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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NOV 30 2004

Midwest Generation EME, LLC
Petitioner

v.

Illinois Environmental Protection Agency,
Respondent

STATE OF ILLINOIS
Pollution Control Board
PCB 04-185
Trade Secret Appeal

NOTICE OF FILING

TO: See attached service list.

PLEASE TAKE NOTICE that on the 30th day of November, 2004, I filed with the Clerk of the Illinois Pollution Control Board the Midwest Generation EME, LLC Clarification of Trade Secret Determination, as required pursuant to Board Order dated November 4, 2004, copies of which are attached hereto and hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS

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Dated: November 30, 2004

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Dated: Chicago, Illinois
November 30, 2004



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Pollution Control Board

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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217/782-5544
217/782-9143(TDD)

November 30, 2004

Mary Ann Mullen, esq.
Schiff Harden & Waite
6600 Sears Tower
Chicago, Illinois 60606-6360

Re: Midwest Generation EME, L.L.C. – Clarification of Trade Secret Determination

Dear Ms. Mullen:

INTRODUCTION

On January 26, 2004, at its request, the Illinois EPA received a statement of justification for a claim of trade secret from Midwest Generation EME, LLC ("Midwest"). On March 10, 2004, the Illinois EPA issued its determination on the claim. By this document, the Illinois EPA is issuing a clarification of its trade secret determination pursuant to the Pollution Control Board ("Board") order issued earlier this month (PCB 04-185, November 4, 2004). More specifically, the Illinois Environmental Protection Agency is clarifying the reasoning behind its denial of certain information claimed trade secret by Midwest.

This matter involves the denial of trade secret protection to information provided to the Illinois EPA in conjunction with Midwest's response to the United States Environmental Protection Agency's (USEPA) §114 request for information ("USEPA information request"). The two categories of information at issue are the capital projects list for each of Midwest's coal-fired

electric generating units ("capital project list")¹ and information identifying the monthly net and annual net generation, the monthly and annual coal heat content, and the monthly and annual net heat rate for each of Midwest's coal-fired units ("generation data").² Midwest submitted these two categories of information in response to Request Two and Request Three of the USEPA information request.

GENERAL DISCUSSION

The Illinois EPA's denial is made on multiple bases, consistent with the applicable laws and rules that govern protection of information that is claimed to constitute a trade secret. First, for certain of the information claimed trade secret by Midwest, information existed indicating that it was a matter of public knowledge; or lacked competitive value or both. Second, claimed information constituted emission data. Third, for certain of the information, Midwest's statement of justification was deficient, failing to demonstrate that all of the information submitted was entitled to trade secret protection.³

In making its determination that Midwest had not met its burden of demonstrating that the information is not publicly available, the Illinois EPA did not, nor is it required to, search exhaustively for all information claimed trade secret by Midwest to confirm whether the material is publicly available. Rather, Midwest was required -- and failed -- to demonstrate the lack of public availability. The fact that the Illinois EPA was able to locate at least some of the specific information that Midwest claimed to be a trade secret not only required rejection of the claim with respect to that particular information, but also cast sufficient doubt on the balance of Midwest's trade claim secret claim so as to warrant a blanket denial.

Indeed, prior to making its trade secret determination, the Illinois EPA informed Midwest of its failure to account for the complete dissemination of all information claimed to be a trade secret. Specifically, the Illinois EPA called to Midwest's attention, in telephone conversations prior to issuance of the Agency's formal decision, Midwest's apparent failure to follow its own procedures for ensuring protection of trade secret information. At a minimum, it was pointed out in these discussions, Midwest had failed to address the complete chain of custody for the information in dispute. It was also pointed out, as noted above, that Midwest did not account for all public entities to which it is required to submit the type of data for which it claims protection, and the record keeping policies at such entities. Despite these pre-decisional discussions, Midwest failed to address the Illinois EPA's concerns in a supplemental statement of justification prior to the Agency's trade secret determination.

¹ This information was submitted in response to information request number three. Information request number three states "For all currently active coal-fired generating units provide a list of all capital projects, of an amount greater than \$100,000, approved or completed between January 1, 1975 and the date of this request. For each such capital project identify the work performed, the date completed or projected to be completed, the project work order number and the dollar amount approved and/or expended."

² This information was submitted in response to information request number two. Information request number two states "For all currently active coal-fired generating units provide monthly and annual total gross and net generation (MW-hr), monthly and annual average heat rate (BTU/Kw-hr) and monthly and annual average coal heat content (BTU/lb) and percent sulfur for all years from 1975 through 2002."

³ 35 Ill. Adm. Code 130.203

Finally, pursuant to state and federal law, emission data cannot be accorded trade secret status. In its statement of justification, Midwest completely failed to address the nature of submitted information as it might be considered to constitute an article containing emission data. As information was being submitted in response to a USEPA request for information under §114 of the CAA, it was both reasonable and appropriate for Midwest to address the status of the submitted information, as it would likely be considered to contain emission data.⁴ Under 35 Ill. Adm. Code 130.203(e), Midwest was under a specific obligation to do so, as in a statement of justification "any other information that will support the claim." Midwest failed to satisfy its obligation under 35 Ill. Adm. Code 130.230(e).

In this regard, emission data includes information on the amount of emissions of various pollutants that an emission unit is authorized to emit under applicable standards and limitations.⁵ It also includes any related information that is necessary to determine emission data, including data related to authorized or allowable emissions.⁶ The New Source Review (NSR) programs⁷ established by the CAA and incorporated into the Environmental Protection Act are appropriately considered standards and limitations for the purpose of defining emission data as these programs establish legal restrictions on emissions. In particular, these programs establish limitations on the emissions of new or modified emission units, as distinguished from existing unmodified units, which are not subject to such limitations. The purpose of the information solicited by the USEPA information request was to determine whether Midwest's units have been modified so as to be subject to limitations under one or more of the NSR programs. As such, submitted information should generally be expected to constitute emission data.

The two categories of information that are in dispute are directly relevant to the applicability of NSR. They relate to the two tests that must be met for a modification, or major modification to have occurred. The first test is that a physical change or change in method of operation has been accompanied by an actual or potential increase in emissions. The generation data that is the subject of dispute generally constitutes emission data as it relates to increases in emissions that have occurred at units. The capital project list generally constitutes emission data as it identifies activities that have been performed on units, some or all of which may entail physical changes to or changes in the method of operation of such units. Considered together, these two categories of information are needed to determine whether units have been modified, and thus should be subjected to standards and limitations for modified units set by NSR.

⁴ Section 114(c) of the Clean Air Act specifically provides that submitted data that constitutes emission data must be available to the public.

⁵ 35 Ill. Adm. Code 230.110(b)(1)(C)

⁶ 35 Ill. Adm. Code 230.110(c)

⁷ These programs include New Source Performance Standards (NSPS), 40 C.F.R. Part 60, Prevention of Significant Deterioration of Air Quality (PSD), 40 C.F.R. 52.21, and non-attainment New Source Review (NA NSR), 35 Ill. Adm. Code Part 203.

GENERATION DATA

The generation data is contained in pages MWG0024 through MWG000056 of Midwest's information response. The Illinois EPA determined that certain generation data (i.e. information regarding gross generation (Mwhr) and gross heat rate (BTU/GKwhr)) constituted confidential business or trade secret information. The Illinois EPA denied trade secret protection to the information regarding net generation rate (Mwhr), net heat rate (BTU/NKwhr), and average coal heat content (BTU/lb). The following is a discussion of the general rationale for denial and the specific rationale for each category of data.

Within the statement of justification, the claimant must provide a detailed statement identifying the persons or class of persons to whom the article has been disclosed.⁸ Midwest's "detailed" statement for generation data consisting of the following two sentences: "Midwest Generation only provides this information [net generation, etc.], as needed, to its senior management and to personnel in the following departments: market and trade, finance, operations and risk management. Midwest Generation also provides this information, to the extent required, to lenders and rating agencies."

These cursory statements fail to address, *inter alia*, Midwest's submittal of the type of information at issue to governmental authorities that regulate the generation of electricity. Thus, Midwest's certification within the statement of justification was, at minimum, misleading, erroneous, and insufficient. Additionally, the certification specifically states that "[u]pon information and belief, the Confidential Information has not been published or disseminated, and has not otherwise become a matter of general public knowledge." Midwest's certification fails to acknowledge that information substantially identical to the information contained in the subject documents had in fact been published or disseminated and become a matter of public knowledge. Once again, the certification was, at minimum, misleading, erroneous, and insufficient.

Regarding the competitive value of generation data, under 35 Ill. Adm. Code 130.203(d), Midwest must provide a detailed discussion concerning the competitive value of information claimed trade secret. For generation data, Midwest states "[t]his information defines Midwest Generation's competitive position in the marketplace and, thus, possesses competitive value."⁹ An article is considered trade secret if the statement of justification *demonstrates* (italics added) that the article has competitive value.¹⁰ A single sentence assertion of competitive value can hardly be construed as a demonstration. Midwest does not explain the competitive value of net generation rate, net heat rate, or average coal heat content individually, but rather makes a blanket assertion. As discussed below, to the extent the information is publicly available, it cannot by definition have competitive value as confidential information.

⁸ 35 Ill. Adm. Code 130.203(b)

⁹ Part II.A of Midwest's statement of justification dated January 23, 2004

¹⁰ 35 Ill. Adm. Code 130.208(a)(2)(B)

Net Generation Rate

The Illinois EPA denied trade secret protection to the net generation rate data on the grounds that the information is a matter of public knowledge, and as such has no competitive value. The Illinois EPA's position is supported by the fact it was able to locate the net generation information for each of Midwest's coal-fired generating units on a publicly accessible federal government website.¹¹

Additionally, the Illinois EPA also considers the information emission data as it indirectly relates to emissions from each unit. In particular, an increase in generation would reflect an increase in operation of a unit and its accompanying emissions. As such, generation data constitutes data that is relevant to determining whether the second test for a modification has been satisfied, i.e., an increase in emissions. In this regard, as generation data is provided on an annual basis, it is relevant to the occurrence of a major modification, pursuant to PSD or non-attainment NSR.

Net Heat Rate

Regarding net heat rate, the Illinois EPA denied trade secret protection as, the information is a matter of public knowledge. Net heat rate can be derived by information available to the public. Information that is available to the public includes, but is not limited to, information reported to the federal government, information reported to the Illinois EPA, and information contained in Midwest's various construction and operating permits. The Illinois EPA maintains that such information cannot be of competitive value if it is discernable through simple calculations.

Additionally, the information is considered emission data. In particular, an improvement in heat rate of a unit indicates that change has occurred at the unit that has reduced the amount of fuel consumed per unit of electricity generated. This is indicative of a possible physical change or change in the manner of operation of a unit. It is also indicative of a possible increase in emissions as a unit that operates more efficiently may be utilized more, compared to other units that are less efficient.

Average Coal Heat Content

¹¹ In fact, contrary to Midwest's assertion in its July 1, 2004 motion to partially reconsider the Board's May 6, 2004 order, counsel for the petitioner was put on notice of the website. The Illinois EPA also discussed with counsel, prior to issuing its trade secret determination, the sufficiency of its claim.

As with the net generation rate and net heat rate data, average coal heat content data is also publicly available information. Through applicable federal and state reporting requirements, Midwest is required to submit information regarding the average coal heat content.

Furthermore, average coal heat content is considered emission data as it indirectly relates to the rate of pollutants emitted at each of Midwest's coal-fired generating units. In particular, this information is needed to determine the amount of coal burned in a boiler from data heat input to a unit or a unit's heat rate.

CAPITAL PROJECT LIST

The Illinois EPA denied trade secret protection to all information contained in the capital project list submitted by Midwest in response to USEPA's information request, except for the work order numbers.¹² The Illinois EPA denied trade secret protection to information contained in the capital project list, as some of the information is publicly available, Midwest failed to demonstrate that any of the information is of competitive value, and much of the information is emission data as it is necessary to determine compliance.

Specifically, as evidenced in the record filed in this matter by the Illinois EPA, a number of the projects identified in the capital project list that are claimed trade secret are subject to permitting requirements. For these projects, project details are found in the publicly available applications for state construction permits or the construction permits or subsequently issued operating permits themselves contained in the Illinois EPA's files; and similar details are found in submissions made to other government entities, including, for example, the Illinois Commerce Commission. The competitive value of the information in the project list is cast in serious doubt not only by the public availability of the particular information at issue in government filings, but also by the ready availability of similar information to the public in ongoing NSR/PSD enforcement cases and like matters.

Midwest contends that information contained in the capital project list possesses competitive value as, if disclosed, competitors could determine its environmental control strategies and assess whether the projects would shift its cost position in the marketplace. Furthermore, Midwest suggests that the information would allow competitors to predict future maintenance costs giving them a competitive advantage. Lastly, Midwest suggests that competitors could use the information regarding costs of certain equipment to negotiate more favorable prices with vendors, resulting in harm to its competitive position. Midwest failed to articulate and expound upon the aforementioned blanket statements thereby failing to make a sufficient demonstration of competitive value. The discussion of competitive value is not correlated with any particular project or information rather the discussion applies generally to all of the information in the capital project list.

¹² Column 2 contains the work order number, which the Illinois EPA determined is confidential business information. Specifically, the work order number does not constitute emissions data and is not necessary to determine the source's compliance status (e.g., NSR/PSD applicability). Rather, the work order number assigned by Midwest could be used solely for internal purposes.

Moreover, the capital project list generally contains emission data. Operational changes at a facility constitute emission data as such activities may be physical or operational changes to emission units, and meet the first test for determining whether modifications under NSR have occurred. The capital projects list also contains information describing projects that is relevant (although not sufficiently presented) to determining whether physical changes or changes in the method of operation.¹³

Chris Pressnall by PB Whelan

Chris Pressnall
Assistant Counsel
Division of Legal Counsel
Illinois EPA

Cc: Fred W. McCluskey, Vice-President, Midwest Generation EME, LLC

¹³ Wisconsin Electric Power Co. v. Reilly, Nos. 88-3264 and 89-1339, United States Court of Appeals for the Seventh Circuit (1990).

CERTIFICATE OF SERVICE

I, TERRY COTTON, an employee of the Illinois Attorney General's Office,
hereby certify that I caused to be served this 30th day of November 2004, the foregoing
Midwest Generation EME, LLC Clarification of Trade Secret Determination upon the
persons listed on said Notice by personal service on or before 5:30 p.m.



TERRY COTTON

Subscribed and Sworn before me this
30th day of November, 2004.

