

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Petitioner's Reply to Respondent's Opposition to Midwest Generation EME, LLC's Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of May 6, 2004, by U.S. Mail, upon the following persons:

Robert A. Messina
Illinois Environmental Regulatory Group
3150 Roland Avenue
Springfield, IL 62703

Keith Harley
Annie Pike
Chicago Legal Clinic
205 W. Monroe, 4th Floor
Chicago, IL 60606

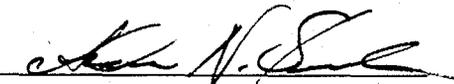
Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601

Dated: Chicago, Illinois
August 27, 2004

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
Andrew N. Sawula

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5540

One of the Attorneys for
Midwest Generation EME, LLC

ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

MIDWEST GENERATION EME, LLC
Petitioner,

v.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

PCB 04-185
(Trade Secret Appeal)

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO
MIDWEST GENERATION EME, LLC'S MOTION FOR
PARTIAL RECONSIDERATION OF THE ILLINOIS POLLUTION
CONTROL BOARD'S ORDER OF MAY 6, 2004

Midwest Generation EME, LLC (hereafter "Midwest Generation" or "Petitioner") has moved for reconsideration of the holding in the Board's May 6, 2004 Order that the hearing on this matter "will be based exclusively on the record before IEPA at the time it issued its trade secret determination." Order at 3. For the reasons summarized below and more fully set forth in the Memorandum of Law in Support of its Motion ("Petitioner's Memorandum"), Midwest Generation believes that this ruling violates the fundamental requirement of the due process clause the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Illinois Constitution.

A hearing based exclusively on the record precludes Midwest Generation from introducing evidence rebutting the facts and reasoning upon which IEPA based its denial. The procedures at the IEPA level gave Midwest Generation no opportunity to respond to the IEPA's determination and the procedures at the Board level will not cure this denial of due process. Midwest Generation submitted the requisite Statement of Justification for its trade secret claim in conformance with the rules creating a rebuttal presumption that the article has not been

published, disseminated, or otherwise became a matter of general public knowledge.¹ IEPA summarily denied the claim without identifying any deficiency in Midwest Generation's Statement of Justification or providing a statement of its reasoning. IEPA trade secret procedures, unlike the FOIA procedures,² do not give those submitting trade secret information the opportunity to cure deficiencies or introduce evidence rebutting IEPA's denial before the determination is final. 35 Ill. Adm. Code 130 et seq. IEPA's trade secret procedures allow the submission of a Statement of Justification and require IEPA to make a determination within 45 days. If the determination is negative, IEPA is required to give the submitter "[A] statement of the State agency's reasoning for denying the claim." 35 Ill. Adm. Code 130.210(b)(1). Midwest Generation is not on notice of the reasons for the IEPA denial and has had no opportunity at the IEPA level to rebut the facts and reasoning supporting IEPA's denial, whatever they may be. A hearing based exclusively on the record will not cure this deficiency because Midwest Generation will not be allowed to introduce evidence.

¹The trade secret regulations provide: There will be a rebuttable presumption that an article has not been published, disseminated, or otherwise become a matter of general public knowledge, if:

- 1) The owner has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access to the articles for limited purposes; and
- 2) The Statement of Justification contains a certification that the owner has no knowledge that the article has ever been published, disseminated, or otherwise become a matter of general public knowledge.

35 Ill. Adm. Code 130.208(b).

² The FOIA regulations provide an opportunity for those claiming exemption from disclosure to respond to the IEPA's initial findings. If IEPA determines that a claim fails to meet the FOIA requirements:

the Agency shall so notify the submitter in writing, within 30 days of the date that the Agency determines that review of the claim is required under subsection (a) of this Section. In such notice, the Agency must identify the deficiency or deficiencies in the claim and provide the opportunity to cure the deficiency or deficiencies within 10 business days of the date of the notification letter.

2 Ill Admin Code 1828.402 (b). Further, once the Agency makes the final decision, the submitter has the opportunity to appeal the denial to the Director of the Agency. 2 Ill Admin Code 1828.405. The submitter is allowed to submit additional evidence in the appeal to the Director. Id.

In its Opposition, IEPA claims Midwest Generation had ample opportunity to submit pertinent information, is not entitled to the full panoply of procedural rights, has not specifically identified additional evidence it would like to submit, and finally, IEPA argues that the Board should not reconsider its position because the Board has always done things this way. These arguments are unpersuasive.

I Midwest Generation Did Not Have An Effective Opportunity to Submit Information to IEPA.

IEPA does not contest that Midwest Generation's only opportunity to submit pertinent information was when it submitted its initial Statement of Justification. IEPA does not contest that its denial failed to set forth the agency's reasoning. And finally, IEPA does not contest that Midwest Generation had no opportunity to respond to IEPA's denial before it was final. IEPA's response to Midwest Generation's argument that a minimum requirement of due process is the requirement that all parties have an opportunity to offer evidence in rebuttal, is that Petitioner is not entitled to a full panoply of procedure rights. IEPA articulates no reason nor cites any authority for its position that the right to offer evidence in rebuttal is not a minimum right guaranteed by the due process clause. IEPA does not refute the authority cited by Midwest Generation. IEPA does not refute that Illinois Appellate courts, reviewing Board decisions, have found an unconstitutional deprivation of due process when a party is denied an effective opportunity to submit information at the IEPA level. See, Petitioner's Memorandum at 4-6.

IEPA argues that Midwest Generation's constitutional arguments should be rejected because it has not identified specific additional evidence it wishes to submit. But, apart from the "emissions data" argument first articulated in the IEPA's Opposition, Midwest Generation is still not on notice as to the IEPA's reasoning in denying its trade secret claims. Given that Midwest Generation does not even know why the claims were rejected, it was hardly in a position to

introduce evidence rebutting these claims, even if there had been an opportunity to do so. The IEPA's novel theory that Midwest Generation's Project Chart is somehow "emissions data" perfectly illustrates the problems associated with denying due process at the IEPA level.

The Project Chart is a list of hardware additions and retirements from Midwest Generation's six coal fired electric generating stations. In its Statement of Justification, Midwest Generation certified that this information had not been released to the public and explained why the information has competitive value to the company. These are the only two showings required by the trade secret regulations, and the certification creates a rebuttable presumption that the information has not been released to the public. 35 Ill Admin Code 130.208. Midwest Generation thought it obvious that the Project Chart, merely a listing of hardware additions and retirements, is not emissions data. There is no requirement in the statute or regulations to demonstrate that the information does not constitute emissions data, probably because it is obvious when information is emissions data. See 35 Ill. Adm. Code 130 et seq. Midwest Generation was not on notice that IEPA would come up with a nonsensical interpretation of the term "emissions data"; accordingly, Midwest Generation could not have dealt with this argument pre-emptorily in its Statement of Justification and had no opportunity to do so after learning of this new interpretation. Although IEPA's position is still unclear,³ unless the Board reverses its ruling, Midwest Generation will be prevented from showing that it is impossible to calculate emissions data from the Project Chart, will be prevented from introducing evidence that Midwest Generation has submitted all actual emissions data without a trade secret claim, from introducing

³ As IEPA contends, Midwest Generation is fully aware of the New Source Review ("NSR") regulations and reasons for USEPA's request for the information on contained on the Project Chart. Even if, as IEPA contends, the Project Chart will aid in determining "what the facility is authorized to emit." Opposition at 6-7, that is determining what regulatory limits apply, but is not "emissions data."

evidence that the USEPA and IEPA have never before considered the information contained in the Project Chart to be emissions data and from introducing evidence from experts that this interpretation is improper.

Midwest Generation does not know IEPA's other reasons, if any, for its denial of trade secret status to the Project Chart. If IEPA determined that release of the Project Chart would not cause competitive harm, Midwest Generation does not know the basis for that determination and does not concede that IEPA is an expert in matters of competition. Given the opportunity, if Midwest Generation had known the basis of the denial, it should have submitted additional evidence on how the release of the Project Chart can cause competitive harm to Midwest Generation.

As to the other piece of trade secret information submitted to IEPA, the Generation Chart, Midwest Generation does not know the basis of IEPA's denial. Once IEPA makes its position clear, Midwest Generation will be denied the opportunity to refute the facts and conclusions.

II The Regulations Permit Midwest Generation to Supplement the Record.

As set forth in Petitioner's Memorandum, Board regulations provide that if a party desires to introduce evidence before the Board with respect to any disputed issue of fact the Board will conduct a separate hearing and receive evidence with respect to that issue of fact. 35 Ill Adm Code 105.214(a). IEPA argues that this sentence merely modifies the preceding sentence in the regulation regarding agreements to supplement the record. But, if the parties agree to supplement the record, Midwest Generation fails to see why a separate hearing would be required.

In support of its argument, IEPA relies upon a hearing officer ruling pertaining, not to the regulation at issue, but rather to a statutory provision governing permit appeals. See Community Landfill, PCB 01-170, transcript Volume 1 at 233-37. IEPA has failed to cite any Board

precedent as to the meaning of this regulatory provision. Midwest Generation believes a plain reading of the text is warranted.

III Board Precedent, Therefore, Does Not Support Limiting Hearings to the Agency Record in Trade Secret Appeals.

The Board should not be persuaded by IEPA's argument that the hearing in this matter should be based exclusively on the record because that is the way the Board has always done things. All authority cited by Respondents pertain to permit appeals. While hearings on the record may be appropriate in permit appeals because permittees are afforded due process at the IEPA level, hearings on the record are not appropriate in appeals of IEPA trade secret determinations.⁴

Further, the cases cited by IEPA actually support the proposition that the Board allows petitioners to introduce new evidence at Board hearings if petitioners had been denied that opportunity at the agency level. In Community Landfill the Board expressly allowed a petitioner to supplement the record with information that was not part of the agency's record because the information pertained to an estoppel argument the petitioner did not know it would have to make until after it received IEPA's permit denial. Community Landfill v. IEPA, PCB 01-170; 2001 WL 1598272 at 4 (Ill. Pol. Control Bd. 2001). Similarly, in Environmental Site Developers, Inc v. EPA, an appeal of a denial of a solid waste disposal site development permit, the Board allowed petitioners to introduce new evidence at the hearing. Environmental Site Developers v. Environmental Protection Agency, PCB 80-15,1980 WL 13571 *3 (June 12, 1980). During the hearing, the agency testified that it denied the permit because of the water pollution potential of

⁴ If, for example, IEPA tentatively decides to deny a Resource Conservation and Recovery Act (RCRA) permit or Underground Injection Control permit, IEPA must issue a notice of intent to deny accompanied by a detailed statement of basis. 35 ILL Adm Code 705.141. The permittees then have an opportunity to submit additional comments and data as well as request a public hearing before the denial is final. 35 Ill Adm Code 705.181.

certain sludges, although this basis was not specified in the permit denial letter. Id. The Board allowed petitioners to introduce additional evidence, not included in its application, providing that the material was inert. In reversing the IEPA's decision the Board observed: "This case could have been handled more easily had the Agency fully complied with the requirements of Section 39(a) of the Act in issuing a denial letter and had ESO responded with a supplemental application." *Id.* Accordingly, in both Community Landfill and Environmental Site Developers, cases cited by IEPA, the Board did not restrict the hearing to the agency's record; rather it allowed permittees to supplement the record as fairness requires.

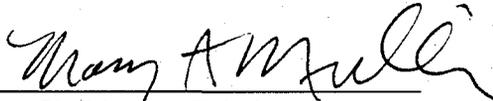
Even if the Board has always limited its review of trade secret determinations to the record developed by IEPA, this is not determinative of whether Midwest Generation's due process rights have been violated. As discussed in Midwest Generation's Memorandum, Appellate courts look to constitutional principles, not the Board's past practices. Petitioners Memorandum at 3-6.

For the reasons set forth above, Midwest Generation respectfully requests that the Board partially reverse its order and find that the hearing on this matter will be de novo.

Dated: August 27, 2004

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
Sheldon A. Zabel

Mary A. Mullin

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5540

Attorneys for
Midwest Generation EME, LLC