

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JAN 11 2005

MIDWEST GENERATION EME, LLC

Petitioner,

vs-

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

Respondent.

STATE OF ILLINOIS
Pollution Control Board

PCB No. 04-185
(Trade Secret Appeal)

NOTICE OF FILING

To: Bradley P. Halloran
Chief Hearing Officer
Ill. Pollution Control Bd.
JRTC, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

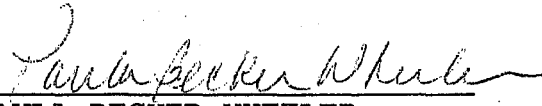
Sheldon A. Zabel
Mary A. Mullin
Andrew N. Sawula
Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606

PLEASE TAKE NOTICE that on the 10th of January, 2005, I filed with the Clerk of the Illinois Pollution Control Board, Respondent's Response to Petitioner's Motion to Strike Clarification of IEPA's Trade Secret Determination, a copy of which is attached hereto and hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General of the State of Illinois,

By:


PAULA BECKER WHEELER
Assistant Attorney General
Environmental Bureau
188 W. Randolph St. - 20th Fl.
Chicago, IL 60601
(312) 814-1511

Dated: January 10, 2005

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Midwest Generation EME, LLC
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JAN 11 2005
PCB 04-185 STATE OF ILLINOIS
Trade Secret Appeal Pollution Control Board

**RESPONSE TO MIDWEST GENERATION'S MOTION TO STRIKE THE
CLARIFICATION OF THE IEPA'S TRADE SECRET DETERMINATION**

Preliminary Statement

Respondent Illinois Environmental Protection Agency ("IEPA") respectfully submits this Response to the Motion to Strike the Clarification of the IEPA's Trade Secret Determination, pursuant to 35 Ill. Adm. Code 101.500. The IEPA submitted the Clarification of Trade Secret Determination as required by the Illinois Pollution Control Board's ("Board") Order dated November 4, 2004. The Board's Order stated that the Clarification was to be filed on or before November 30, 2004. The Clarification was filed on November 30, 2004 as required. Prior to filing the Clarification, Midwest Generation ("Midwest") faxed and mailed to the IEPA directly, on November 22, 2004, through its attorneys, a Supplemental Statement of Justification, attached hereto as Exhibit A. No copy was provided to the Attorney General's Office. Although sent before November 30, 2004, the Respondent did not consider this Supplemental document as the Board Order required it to clarify its decision from March 10, 2004, not consider new justifications from Midwest.

Response

Midwest Generation's Motion to Strike the Clarification makes three distinct arguments. The first argument is that the entire clarification should be stricken because it

was not written by the IEPA. The affidavit of Christopher Pressnall, attached hereto as Exhibit B, will verify that the Clarification was, in fact, drafted by the IEPA. It was signed by an Assistant Attorney General because the original document signed by Mr. Pressnall of the IEPA, could not be faxed to the Attorney General's Office, due to equipment malfunction. Instead, it was sent electronically, printed and signed by an Assistant Attorney General for Mr. Pressnall, at his request. It was filed by the Attorney General's Office with the Board, with copies delivered to the Petitioner in the ordinary course of client legal representation.

Secondly, Midwest Generation states that certain portions of the Clarification should be stricken because they consist of irrelevant statements between the IEPA and Midwest Generation, concerning possible conversations prior to the March 10, 2004 trade secret determination by the IEPA. After further review, the IEPA acknowledges that these specific discussions occurred after the March 10, 2004, IEPA trade secret determination. While the IEPA agrees that the timing of these statements is irrelevant, the statements are not, in that they consist of discussions concerning Midwest's failure to demonstrate that their alleged trade secret information is not publicly available.

Midwest's third argument states that the IEPA has exceeded its authority and created new grounds for denying trade secret protection to information submitted by Midwest. Midwest is specifically concerned with data contained in what Midwest labels its "Generation Chart". Such information includes the Net Generation Rate, the Net Heat Rate, and the Average Coal Heat Content. The IEPA clarified that the information contained in the Generation Chart is emissions data and therefore must be available to the

public. Section 130.110 of 35 Ill. Adm. Code 130.110, entitled "Articles Containing Emission Data" states, in part, as follows:

- a) All emission data reported to or otherwise obtained by the Illinois Environmental Protection Agency, the Board or DNR in connection with any examination, inspection or proceeding under the Act shall be available to the public...

This section specifically excludes emission data from the being afforded trade secret protection. Although the IEPA did not mention emission data specifically with regard to the Generation Chart data in its original March 10, 2004 determination, it was implicit in its decision. Since the Board Order dated November 4, 2004 at p. 30, 31 directed the IEPA to specify which grounds apply and why, the IEPA Clarification did just that. It made it explicit and unambiguous that the IEPA considered, *inter alia*, the information contained in the Generation Chart emission data and gave its reasoning for that characterization. The Board has now given Midwest the opportunity to respond to this Clarification. Its response, of course, can articulate any rationale as to why it believes the information does not constitute emission data.

The data contained in the Generation Chart clearly falls under the definition of emission data, and must be available to the public, as stated in the Clarification. The question of whether or not Midwest (or even the IEPA) considers it a trade secret is not germane when it must be released pursuant to Section 130.110, 35 Ill. Adm. Code 130.110, and the Clean Air Act. This is not a new ground for denying trade secret protection. It is a clarification of the prior determination, informing Midwest that this information is considered emission data and therefore, must be available to the public.

Furthermore, Subpart B of the Board's trade secret regulations ("Procedures for Identifying Articles that Represent Trade Secrets") articulates the standards for state

agency trade secret determinations. Specifically, Section 130.208 ("Standards for State Agency Determination"), 35 Ill. Adm. Code 130, instructs the IEPA to afford trade secret protection to claimed information if the article has not become a matter of public knowledge and the article has competitive value. Section 130.210 ("State Agency Actions Following a Negative Determination"), 35 Ill. Adm. 130.210, states:

- a) If the State agency determines that an article, or any page or portion thereof, does not meet the standards, specified in Section 130.208(a)(1) or (2) of this Subpart, the State agency must deny the claim for trade secret protection for the article or page or portion thereof, and must give written notice of the determination to the owner of the article and any requester pursuant to subsection (b) of this Section.

The Board does not require the IEPA to state whether information constitutes emission data when evaluating and responding to a statement of justification, as, by definition, it must be available to the public.

Conclusion

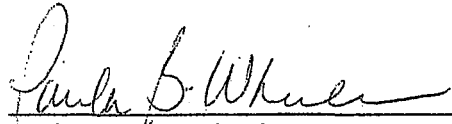
For the foregoing reasons, IEPA respectfully requests that Midwest Generation's Motion to Strike the IEPA's Clarification of Trade Secret Determination be denied.

Dated: Chicago, Illinois
January 10, 2005

Respectfully submitted,

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental
Enforcement/
Asbestos Litigation Division

BY: 
Paula Becker Wheeler
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188 West Randolph Street, Suite 2001
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ATTORNEY NO.: 1526
CLIENT/MATTER NO.: 27674-0038
DATE: November 22, 2004

FACSIMILE TRANSMITTAL SHEET

TO THE FOLLOWING:

Name	Company	Fax Number	Phone Number
Chris Pressnall	Illinois Environmental Protection Agency	217-782-9807	217-782-5544

FROM: Mary A. Mullin DIRECT DIAL NO.: 312.258.5687

Transmission consists of cover sheet plus 5 page(s).

If there are any problems with this transmission, please call _____.

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November 22, 2004

VIA FAX AND U.S. MAIL

Chris Pressnall
Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Ave. East
P.O. Box 19276
Springfield, IL 62794-9276

**Re: Midwest Generation
Supplemental Statement of Justification**

Dear Mr. Pressnall:

I am writing to supplement Midwest Generation EME, LLC's ("Midwest Generation's") January 23, 2004 Statement of Justification of its trade secret claims relating to information originally submitted to the United States Environmental Protection Agency ("USEPA") in response to a Clean Air Act §114 Information Request ("Information Request"). Midwest Generation provided a duplicate copy of this information to the Illinois Environmental Protection Agency ("IEPA") at the suggestion of USEPA. By this letter, Midwest Generation provides IEPA with additional information supporting its trade secret claims.

Midwest Generation has identified as trade secret two charts compiled to respond to the USEPA's §114 information request. The first chart, on pages MWG000024 — MGG000056, contains the monthly and annual gross and net (1) generation, (2) heat rate, and (3) average coal heat content at each unit (hereafter referred to as the "Generation Chart"). The second chart, on pages MWG000058 — MWG000068, contains information describing the capital projects undertaken at each station and the dollars expended for each project (hereafter referred to as the "Project Chart"). Both of these charts are compilations of data and therefore constitute trade secrets.

Midwest Generation spent over eight months and considerable expense compiling the Project Chart in order to respond to the Information Request. Numerous engineering and accounting employees at each of the generating stations were involved in gathering, assessing and describing the information contained in the Project Chart. Information in the chart describes every capital project over \$100,000.00 undertaken at each of Midwest Generation's coal-fired units, identifies the work order number for the project, identifies the date the project was undertaken or will be undertaken, and states the cost of the project. The Project Chart was compiled solely to respond to the USEPA's information request and, as set forth in Midwest Generation's original Statement of Justification, its confidentiality has been



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maintained. This information, compiled in this format, only exists in the submittals made to USEPA and copied to IEPA. While a few of the projects, approximately 5%, are mentioned in publicly available permits, most are not. No information regarding the cost or the timing of any of the projects is available to the public. Thus, contrary to the conclusion the IEPA may have reached, this information and certainly this compilation is not publicly available.

Disclosing the Project Chart will harm Midwest Generation's competitive position. This comprehensive list of capital projects gives competitors an insider's view to the maintenance history of each unit, revealing the reliability and future maintenance needs of the individual units. By reviewing a unit's maintenance history, a competitor can determine the maintenance needs associated with a specific unit enabling the competitor to estimate the unit's future availability and to predict future maintenance outages. The ability to predict future maintenance outages allows a competitor to take advantage of these facts to plan its own unit dispatching and pricing. If a competitor can predict when a unit will be down, it can predict when the electricity will be in shorter supply. In the current highly competitive independent power producers market, this information is highly sensitive. Further, because knowing a unit's reliability reflects its profitability, this is also valuable information for investors, and lending institutions.

The Project Chart reveals how much Midwest Generation paid for certain maintenance projects as well as pollution control equipment; competitors, as well as future suppliers, can use this information to negotiate more favorable pricing for themselves, thereby increasing Midwest Generation's costs, reducing its profit margins, and adversely impacting its competitiveness. If vendors are aware of the past pricing for similar services and equipment, Midwest Generation will be at a competitive disadvantage, compared to electric generators for which the information is unavailable, when negotiating future contracts.

Similarly, the Generation Chart is a compilation. It contains monthly and annual net generation, average coal heat content and net heat rate for each of Midwest Generation's coal-fired units. Midwest Generation compiled this information onto the Generation Chart solely for the purpose of responding to the USEPA's §114 request. As set forth in Midwest Generation's Statement of Justification, Midwest Generation does not make this information available to the public. Midwest Generation does submit information regarding monthly net generation and coal heat content as required to the Department of Energy ("DOE"). The DOE, however, does not maintain this information in a simple chart format; rather, the DOE maintains pieces of this information in numerous coded spreadsheets on the DOE website. The information is deeply embedded, difficult to access and in numerous locations requiring the pursuit of multiple links. Sophisticated technical and substantive knowledge would be necessary to even attempt to replicate this data. If a competitor could obtain the net generation and coal heat content information on this chart, which was compiled solely to comply with a USEPA information request, simply by filing a FOIA request rather than piecing it together from various hard to obtain sources, competitors would gain an improper windfall. Worthington Compressors v. Castle, 662 F.2d 45 (U.S. App. DC 1981). Monthly net heat rate is not available on the DOE website. For the purpose of the Information Request, Midwest Generation calculated each unit's monthly net heat rate from the coal consumption data, coal heat content data and generation data. The results of this calculation are not publicly available nor determinable from publicly available sources.



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Disclosing information on the Generation Chart will harm Midwest Generation's competitive position. The unit's heat rate represents the unit's efficiency, a significant indicator of a unit's profitability. Midwest Generation's competitive position is measured by its ability to sell electricity from its lowest cost units; disclosing this information publicly would allow competitors to undercut Midwest Generation's pricing regime.

Regardless of whether the individual pieces of information in the Project Chart and Generation Chart are trade secrets independently, the compilation of the information is a trade secret. Under Illinois law, a trade secret includes a compilation that:

(1) is sufficiently secret to derive economic value, actual or potential, not from being generally known to other persons who can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality.

765 ILCS 1065/2(d). The effort of compiling useful information is, of itself, entitled to protection even if the information is otherwise generally known. ISC v. Altech, 765 F.Supp. 1310, 1321 (ND Ill. 1990). Under Illinois law, trade secrets may exist in combination of a number of elements of information, even if each discrete element may be found in the public domain. Nilssen v. Motorola, Inc., 963 F.Supp. 664 (ND Ill. 1997.)

In its March 10, 2004 denial, IEPA denied trade secret protection to the Project Chart because Midwest Generation failed to demonstrate the information does not constitute "emissions data". Given that the Project Chart is merely a listing of capital projects at the generating stations, such a demonstration seems unnecessary. Further, the regulations do not require such a demonstration at the outset. See 35 Ill. Adm. Code 130.203. Regardless, Midwest Generation hereby provides such a demonstration.

Pursuant to the regulations promulgated under the Environmental Protection Act, emissions data shall be available to the public. 35 Ill. Adm. Code 130.110(a). This regulation defines the term "emissions data" as:

The identity, amount, frequency, concentration, or other characteristics (related to air quality) of any contaminant that:

- A) Has been emitted from an emission unit;
- B) Results from any emission by the emission unit;
- C) Under an applicable standard or limitation, the emission unit was authorized to emit; or
- D) Is a combination of any of the items described in subsection (b)(1)(A), (B), or (C) of this Section.

35 Ill. Adm. Code 130.110(b). Accordingly, "emissions data" is information about contaminants. None of the information contained in the Project Chart contains information about contaminants. The Project



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Chart merely describes capital projects undertaken at the stations, it contains no information about pollutants.

Although IEPA's position is still unclear, in proceedings before the Illinois Pollution Control Board it seems to be taking the position that "emissions data" is any information relevant to determining how much a particular facility is "authorized to emit". Rather than relying on the regulatory definition promulgated under the Illinois trade secret statutes, IEPA has relied upon the following federal definition of "emissions data":

Information necessary to determine the identity, amount, frequency, concentration or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source).

40 CFR 2.301(a)(2)(i)(B). But even under this definition, "emissions data" is the data necessary to determine the identity, amount, frequency, concentration or other characteristics of a source's emissions. The regulation says "under an applicable standard," it does not say "to determine what the applicable standard is." The regulation presumes knowledge of the applicable standard; "emissions data" is the information used to determine compliance with the standard - with the authorization - not the information used to determine what the standard or authorization is. Even if the Project Chart could somehow aid in determining "what the facility is authorized to emit," that is determining what regulatory limits may apply, but is not, itself, "emissions data." Midwest Generation has submitted all "emissions data" as required by its air permits, these submittals are available to the public.

Even if the Project Chart can be properly considered "emissions data," the trade secret provisions of the Environmental Protection Act only exclude from protection "emission data reported to or otherwise obtained by the Agency, the Board or the Department in connection with any examination, inspection or proceeding under this Act." 415 ILCS 5/7(c). The Project Chart was neither reported to IEPA nor was it obtained in a proceeding under the Act; rather, IEPA was provided a copy of the Project Chart after Midwest Generation submitted the document in response to the USEPA's investigation under the federal Clean Air Act. Accordingly, even if the Project Chart can somehow be considered "emissions data," the trade secret provisions of the Environmental Protection Act do not exclude the Project Chart from trade secret protection.

In accordance with 35 Ill. Adm. Code 130.200 et seq., the Statement of Justification and this supplement hereto only concern whether the Project Chart and Generation Chart are trade secrets. Midwest Generation also considers this information confidential data protected from disclosure under the confidential data provisions of the Environmental Protection Act and the Illinois Freedom of Information Act. 415 ILCS 5/7(a)(iv) and 5 ILCS 140/7 (g).



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Thank you for your attention to this matter.

Sincerely,


Mary A. Mullin

cc: Deborah Golden

ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION EME, LLC

Petitioner,

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,**

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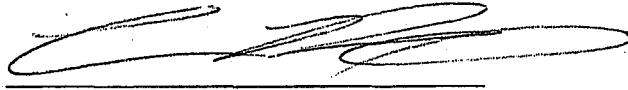
AFFIDAVIT OF CHRISTOPHER R. PRESSNALL

I, Christopher R. Pressnall,, being duly sworn, testify to the following facts of which I am personally aware:

1. I am an attorney with the Illinois Environmental Protection Agency ("Illinois EPA"). I represented, and continue to represent, the Illinois EPA in regards to Midwest Generation EME, LLC's ("Midwest Gen") trade secret claims pertaining to information submitted to the Illinois EPA pursuant to a United States Environmental Protection Agency §114 request for information.
2. I assisted in drafting, and signed, the Illinois EPA's trade secret determination that is at issue in the instant matter.
3. On November 4, 2004, the Illinois Pollution Control Board ordered the Illinois EPA to file a clarification of its trade secret determination. I, with the assistance of other Illinois EPA staff, drafted the Illinois EPA's clarified trade secret determination.

4. On November 30, 2004, at approximately 4:15 p.m., I attempted to send a facsimile of the final signed version of the document to Assistant Attorney General Paula Wheeler for filing. The facsimile machine in the Division of Legal Counsel was not in service. I then attempted to send the facsimile via an alternative machine, however, the facsimile would not send promptly. Thus, to meet the filing deadline, I sent the final document to Assistant Attorney General Paula Wheeler via electronic mail and bestowed signature authority to same.

5. The Illinois Attorney General's Office did not draft the clarified trade secret determination; rather it simply filed the document on behalf of the Illinois EPA given the technical difficulties experienced during transmission of the final signed document from Springfield to Chicago.



Christopher R. Pressnall

SUBSCRIBED AND SWORN TO BEFORE ME

this 7th day of January, 2005

NOTARY PUBLIC: Brenda Boehner

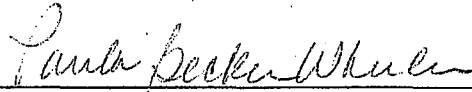


CERTIFICATE OF SERVICE

I, Paula Becker Wheeler, an Assistant Attorney General, assigned to these proceedings, certify that I have served the attached Respondent's Motion for Extension of Time, by U.S. Mail on January 10, 2005, upon the following persons:

Bradley P. Halloran
Chief Hearing Officer
Ill. Pollution Control Bd.
JRTC, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

Sheldon A. Zabel
Mary A. Mullin
Andrew N. Sawula
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6600 Sears Tower
Chicago, IL 60606



Paula Becker Wheeler