

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC,)	
Petitioner)	PCB 04-216
)	Trade Secret Appeal
v.)	
)	
Illinois Environmental Protection Agency,)	
Respondent)	

NOTICE OF FILING

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Brad Halloran
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Please take notice that today we have filed with the Office of the Clerk of the Pollution Control Board via electronic filing Respondent's Response and Memorandum in Opposition to Midwest Generation's Motion for Interlocutory Appeal of Order Denying Motions to Compel Discovery. A copy is herewith served upon the assigned Hearing Officer and the attorneys for the Petitioner, Midwest Generation EME, LLC.

Dated: Chicago, Illinois
June 14, 2007

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**RESPONSE AND MEMORANDUM IN OPPOSITION TO PETITIONER'S
MOTION FOR INTERLOCUTORY APPEAL OF ORDER DENYING MOTIONS
TO COMPEL DISCOVERY**

Preliminary Statement

Respondent Illinois Environmental Protection Agency ("IEPA" or the "Agency") submits this Response and Memorandum in Opposition to Petitioner Midwest Generation EME, LLC's ("Midwest Generation") Motion for Interlocutory Appeal of Order Denying Motions to Compel Discovery. Midwest Generation's Motion, filed May 31, 2007, is to appeal the Corrected Hearing Officer's Order denying Midwest Generation's Motion and Amended Motion to Compel the IEPA's response to several of Midwest Generation's Initial Interrogatories and Request for the Production of Documents.

The Hearing Officer's Corrected Order, entered April 26, 2007, denying Midwest Generation's Motions to Compel should be affirmed and upheld. The Hearing Officer agreed with the argument the IEPA has asserted from the beginning – that the discovery in dispute is simply not relevant or reasonably calculated to lead to relevant information. Corrected Hearing Officer Order, April 26, 2007, p. 4. Petitioner's present appeal stems from initial discovery requests whereupon Midwest Generation requested information concerning every single trade secret determination the Agency had ever made, as well as to produce all statements of justification or responses to them from the past 17 years.

When the IEPA objected to the requests because they were irrelevant, overbroad, and burdensome, Petitioner filed two Motions to Compel. The Hearing Officer denied Midwest Generation's Motions to Compel, holding that the Board's procedural rules mandate that trade secret hearings are to be held exclusively on the record and therefore, the voluminous historical information sought is irrelevant and inadmissible. Corrected Hearing Officer Order, April 26, 2007, pp. 2, 4. In addition to the irrelevance of the discovery in dispute, Midwest Generation failed to "persuasively identify any additional discovery evidence" calculated to lead to relevant information. Corrected Hearing Officer Order, April 26, 2007, p. 4. Midwest Generation's present Motion fails to introduce any new relevant discoverable evidence or arguments to justify circumventing the Board's rules and overruling the Hearing Officer's Order.

Further, in its Motion, Midwest Generation mischaracterizes the IEPA's position by focusing on the Agency's argument that the requested discovery would be burdensome and impractical. Petitioner's Motion ¶ 5. While they are certainly part of the IEPA's objections (as discussed in Respondent's previous Memorandums in Opposition filed March 2, 2006 and March 28, 2007), the key issue behind both the Agency's objection and Hearing Officer's ruling is **irrelevance**. Corrected Hearing Officer Order, April 26, 2007, p. 4. The Board has now explicitly made clear for the **third time** that the hearing will be based exclusively on the administrative record of the IEPA's trade secret denial in this matter. Corrected Hearing Officer Order, April 26, 2007, pp. 3-4. The requested materials are irrelevant as they remain outside the, by now, well-established evidentiary boundaries set by the Board. Midwest Generation's Motion should therefore be denied.

I. Petitioner's discovery requests are irrelevant based upon numerous Board Orders confining the evidentiary parameters exclusively to the Administrative Record.

In its Motion for Interlocutory Appeal, Petitioner inaccurately portrays the IEPA's primary reason for objecting to certain interrogatories and document requests. Petitioner's Motion ¶ 5. Through previous pleadings responding to Petitioner's Motions to Compel, the Agency has repeatedly argued for denial based upon the lack of relevancy of the requested materials. The Hearing Officer upheld the validity of the IEPA's argument in its recent Order, which focused on the issue of relevance in deciding against Midwest Generation's motion. Corrected Hearing Officer Order, April 26, 2007, pp. 3-4.

Besides the most recent Order, the Board has previously made it abundantly clear in issuing three other Orders (on May 16, 2004, June 17, 2004, and November 4, 2004 in Board Case No. PCB 04-185) that hearings in trade secret matters are to be held **exclusively** on the administrative record and that no non-record evidence is admissible. The only exception the Board noted it would allow is for new information available to neither Petitioner nor the IEPA at the time of the IEPA's decision. The Board recognized the importance of minimizing the People's burden so that citizen requests about environmental matters are not delayed. Plainly disregarding the Board's prior pronouncements, Midwest Generation is still requesting massive volumes of records from unrelated cases clearly beyond the scope of this matter.

Petitioner argues that it suspects the IEPA may have evolved in how it interprets trade secrets regulations, which suspicion then somehow validates its repeatedly denied requests for vast amounts of historical, unrelated information. Petitioner's Motion ¶ 12. Midwest Generation apparently hopes to find that some time within the decades of the

Agency's existence, the IEPA has treated another company differently based on similar facts. Petitioner now attempts to justify the possibility of finding any such data based upon two IEPA employees' vague anecdotal recollections of a few trade secret or emissions data determinations in which they participated. Petitioner's Motion ¶ 17. However, putting aside Petitioner's dubious rationalization for the information, the Hearing Officer correctly denied the request stating that the Board has no authority to determine whether the Agency treated other companies differently. Corrected Hearing Officer Order, April 26, 2007, p. 4. Further, the Board has previously held that Petitioner is allowed to probe the Agency's reasoning through testimony, not through admission of non-record documents such as those in old case files.

Simply put, the applicable Board's procedural rule, 35 Ill. Adm. Code 105.214(a), explicitly states that hearings on trade secret determinations are based exclusively on the record before the Agency at the time it issued its trade secret determination. When the administrative record was filed on July 13, 2004, the information requested in the disputed discovery was not included. Therefore, since the information Petitioner seeks was developed and requested after the Agency's trade secret decision, it is not part of the record and therefore irrelevant.

Petitioner also attempts to gain access to the disputed discovery by citing the Board rules that allow discovery "calculated to lead to relevant information." (35 Ill. Adm. Code 101.616(a)). However, as was succinctly stated in the latest Order, based upon "the Board's procedural provisions and the plethora of case law," Petitioner's discovery request is not so reasonably calculated as to lead to any relevant information so as to make the rule applicable. Corrected Hearing Officer Order, April 26, 2007, pp. 3-4.

Midwest Generation claims the Hearing Officer's finding was wrong in that the information should be disclosed so that Petitioner can rely upon it for cross-examinations, impeachment purposes, or the interpretation of substantive law. Petitioner's Motion ¶ 14. While Petitioner is surely entitled to each of the purposes cited, its arguments are misplaced amongst a discussion of reasonably calculated discovery requests. In contrary to the plain meaning of reasonably calculated discovery, Petitioner fails to tailor the discovery request to justify 'overruling the Hearing Officer's Order. Instead, Midwest Generation asserts the same need for historical, entirely unrelated documents, claiming it would result in a reasonable calculation designed to lead to discoverable evidence. The Hearing Officer correctly denied Midwest Generation's Motion since trade secret determinations going back some 17 years is not discoverable in a record-only proceedings and Petitioner failed to persuasively identify any additional discovery evidence reasonably calculated to lead to any new information unavailable to the Agency at the time of the determination.

II. Petitioner's requested discovery is impractical, burdensome, and would inevitably result in an undesirably incomplete record.

In addition to the requested information being totally irrelevant, it would be nearly impossible for the IEPA to call up files from every prior Agency trade secret determination because the files are kept according to the emission source. Midwest Generation claims it was wrong for the Hearing Officer not to allow access to a "small subset of materials" IEPA employees vaguely recalled in depositions. Petitioner's Motion ¶ 18. However, contrary to Midwest Generation's assertion, it would not advance the merits of the case but obstruct justice by attempting to use a few isolated

unrelated past decisions to prove the Agency's entire record in interpreting trade secret determinations.

Petitioner seeks to overcome the overly burdensome and broad request by now requesting a few closed files, but this brings about the new problem of using a few historical files in a record-only case to prove an Agency's entire history of trade secret determinations. Petitioner's Motion ¶ 17. Producing a few historical case files would likely result in an erroneous unjust representation of the Agency's record of trade secret determinations. There may be many other files with different outcomes than the few files Petitioner requests that are un-findable because of the IEPA's filing system. Also, since the Agency's policy is to archive and eventually destroy files of sources no longer operating in Illinois, older unavailable files may also produce an inaccurate record of IEPA decisions. Moreover, many determinations may have been made informally leaving no record besides unreliable vague recollections of past informal trade secret determinations. Therefore, Midwest Generation's present attempts to gain access to a few historical files would result in an inaccurate record prompting the overly burdensome and broad search of 17 years of unrelated past decisions which the Hearing Officer has refused to allow. Corrected Hearing Officer Order, April 26,2007, p. 5.

Petitioner accuses the IEPA of being uncooperative in refusing to provide a subset of known information, when in reality the Agency recognizes the importance of an accurate record which would be tainted by providing incomplete data. Petitioner's Motion ¶ 16. Midwest Generation argues that it needs the documents in order to show that previous determinations on similar facts came out differently. Petitioner's Motion ¶ 14. However, based on such an argument, anything less than the full set of prior Agency

determinations would not serve to support the conclusion Petitioner seeks to prove. Contrary to Petitioner's claim, the Hearing Officer correctly understood the significance of the information sought when he denied the Motions to Compel, and the Hearing Officer's ruling should therefore be affirmed.

Conclusion

For the foregoing reasons, Respondent respectfully requests that Petitioner's Motion for Interlocutory Appeal of Order Denying Motions to Compel Discovery be denied.

Dated: Chicago, Illinois
June 14, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I did on the 14th day of June, 2007 send by United States mail a copy of Respondent's Response and Memorandum in Opposition to Midwest Generation's Motion for Interlocutory Appeal of Order Denying Motions to Compel Discovery to:

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Dated: Chicago, Illinois
June 14, 2007

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