I have served the attached Notice of Filing and Midwest Generation EME, LLC's Response to Respondent's Motion to Clarify, Reconsider and/or Modify the Board's April 7, 2011 Order in PCB 04-185 by U.S. Mail on this 27th day of May, 2011, upon the following persons:

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

Stephen J. Sylvester  
Ann Alexander  
Office of the Attorney General  
69 West Washington Street  
Suite 1800  
Chicago, Illinois 60602

  
Kathryn McCollough Long