

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
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JUL 01 2004

STATE OF ILLINOIS  
Pollution Control Board

Midwest Generation EME, LLC)

Petitioner

v.

Illinois Environmental Protection Agency,  
Respondent.

PCB 04-185

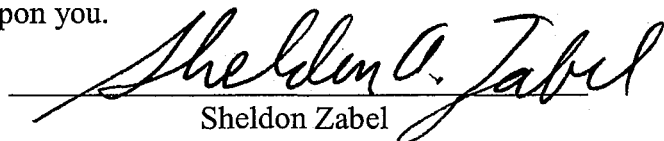
Trade Secret Appeal

NOTICE OF FILING

To: 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  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board, Midwest Generation EME, LLC's Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of May 6, 2004 and Memorandum in Support of Motion for Partial Reconsideration of the Illinois Pollution Control Board's Order of May 6, 2004, copies of which are herewith served upon you.

  
Sheldon Zabel

Dated: July 1, 2004

Schiff Hardin LLP  
6600 Sears Tower  
Chicago, Illinois 60606  
(312) 258-5577

**CERTIFICATE OF SERVICE**

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

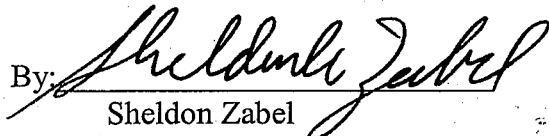
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Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601

Dated: July 1, 2004

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By:   
Sheldon Zabel

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

One of the Attorneys for  
Midwest Generation EME, LLC

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD JUL 01 2004

STATE OF ILLINOIS  
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Midwest Generation EME, LLC  
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MIDWEST GENERATION'S  
MOTION FOR PARTIAL RECONSIDERATION OF THE  
ILLINOIS POLLUTION CONTROL BOARD'S ORDER OF  
MAY 6, 2004

Pursuant to 35 Ill Adm. Code 101.520 and the hearing officer's Order of May 19, 2004 in the above-captioned matter, Petitioner, Midwest Generation EME, LLC ("Midwest Generation"), by and through its attorneys, Schiff Hardin LLP, hereby moves the Illinois Pollution Control Board (the "Board") for partial reconsideration of its Order of May 6, 2004. In support hereof, Petitioner states as follows:

1. On April 19, 2004, Midwest Generation filed a Petition for Review concerning the Illinois Environmental Protection Agency's ("IEPA's") March 10, 2004 denial of trade secret protection to information Midwest Generation submitted to IEPA.
2. By Order dated May 6, 2004 ("May 6 Order"), the Board accepted Midwest Generation's Petition for Review. In the May 6 Order, the Board found that: "Hearings will be based exclusively on the record before IEPA at the time it issued its trade secret determination." May 6 Order at 3.

3. On May 27, 2004, all parties participated in a telephonic status conference with the Hearing Officer. The Petitioner represented that it intended to file a motion for reconsideration of the Board's May 6, 2004 Order. Without objection, the Hearing Officer extended the time in which the Petitioner had to file its motion for reconsideration and set a briefing schedule. Pursuant to the Hearing Officer's Order, Petitioner's motion and accompanying brief are due on or by July 1, 2004.
4. For the reasons set forth in the accompanying Memorandum in Support of Midwest Generation's Motion for Partial Reconsideration of the Board's Order of May 6, 2004, Midwest Generation respectfully requests that the Board partially reverse its Order and find that the hearing on this matter be held *de novo*.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Sheldon A. Zabel  
Mary Ann Mullin

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

One of the Attorneys for  
Midwest Generation EME, LLC

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD JUL 01 2004**

**STATE OF ILLINOIS**  
**Pollution Control Board**

**Midwest Generation EME, LLC**  
**Petitioner,**

**v.**

**Illinois Environmental Protection Agency,**  
**Respondent.**

**PCB 04-185**  
**Trade Secret Appeal**

**MEMORANDUM IN SUPPORT OF MIDWEST GENERATION'S**  
**MOTION FOR PARTIAL RECONSIDERATION OF THE**  
**ILLINOIS POLLUTION CONTROL BOARD'S ORDER OF**  
**MAY 6, 2004**

As more fully set forth in Midwest Generation's Petition for Review ("Petition"), Midwest Generation (or "Petitioner") submitted a copy of its response to the USEPA §114 information request to the Illinois Environmental Protection Agency ("IEPA") as required by the request. Midwest Generation's response contained confidential business and trade secret information. Later, in response to an IEPA request, Midwest Generation submitted a Statement of Justification for its trade secret claims. (Attachment 1). In the Statement of Justification, Midwest Generation identified two charts that contained trade secret information, a Project Chart and a Generation chart. In the Statement of Justification, Midwest Generation explained that the information on the Charts was compiled solely to respond to the §114 request, that the information was not publicly available and Midwest Generation identified specific reasons why the release of the information would cause the company competitive harm. Midwest Generation supplied the affidavit of a corporate official attesting to the fact that the information was not made publicly available.

By letter, IEPA summarily denied most of Midwest Generation's claims. (Attachment 2). The denial did not state the reasons for denying trade secret protection to Midwest Generation's information. In denying trade secret status to information on the Project Chart, IEPA merely states:

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.

Attachment 2 at 1. The letter does not state whether IEPA's position is that the information is both publicly available and does not have competitive value or that only one of these factors has been met. If IEPA's position is that the information is publicly available, IEPA has failed to articulate the factual or other basis for this conclusion. If IEPA has determined that the information has no competitive value, again IEPA has failed to articulate the basis for that conclusion or to state any reason for rejecting Midwest Generation's determination, submitted under oath, that the information would harm its competitive position. IEPA's denial of trade secret protection to the Generation Chart is identical with the curious addition of one sentence: "Further, Midwest has failed to demonstrate that the information does not constitute emissions data." Attachment 2 at 2. Midwest Generation cannot conceive of why the generation information on this chart would be considered emissions data.

No hearing, formal or informal, was held on this matter before the denial. Midwest Generation was not given notice of IEPA's determination until the determination was final. IEPA never discussed Midwest Generation's claims with Midwest Generation before issuing this denial and Midwest Generation was given no opportunity to refute IEPA's conclusory determinations by submitting additional evidence.

On May 6, 2004, the Pollution Control Board ("Board") issued an Order holding 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 set forth below, Petitioner contends that this ruling violates the due process requirements under the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Illinois Constitution.

### Argument

An administrative hearing must be conducted in accordance with the due process requirements under the Fourteenth Amendment to the United States Constitution and Article I, Section 2, of the Illinois Constitution. In re Abandonment of Wells Located in Illinois v. Department of Natural Resources, 343 Ill. App. 3d 303, 796 NE 2d 623 (Ill. App. Ct. 2003) citing In re Estate of Hect, 63 Ill. App. 3d 539, 540, 20 Ill. Dec. 254, 379 N.W. 2d 1332, 1324 (1978). A fair trial before a fair tribunal is a basic requirement of due process, a requirement that applies to both courts and administrative agencies that perform adjudicatory functions. Arvia v. Madigan, 809 NE 2d 88, 101 (Ill. 2004). The due process clause requires the opportunity to be heard occur at a meaningful time and in a meaningful manner. Lyon v. Dept. of Children and Family Services, 807 NE 2d 423, 430 (Ill. 2004), citing Mathews v. Eldridge, 424 US 319, 333, 96 S.Ct. 893, 47 L. Ed 2d 18, (1976). The United States Supreme Court has explained the factors courts should consider when evaluating procedural due process claims:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Lyon at 423 citing Mathews, 424 U.S. at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33. Applying the first factor, Midwest Generation's claim involves the protection of trade secrets, a property interest. As set forth in the Statement of Justification, disclosure of these trade secrets will cause

Midwest Generation financial harm. As to the second factor, the risk of deprivation of this interest is great if Midwest Generation is prevented from knowing IEPA's reasons for denial and from submitting evidence to refute these reasons. Regarding the third factor, the Government's interest, the Government has no interest in releasing trade secret information; it is protected from disclosure under 415 ILCS 5/7(a). Lastly, allowing Midwest Generation to submit additional evidence at the Board hearing will not cause a significant administrative burden; it will only slightly lengthen the required hearing.

While the due process clause is flexible, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. People v Botruff, 331 Ill. App. 3d 486, 575, 771 NE 2d 570, (Ill. App. Ct. 2002) Due process requires that all parties have an opportunity to offer evidence in rebuttal. Novosad v. Mitchell, 251 Ill. App. 3d 166, 621 NE 2d 960, 966 (Ill. App. Ct. 1993), Anderson v. Human Rights Commission, 314 Ill. App. 35, 731 NE 2d 371, 376 (Ill. App. Ct. 2000).

If a party is denied an effective opportunity to submit information at the IEPA level, this denial of due process will not be corrected at the Board level if, in the proceedings before the Board, the party cannot submit additional information. See, Village of Sauget v. PCB, 207 Ill. App. 3d, 974, 982 (1990), see also, Wells Manufacturing Company v. EPA, 195 Ill. App. 3d 593, 596 (Ill. App. Ct. 1990) In Village of Sauget, the court found that petitioner, Monsanto, was denied due process because it was denied an effective opportunity to introduce evidence into the agency record responding to USEPA's comments on its permit application. Village of Sauget at 983. The court reasoned:

If, as occurred here, the parties are precluded from supplementing the record before the IEPA on such issues, this failure cannot be cured through the Board hearing because the scope of a Board hearing in a permit appeal is limited to the record developed before the IEPA.



Id. The court concluded: "We find that the procedural safeguards to which Monsanto was due at the agency level were not afforded, and the proceedings before the Board did not cure this deficiency." Id.

In Wells, the IEPA denied Wells' application to renew its air permit concluding that operation of the Wells facility would cause a violation of the Environmental Protection Act. Wells at 596. Wells did not have the opportunity to present evidence that it would not violate the Act before its renewal application was denied. Wells at 597. The Board affirmed this decision, but the Appellate Court reversed reasoning:

There are several problems with this procedure. The Board's decision was based on the record compiled by the Agency. . . . However, Wells never had an opportunity to proffer evidence that it would not pollute.

Wells at 597. The Court concluded:

. . . it is obvious that the manner in which the Agency compiled information denied Wells a fair chance to protect its interest. The Agency asserts that the Board hearing gave Wells an opportunity to challenge the information relied on by the Agency in its permit denial. This is by no means the same as being allowed to submit evidence, some time during the application process, in order to show that it is not polluting the air.

Wells at 598.

Like Monsanto and Wells, Midwest Generation was not given an effective opportunity to protect its interest by responding to IEPA before IEPA denied trade secret protection to its information. Midwest Generation submitted its initial Statement of Justification that IEPA disagreed with or conclusorily rejected on a factual basis unknown to Midwest Generation and as to which Midwest Generation never had an opportunity to respond. This denial of due process will not be cured by a Board hearing on the record before IEPA because Midwest Generation will not have the opportunity to submit evidence responding to IEPA's sweeping,

unsubstantiated conclusions that the trade secret information is not in the public domain and that its release will not cause competitive harm.

In its Order, the Board cites 35 Ill. Adm. Code 105.214(a) for its holding that the hearing in this matter will be based exclusively on the record before IEPA at the time it issued its trade secret determination. This regulation, however, explicitly allows for the submittal of additional evidence. In relevant part, the regulation provides: "If any party desires to introduce evidence before the Board with the [sic] respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with the respect to the issue of fact." 35 Ill. Adm. 105.214(a). The Board's Order would seem to negate the protection afforded in the regulation.

Further, the authorizing statute for this regulation, the trade secret provisions of the Illinois Environmental Protection Act ("Act"), does not require the Board to base its decision exclusively on the record before the IEPA. 415 ILCS 5/7.1. Section 105.214(a) also applies to appeals of permit denials and the permitting provisions of the Act do require appeals of permit denials to be based exclusively on the record, 415 ILCS 5/40(d), unlike the trade secret provisions of the Act.

Even assuming the implementing regulations require Board review to be limited to the record developed by IEPA, this is not determinative of whether Midwest Generation's due process rights have been violated. The United States Supreme Court has made clear that due process is a matter of Federal constitutional law, so compliance or noncompliance with state procedural requirements is not determinative of whether minimum procedural due process standards have been met. Lyon v. Department of Children & Family Services, 209 Ill. 2d 264, 807 NE 2d 423 (Ill. 2004) citing Cleveland Board of Education v. Loudermill, 470 US 532, 541, 105 S. Ct. 1487, 1492, 84 L Ed. 2d 494, 503 (1985).

Further, the cases cited in the Order do not support the holding that “information developed after IEPA’s decision typically is not admitted at hearing or considered by the Board.” Order at 3.<sup>1</sup> In Community Landfill, the issue before the court was a narrow factual issue concerning whether the IEPA had certain documents in its possession when it made a decision to deny a permit. The court merely found that the record on appeal was inadequate for it to make this determination. The court concluded: “Because this court has insufficient information to guide us in our evaluation of this issue, we must presume the hearing officer correctly excluded the evidence”. Community Landfill Co. v. Pollution Control Board, 331 Ill. App. 3d 1056, 1063 (Ill. App. Ct. 2002). The issue before the Court was not whether the hearing should be limited to the record, but rather, whether the IEPA properly included information in the record. The court found it could not decide the issue because the appellant had not filed a sufficient record on appeal. Id. The court did not address whether information developed after IEPA’s decision was admissible.

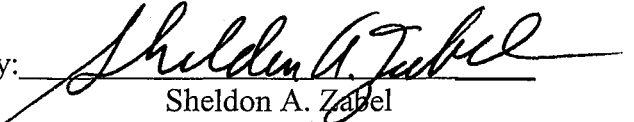
Because the proceedings before the IEPA did not meet the test of due process, a hearing before the Board on the record developed by the IEPA cannot meet the test of due process. Therefore, Midwest Generation respectfully requests that the Board partially reverse its Order and find that the hearing on this matter will be held de novo.

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<sup>1</sup> In Alton, the court only mentioned the procedural due process issues in dicta. See Alton Packaging Corp v. Pollution Control Board, 516 NE 2d 275, 279 (Ill. App. Ct. 1987). In Alton, the court merely observed that the Waste Management case did not change the law with respect to the requirements of the hearing before the Board in a permit appeals. Alton at 280 citing Environmental Protection Agency v. Pollution Control Board, 115 Ill. 2d 65, 70 (1986) (hereafter referred to as “Waste Management”). The Waste Management court, however, found that when procedural due process is unavailable at the Agency level, the Board is not required to apply the manifest-weight test to the Agency’s findings. Waste Management at 70.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By:   
Sheldon A. Zabel  
Mary Ann Mullin

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

One of the Attorneys for  
Midwest Generation EME, LLC

CH2\1122506.1

# Exhibit 1



## ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276. 217-782-3397  
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601, 312-814-6026

ROD R. BLAGOJEVICH, GOVERNOR

RENÉ CIPRIANO, DIRECTOR

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

March 10, 2004

Jane E. Montgomery  
Schiff Harden & Waite  
6600 Sears Tower  
Chicago, Illinois 60606-6360

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

Dear Ms. Montgomery:

The Illinois Environmental Protection Agency ("Illinois EPA") is in receipt of Midwest Generation EME, L.L.C.'s ("Midwest") trade secret Statement of Justification dated January 23, 2004 and received by the Illinois EPA on January 26, 2004. The Statement of Justification was provided at the request of the Illinois EPA and covers information submitted by Midwest to the Illinois EPA in response to a United States Environmental Protection Agency ("USEPA") request for information under §114 of the Clean Air Act. This letter serves as the Illinois EPA's response to Midwest's Statement of Justification.

The Illinois EPA acknowledges Midwest's withdrawal of its confidentiality claim pertaining to information contained on pages MWG0017 through MWG0022, information contained in column 7 on pages MWG0024 through MWG000056, and the boiler cross-sectionals. Notwithstanding the withdrawn information on pages MWG0024 through MWG000056, the Illinois EPA has determined that only columns 2 and 4 constitute confidential business or trade secret information. 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. The Illinois EPA denies trade secret protection to the abovementioned information with the exception of the information contained in columns 2 and 4.

Regarding the information contained in the response to USEPA's request #3, the Illinois EPA is denying trade secret protection to all information except that found in column 2. 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. Further, Midwest has failed to demonstrate that the information does not constitute emission data.

Midwest (or any requestor who is adversely affected by this determination) may petition the Illinois Pollution Control Board ("Board") pursuant to 35 Ill. Adm. Code 105, Subparts A and B to review the Illinois EPA's final determination within 35 days after service of the determination. Furthermore, Midwest (or any requestor who is adversely affected by a final determination of the Board) may obtain judicial review from the appellate court by filing a petition for review pursuant to Section 41 of the Illinois Environmental Protection Act [415 ILCS 5/41]. (35 Ill. Adm. Code 130.214)

Should Midwest or any requestor petition the Board or obtain judicial review from the appellate court, the Illinois EPA will continue to protect all information for which trade secret protection has been granted until it receives official notification of a final order by a reviewing body with proper jurisdiction that reverses this determination and that is not subject to further appeal. (35 Ill. Adm. Code 130.214)

The Illinois EPA will cease protecting all information not subject to trade secret protection as discussed herein unless the Agency is served with notice of the filing of a petition for review of its determination within 35 days after service of this notice of denial on Midwest and any requestor.

If you have any questions or concerns regarding this matter please do not hesitate to contact me.



Chris Pressnall  
Assistant Counsel  
Division of Legal Counsel

cc: Adam Quader, Sierra Club

# Exhibit 2



**The confidential information in this attachment has been redacted.**

**The full attachment was submitted under seal with Midwest Generation's Petition for Review.**

Andrew N. Sawula  
(312) 258-5577  
Email: asawula@schiffhardin.com

**REDACTED**

January 23, 2004

**VIA U.S. MAIL**

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

**CONFIDENTIAL**

**Re: Midwest Generation EME, LLC  
FOIA Request from Sierra Club – Midwest Generation's Statement of  
Justification**

Dear Mr. Pressnall:

I am writing on behalf of Midwest Generation EME, LLC ("Midwest Generation" or the "Company") to provide a Statement of Justification for its claim of business confidentiality concerning information (the "Confidential Information") submitted in response to a request for information (the "Information Request Response") from the United States Environmental Protection Agency ("U.S. EPA"). In this Statement of Justification, as required by 35 Ill Admin. Code § 130.203, the Company describes the procedures it uses to safeguard the Confidential Information, explains the competitive value of the Confidential Information and identifies the people to whom the Confidential Information has disclosed. I attach a certification by Fred McCluskey, on behalf of the Company, that upon information and belief, the Confidential Information has not been published or disseminated, and has not otherwise become a matter of general public knowledge. (See Attachment A)

**I. Procedures for Safeguarding Information (35 Ill. Admin. Code § 130.203(a))**

**REDACTED**

Chris Pressnall  
January 23, 2004  
Page 2

**II. Discussion of Competitive Value and Identification of People to whom Information has been Disclosed (35 Ill. Admin. Code §§ 130.203 (b), (d))**

In its Information Request Response, the Company identified various information as "Confidential Business Information." Through this letter, the Company withdraws its claim of business confidentiality for (1) information contained on pages MWG0017 through MWG0022, (2) information contained in Column 7 on pages MWG0024 through MWG000056 and (3) the boiler cross-sectionals, which are stamped MWG000153, MWG000155, MWG000157, MWG000159, MWG000161, MWG000164, MWG000166, MWG000168, MWG000170, MWG000172, MWG000174, MWG000176, and PWT000001. The Company maintains that the following pieces of information are trade secrets and must not be disclosed to third parties who request a copy of the Information Request Response.

**A. Gross and Net Generation; Gross and Net Heat Rate; and Coal Heat Content**

The monthly and annual gross and net (1) generation, (2) heat rate, and (3) average coal heat content at each unit is trade secret information. This information appears in Columns 2, 3, 4, 5 and 6 on pages MWG0024 through MWG000056 of the Information Request Response. This information defines Midwest Generation's competitive position in the

**REDACTED**

Chris Pressnall  
January 23, 2004  
Page 3

information, as needed, to

this information, to the extent required, Midwest Generation also provides rating agencies. Finally, Midwest Generation provided this information, through the Information Request Response, to U.S. EPA, the Illinois Environmental Protection Agency ("IEPA")

**B. List of Capital Projects**

The list of capital projects that appears on pages MWG000058 through MWG000068 of the Information Request Response is trade secret information. Midwest Generation did not possess such a comprehensive list of its projects until it assembled this list for the purpose of responding to the Information Request. This list possesses competitive value because, by looking at the nature of the projects, competitors can accurately assess Midwest Generation's environmental control strategies and can assess whether the projects will shift Midwest Generation's cost position in the marketplace. Further, if this information is released, competitors may be able to predict the Company's future maintenance costs, giving other power producers and utilities a competitive advantage. Finally, competitors could use the information regarding Midwest Generation's costs for certain equipment to negotiate more favorable prices with vendors, resulting in substantial harm to Midwest Generation's competitive position.

Midwest Generation has only provided this full list, through the Information Request Response, to U.S. EPA, IEPA

Internally, the personnel in the following departments have access to this information as needed:

Thank you for safeguarding the Confidential Information. Please feel free to contact me if you have any questions.

Very truly yours,

Andrew N. Sawula

Enclosures

cc: Becky Lauer, Midwest Generation  
Fred McCluskey, Midwest Generation  
Jane Montgomery

# **ATTACHMENT A**

### **Certification**

I, Fred W. McCluskey, do state as follows:

1. I am the Vice President, Technical Services, for Midwest Generation EME, LLC (the "Company") and I am authorized to execute this certification on behalf of the Company.
2. The Company is the owner of the information described in the Statement of Justification, for which information the Company claims trade secret protection (the "Confidential Information").
3. Upon information and belief, the Confidential Information has not been published or disseminated, and has not otherwise become a matter of general public knowledge.

Dated: January 22, 2004

  
Fred W. McCluskey, Vice President

CH2V 1070705.1