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JAN 19 2005

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION EME, LLC
Petitioner,

v.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

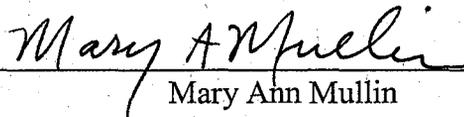
PCB 04-185
(Trade Secret Appeal)

NOTICE OF FILING

To: Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, IL 60601

Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
Office of the Attorney General
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board and original (1) and nine (9) copies of Midwest Generation's Motion for Leave to File the Attached Reply To Illinois Environmental Protection Agency's Response To Midwest Generation's Motion To Strike, a copy of which is herewith served upon you.


Mary Ann Mullin

Dated: January 19, 2005

Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5687

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD JAN 19 2005

STATE OF ILLINOIS
Pollution Control Board

Midwest Generation EME, LLC)	
 Petitioner,)	PCB 04-185
)	Trade Secret Appeal
v.)	
)	
Illinois Environmental Protection Agency,)	
 Respondent.)	

MOTION FOR LEAVE TO FILE THE ATTACHED REPLY TO ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO MIDWEST GENERATION'S MOTION TO STRIKE

Pursuant to 35 Ill. Adm. Code 101.500(e), Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Motion for Leave to File the Attached Reply to the Illinois Environmental Protection Agency's ("IEPA's") Response to Midwest Generation's Motion to Strike. In support of this motion, Midwest Generation states as follows:

Midwest Generation will be materially prejudiced unless it is allowed to file the attached Reply. First, in its Response to Midwest Generation's Motion to Strike, IEPA acknowledges that certain statements in the November 30, 2004 Clarification of IEPA's Trade Secret Determination ("Clarification") are erroneous; IEPA nonetheless, seems to argue these statements should remain in the record. In the attached Reply, Midwest Generation demonstrates why these erroneous statements need to be stricken from the record. Secondly, in its Response, IEPA makes several arguments in an attempt to justify the inclusions of new grounds in its Clarification. Midwest Generation will be prejudiced unless it has an opportunity to respond to these new arguments.

WHEREFORE, Midwest Generation respectfully requests that the Board grant Midwest Generation's Motion for Leave to File the Attached Reply.

Dated: January 19, 2005

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: Mary Ann Mullin

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Mary Ann Mullin
Andrew N. Sawula

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Attorneys for
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC)	
Petitioner,)	PCB 04-185
)	Trade Secret Appeal
v.)	
)	
)	
Illinois Environmental Protection Agency,)	
Respondent.)	

**REPLY TO ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO
MIDWEST GENERATION'S MOTION TO STRIKE**

Petitioner, Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Reply to the Illinois Environmental Protection Agency's Response to Midwest Generation's Motion to Strike the Attorney General's Clarification of IEPA's Trade Secret Determination ("Motion to Strike"). In support of this Reply, Midwest Generation states as follows:

1. Midwest Generation has moved to strike the November 30, 2004 Clarification of Illinois Environmental Protection Agency's ("IEPA's") Trade Secret Determination ("Clarification") in its entirety because the Attorney General, not the IEPA, attempted to clarify the trade secret determination. Alternatively, Midwest Generation moved to strike (1) the portions of the Clarification that contain false statements about conversations between Midwest Generation and IEPA and an inaccurate claim as to the timing of the conversations and (2) the portions of the Clarification that exceed the scope of the Board's November 4, 2004 Order ("Order").¹ In response to Midwest Generation's Motion to Strike the Clarification in its

¹ IEPA accurately notes in its Response that Midwest Generation submitted a Supplemental Statement of Justification to the IEPA on November 22, 2004. In light of the Order which seems to authorize Supplemental Statements of Justification at any time, Midwest Generation decided to Supplement its Statement of Justification to respond to the positions IEPA had articulated to date. Midwest Generation did not intend for this submittal to be a filing in this

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Entirety, IEPA provided an affidavit attesting that IEPA drafted the Clarification. In light of this information and despite the procedural irregularities, Midwest Generation withdraws its Motion to Strike the Clarification in its Entirety, however, Midwest Generation does not withdraw its alternative Motion to Strike Portions of the Clarification.

2. First, Midwest Generation moved to strike the paragraph of the Clarification relating to purported conversations between Midwest Generation and IEPA allegedly occurring before IEPA issued its March 10, 2004 letter denying trade secret protection to certain information Midwest Generation provided to IEPA ("March 10, 2004 Denial"). In this paragraph, IEPA states three times that IEPA informed Midwest Generation of alleged deficiencies in its Statement of Justification before the March 10, 2004 Denial. IEPA now acknowledges these statements are erroneous, admitting that any such conversations between IEPA and Midwest Generation took place after the March 10, 2004 Denial was issued. Response at 2. For this reason, paragraph 3 on page 2 should be stricken from the Clarification.

3. Further, the erroneous representations should be stricken because they create the mis-impression with the Board, and in the record, that Midwest Generation had an opportunity to know, discuss and respond to the reasoning for the IEPA decision in advance of it becoming final. IEPA's concluding sentence in the paragraph is: "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". Clarification at 2. Midwest Generation could hardly supplement its justification based on these conversations when, as IEPA now acknowledges, no such conversations took place before the March 10, 2004 Denial. Rather

case and therefore did not serve the Attorney General. Thirty-five days have lapsed and IEPA has not responded to Midwest Generation's Supplemental Statement of Justification.

then agreeing to strike the paragraph, IEPA seems to be taking the position that these statements should remain in the record. IEPA claims that "While the IEPA agrees that the timing of these statements is irrelevant, the statements are not . . ." Response at 2. Midwest Generation is not at all sure with whom IEPA is agreeing but it is not Midwest Generation. The timing of these discussions is particularly relevant to their inclusion in the record and for Midwest Generation's due process argument currently before the Appellate Court.

4. IEPA also seems to argue that the erroneous statements should remain in the record because the conversations Midwest Generation and IEPA had after the March 10, 2004 Denial are somehow relevant irrespective of the timing. Response at 2. IEPA gives no reason why these conversations are relevant for the purposes of the Clarification. While Midwest Generation acknowledges it did contact IEPA after the March 10, 2004 Denial, in a largely unsuccessful attempt to glean IEPA's reasoning supporting its March 10, 2004 Denial, Midwest Generation cannot see how these conversations, even if accurately represented, have any relevance to the bases for the denial and therefore are appropriate for inclusion in the Clarification.

5. Midwest Generation also disagrees with IEPA's representations as to the content of these conversations. See Affidavit of Mary A. Mullin at p. 2, attached to the Motion to Strike. The Board ordered IEPA to supplement the March 10, 2004 Denial in order to explain the reasoning supporting its decision. Order at 1-2. Statements regarding conversations with Midwest Generation that occurred after the final denial was issued are not relevant to this task.²

² Midwest Generation notes that the silence of the IEPA's response and accompanying affidavit on the question of the accuracy of the description of these conversations may be more eloquent than anything Midwest Generation can argue.

6. Secondly, Midwest Generation has moved to strike the portion of the November 30, 2004 Clarification ("Clarification") pertaining to the argument that the Generation Chart is emissions data, arguing that this is a new grounds for denial not allowed by the Order.³ IEPA admits that that "IEPA did not mention emissions data specifically with regard to the Generation Chart in its original March 10, 2004 determination." Response at 3. But, IEPA contends, this is not a new grounds for the denial, but rather a clarification of the March 10, 2004 Denial. This position is untenable.

7. IEPA clearly identified the grounds (but not the reasons supporting these grounds) for its denial of trade secret protection to the Generation Chart and the Project Chart in the March 10, 2004 Denial. IEPA denied protection to the Project Chart, in part, because IEPA claimed the Project Chart constituted emissions data; IEPA made no such claim as to the Generation Chart. The March 10, 2004 Denial specified the following grounds for denying trade secret protection to the Generation Chart:

Midwest failed to adequately demonstrate that the information has not been published, disseminated, or otherwise become a matter of general public knowledge (i.e., the Illinois EPA was able to locate the information in sources available to the public) and/or failed to demonstrate that the information has competitive value.

March 10, 2004 Denial at 2. In the portion of the March 10, 2004 Denial pertaining to the Project Chart, IEPA identified the following grounds for its denial:

Midwest failed to adequately demonstrate that the information has not been published, disseminated, or otherwise become a matter of general public knowledge (i.e., the Illinois EPA was able to locate the information in sources available to the public) and/or failed to demonstrate that the information has

³ Midwest Generation strenuously objects to the characterization of the Generation Chart as emissions data. If this new argument is not stricken from the Clarification, Midwest Generation will address this issue in its Response to the Clarification now due to be filed with the Board on February 22, 2005.

competitive value. **Further, Midwest has failed to demonstrate that the information does not constitute emissions data.**

March 10, 2004 Denial at 2 (emphasis added). The IEPA identified the Project Chart as constituting emissions data, it could have just as easily identified this grounds as to the Generation Chart but failed to do so.

8. There is no merit to IEPA's position that the addition of the claim that the Generation Chart is emissions data is somehow "implicit" in the March 10, 2004 Denial. As IEPA admits in its Response, the question of whether or not the Generation Chart is a trade secret is "not germane" to the evaluation of whether or not it is emissions data. Response at 3. If it is emissions data, obtained pursuant to the Illinois Environmental Protection Act, even if it is otherwise a trade secret, it is not protected. These are separate inquiries because emissions data is an exception to the general rule that trade secrets are protected from disclosure.⁴ 415 ILCS 5/7(c). Therefore, regardless of its status as a trade secret, if data constitutes emissions data properly obtained it is to be released. Accordingly, the fact that IEPA now considers the Generation Chart to be emissions data could not be a "clarification" of one of the grounds identified in the March 10, 2004 Denial, both of which have to do with whether or not the Generation Chart is a trade secret. Which ground could it possibly support? Does the fact that IEPA now considers the Generation Chart emissions data support the IEPA determination that the information is publicly available? Does it support the IEPA determination that the data has no competitive value? Neither position makes sense and the IEPA's Response sheds no light on this. IEPA's attempts to inject into the case this new argument as to the Generation Chart should be rejected.

³Thus, Midwest Generation can equally argue that its request for protection "implicitly" informed IEPA that Midwest Generation did not believe the information was emissions data.

9. Apparently recognizing the speciousness of its "emissions data" argument, IEPA appears to argue that the Order gave them license to add grounds not identified in the March 10, 2004 Denial. The Order clearly does not. The Board sent the March 10, 2004 Denial back to IEPA finding: "...IEPA's denial letter states that Midwest failed to demonstrate that the claimed information is not publicly available 'and/or' has competitive value. The denial is ambiguous as to whether one or both grounds apply." Order at 31. Therefore, the Board required IEPA to specify which grounds apply and why. See Board Order at 31. The Board did not authorize IEPA to revisit its decision and create new grounds not previously identified; the Board only required IEPA to articulate the reasons that existed when it issued its March 10, 2004 Denial:

The Board is not, however, directing IEPA to reconsider its decision. Instead, the Board is remanding this matter to IEPA for the limited purpose of having IEPA articulate, in compliance with Section 130.210 (b)(1), the reasoning behind IEPA's March 10, 2004 denial of trade secret protection.

Order at 31. To the extent the March 10, 2004 Denial was ambiguous, the Board ordered IEPA to specify whether one or both grounds applied, and why. The Board did not empower IEPA to revisit its decision to identify additional grounds. Accordingly, as to the Generation Chart, IEPA was authorized to choose whether one or both of the grounds identified applied; IEPA was not authorized to revisit its decision to add a claim that the Generation Chart is emissions data. To avoid giving IEPA a second bite at the apple, the Board should strike all references to this argument from the Clarification.

10. In further defense of its failure to identify the Generation Chart as emissions data in its March 10, 2004 Denial, IEPA asserts that: "The Board does not require the IEPA to state whether information constitutes emissions data when evaluating and responding to a statement of justification, as, by definition, it must be made available to the public." Response at 4. In its Order, the Board has laid to rest any uncertainty as to what is required in IEPA's denial letter.

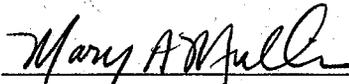
The Board directed "IEPA to specify which grounds apply (i.e., matter of general public knowledge, lacks competitive value, emissions data) and **why**. Order at 30-31.

WHEREFORE, Midwest Generation respectfully requests that the Board enter an order striking (1) the inaccurate and irrelevant paragraph on page 2 of the Clarification alleging that Midwest Generation and IEPA had conversation about Midwest Generation's Statement of Justification before the March 10, 2004 Denial was issued and (2) the portions of the Clarification on pages 3, 4, and 5 relating to the newly created argument that the Generation Chart constitutes emissions data.

Dated: January 19, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Midwest Generation EME, LLC's Motion for Leave to File the Attached Reply To Illinois Environmental Protection Agency's Response To Midwest Generation's Motion To Strike, by U.S. Mail, upon the following persons:

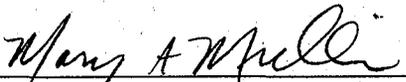
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Dated: Chicago, Illinois
January 19, 2005

Respectfully submitted,

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