

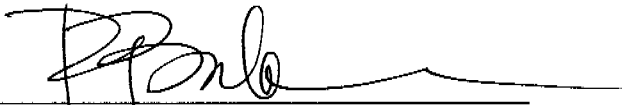
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Commonwealth Edison Company,)	
)	
Petitioner,)	
)	
v.)	PCB No. 04-215
)	(Trade Secret Appeal)
)	
Illinois Environmental Protection Agency,)	
)	
Respondent.)	

NOTICE OF FILING

To:	Dorothy Gunn, Clerk Illinois Pollution Control Board 100 West Randolph Suite 11-500 Chicago, Illinois 60601	Ann Alexander Assistant Attorney General and Environmental Counsel 188 West Randolph Street Suite 2000 Chicago, Illinois 60601
	Brad Halloran Hearing Officer Illinois Pollution Control Board 100 West Randolph Suite 11-500 Chicago, Illinois 60601	

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board **Commonwealth Edison Company's Amended Motion to Compel Respondent's Discovery Responses**, a copy of which is herewith served upon you.



Roshna Balasubramanian

Dated: March 23, 2007

Byron F. Taylor
Roshna Balasubramanian
Sidley Austin LLP
One South Dearborn
Chicago, Illinois 60603
(312) 853-7000

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Commonwealth Edison Company,)	
)	
Petitioner,)	
)	
v.)	PCB No. 04-215
)	(Trade Secret Appeal)
Illinois Environmental Protection Agency,)	
)	
Respondent.)	

**COMMONWEALTH EDISON COMPANY'S AMENDED MOTION TO COMPEL
RESPONDENT'S DISCOVERY RESPONSES**

Comes now Commonwealth Edison Company ("ComEd"), through the undersigned counsel and pursuant to 35 Ill. Admin. Code. § 101.500, and hereby files this Amended Motion to Compel the Illinois Environmental Protection Agency's ("IEPA's") responses to certain of ComEd's Initial Interrogatories and Initial Requests for the Production of Documents. In addition to the legal and factual bases for compelling IEPA's responses to discovery that were previously set forth in ComEd's Motion to Compel (currently pending before the Hearing Officer), deposition testimony issued in this proceeding after the Motion to Compel was filed directly contravenes Respondent's objection that ComEd's discovery requests are overbroad and unduly burdensome. This testimony should be considered in connection with ComEd's request that the Hearing Officer issue an Order compelling IEPA's discovery responses. In support thereof, ComEd states as follows:

1. Consistent with the Hearing Officer's Scheduling Order in this matter ("Order"), ComEd served IEPA with written discovery. ComEd's Interrogatories and Document Requests sought, *inter alia*, information relating to IEPA's prior trade secret determinations regarding financial and operational data—including the same type of data at issue in this trade secret

dispute—submitted by other businesses and electric utilities. ComEd further requested the Agency's prior analyses and/or determinations of what constitutes "emissions data." The relevant interrogatories sought the following information:

Interrogatory No. 12: Any determination IEPA has made relating to the trade secret status of a business's financial information.

Interrogatory No. 13: Any determination IEPA has made relating to the trade secret or confidential business information status of any other electric utility company's GADS data or other similar operational data.

Interrogatory No. 14: Any determination IEPA has made that information constituted "emissions data" as that term is now or was in the past defined under Section 5/7 of the Illinois Environmental Protection Act, 415 ILCS 5/7, or Section 114(c) of the Clean Air Act, 42 U.S.C. § 7414(c), or their predecessors and their implementing regulations.

Document Request No. 4: All statements of justification—prepared in defense of trade secret or confidential business information claims—submitted to IEPA between January 1, 1990 and the present.

Document Request No. 5: IEPA's responses—including preliminary and final agency determinations and correspondence related to the same—to such statements of justification.

2. IEPA provided no answers to the above-enumerated interrogatories, nor did it agree to undertake reasonable efforts to locate responsive information. IEPA instead referred ComEd to "General Objections A, C, and D," which state, respectively, that ComEd's Initial Interrogatories and Document Requests seek irrelevant/inadmissible evidence (General Objection A), "are overbroad and burdensome" (General Objection C), and "are vague" (General Objection D). *See* Resp't Resp. to Interrogs. and Req. Produc. Docs. No substantiation of any of the objections was provided, nor was there any explanation of how the general objections applied to the specific requests.

3. As explained in ComEd's February 22, 2006 Motion to Compel (attached hereto as "Exhibit A"), the parties were not able to negotiate a mutually satisfactory resolution of these discovery issues. Accordingly, ComEd filed its Motion to Compel, in which it explained that its discovery requests were both reasonable and relevant and required complete responses pursuant to Illinois law and the applicable Board rules. ComEd incorporates by reference its Motion to Compel, filed on February 22, 2006, as if fully set forth herein.

4. IEPA filed an Opposition to ComEd's Motion to Compel, in which it flatly refused to produce any information responsive to Interrogatory Nos. 12, 13, 14, and Document Request Nos. 4 and 5 and, in fact, claimed that any attempt to even look for certain responsive information would be "unduly burdensome." Resp't Mem. Opp. Mtn. Compel at 11-12. For instance, in response to the request for prior Agency trade secret determinations, IEPA responded that no "separate record of trade secret determinations" existed; consequently, every single source file would need to be reviewed, a task which, according to IEPA, would be excessively burdensome. *See id.* ComEd argued in its Reply that reasonable efforts to comply are required by Illinois rules and suggested that IEPA simply ask its employees to recall companies that had been involved in prior trade secret determinations, so that these individual source files could be consulted. Pet. Reply Supp. Mtn. Compel at 6. IEPA may not unilaterally decide to avoid compliance. *See* Resp't Mem. Opp. Mtn. Compel at 13.

5. Since the motions relating to ComEd's Motion to Compel were filed, several depositions of IEPA employees have been taken. Testimony provided during these depositions demonstrates that ComEd's interrogatories and document requests relating to prior trade secret and Freedom of Information Act determinations clearly are not overbroad or unduly

burdensome. To the contrary, IEPA should be able to locate such documents with reasonable effort.

6. IEPA's Associate Counsel for the Bureau of Air, Julie Armitage, testified that copies of the Agency's trade secret determinations are kept in files labeled according to the source involved in the determinations. (Armitage Dep., Mar. 15, 2006 ("Ex. B") at 23:19-23). IEPA Assistant Counsel Christopher Presnall confirmed that the Bureau of Air's central files are organized by ID number and facility. (Presnall Dep., Mar. 15, 2006 ("Ex. C") at 10:14-24, 12:14-16). Thus, a trade secret determination involving a particular utility could be located simply by pulling that utility's central file, given that the central files are organized by entity name.

7. At least five companies involved in relevant trade secret determinations were identified by IEPA employees in their depositions. (*See* Ex. C at 31-33, 107; Romaine Dep, Mar. 16, 2006, ("Ex. D") at 25-28). For instance, Christopher Presnall testified that he has reviewed fewer than ten statements of justification under the trade secret rules and issued only one trade secret denial prior to ComEd's. (Ex. C at 20:11-15, 30:6-10). He also recalled names of at least two sources involved in formal or informal trade secret denials. (Ex. C at 31-33, 107).

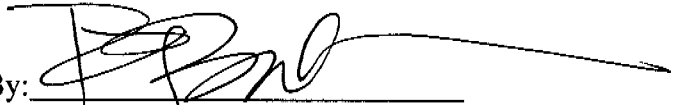
8. The above-cited deposition testimony establishes that IEPA employees can retrieve some of the Agency's prior trade secret determinations with little effort. ComEd's discovery requests for prior Agency determinations are neither overly broad nor unduly burdensome, and IEPA must produce responsive information to the extent practicable.

WHEREFORE, ComEd respectfully requests that the Hearing Officer grant its Motion to Compel.

Dated: March 23, 2007

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 

Byron F. Taylor
Roshna Balasubramanian
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Commonwealth
Edison Company

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Commonwealth Edison Company,)
)
Petitioner,)
)
v.)
)
Illinois Environmental Protection Agency,)
)
Respondent.)

PCB No. 04-215
(Trade Secret Appeal)

RECEIVED
CLERK'S OFFICE

FEB 22 2005

STATE OF ILLINOIS
Pollution Control Board

RECEIVED
CLERK'S OFFICE

FEB 22 2006

STATE OF ILLINOIS
Pollution Control Board

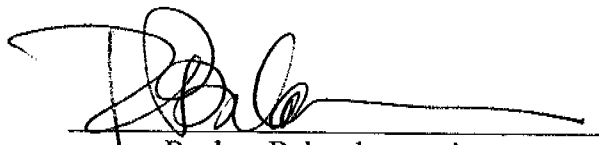
NOTICE OF FILING

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Ann Alexander
Assistant Attorney General and
Environmental Counsel
188 West Randolph Street
Suite 2000
Chicago, Illinois 60601

Brad Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board **Commonwealth Edison Company's Motion to Compel**, a copy of which is herewith served upon you.


Roshna Balasubramanian

Dated: February 22, 2006

Byron F. Taylor
Roshna Balasubramanian
Sidley Austin LLP
One South Dearborn
Chicago, Illinois 60603
(312) 853-7000

THIS FILING SUBMITTED ON RECYCLED PAPER

EXHIBIT

A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

FEB 22 2005

STATE OF ILLINOIS
Pollution Control Board

Commonwealth Edison Company,

Petitioner,

v.

Illinois Environmental Protection Agency,

Respondent.

PCB No. 04-215

(Trade Secret A

RECEIVED
CLERK'S OFFICE

FEB 22 2006

STATE OF ILLINOIS
Pollution Control Board

COMMONWEALTH EDISON COMPANY'S MOTION TO COMPEL

Petitioner, Commonwealth Edison Company ("ComEd"), by and through counsel and pursuant to 35 Ill. Admin. Code §§ 101.614 and 101.616(b), hereby moves the Hearing Officer for an Order compelling Respondent, Illinois Environmental Protection Agency ("IEPA" or "the Agency"), to respond to certain of ComEd's Initial Interrogatories and Initial Requests for the Production of Documents. In support thereof, ComEd states as follows:

BACKGROUND

1. This case comes before the Illinois Pollution Control Board (the "Board") and the Hearing Officer on ComEd's petition for review of a negative IEPA determination (hereinafter "Agency's Denial") that certain data relating to six coal-fired generating stations was not entitled to trade secret protection under 35 Ill. Admin. Code Part 130. The trade secret materials consisted of compiled excerpts from an accounting record for each generating station, known as the Continuing Property Record ("CPR"), as well as excerpts of the Generating Availability Data System ("GADS") data for the stations (collectively, the "Confidential Articles"). Pursuant to 35 Ill. Admin. Code § 130.203, ComEd submitted to IEPA a statement of justification that set forth

the requisite elements for trade secret protection and the manner in which each element was satisfied.

2. On April 23, 2004, IEPA issued a cursory written statement denying ComEd's trade secret claims for both the CPR and the GADS data. The Agency's Denial offered no explanation, other than a recitation of the applicable legal standards:

ComEd and/or Midwest failed to adequately demonstrate that the information has not been published, disseminated, or otherwise become a matter of general public knowledge and/or failed to demonstrate that the information has competitive value. Further, ComEd and/or Midwest has failed to demonstrate that the information does not constitute emission data.

3. On appeal, ComEd contends that the Confidential Articles are entitled to trade secret protection under Illinois law, that there is insufficient evidence to support the Agency's Denial, and that Respondent failed to follow the procedures set forth in 35 Ill Admin. Code § 130.210(b)(1) in issuing its denial.

4. Following the Board's granting of ComEd's petition, the Hearing Officer entered an August 25, 2005 Order setting forth the applicable discovery schedule. Each party is permitted to serve interrogatories and document requests and conduct depositions. Consistent with the above-reference Order, ComEd served IEPA with written discovery. *See* Pet'r Initial Interrogs. (hereinafter "Exhibit A"); Pet'r Initial Req. Produc. Docs. (hereinafter "Exhibit B"). The Interrogatories and Document Requests sought, *inter alia*, information relating to IEPA's prior trade secret determinations of financial and operational data—including accounting records and GADS data—submitted by other businesses and electric utilities. ComEd further requested the Agency's prior analyses and/or determinations of what constitutes "emissions data." The relevant interrogatories sought the following information:

Interrogatory No. 12: Any determination IEPA has made relating to the trade secret status of a business's financial information.

Interrogatory No. 13: Any determination IEPA has made relating to the trade secret or confidential business information status of any other electric utility company's GADS data or other similar operational data.

Interrogatory No. 14: Any determination IEPA has made that information constituted "emissions data" as that term is now or was in the past defined under Section 5/7 of the Illinois Environmental Protection Act, 415 ILCS 5/7, or Section 114(c) of the Clean Air Act, 42 U.S.C. § 7414(c), or their predecessors and their implementing regulations.

Document Request No. 4: All statements of justification—prepared in defense of trade secret or confidential business information claims—submitted to IEPA between January 1, 1990 and the present.

Document Request No. 5: IEPA's responses—including preliminary and final agency determinations and correspondence related to the same—to such statements of justification.

The requested information bears heavily on the Board's review of the Agency's Denial, both as to whether the Agency's record contained all necessary and relevant information and as to the substantive reasoning utilized by the Agency to deny trade secret protection. *See Pulitzer Community Newspapers, Inc. v. Illinois Environmental Protection Agency*, PCB 90-142, slip op. at 6 (Dec. 20, 1990)(in trade secret appeals to the Board, "[t]he information in the [agency's] denial statement frames the issues on review").

5. IEPA provided no answers to the above-enumerated interrogatories, nor did it indicate that it would undertake reasonable efforts to locate responsive information. IEPA instead referred ComEd to "General Objections A, C, and D," which state, respectively, that ComEd's Initial Interrogatories and Document Requests seek irrelevant/inadmissible evidence (General Objection A), "are overbroad and burdensome" (General Objection C), and "are vague" (General Objection D). *See* Resp't Resp. to Interrogs. and Req. Produc. Docs. (collectively, hereinafter "Exhibit C"). No substantiation of any of the objections was provided, nor was there any explanation of how the general objections applied to the specific requests.

6. Counsel for ComEd has conferred with IEPA by letter, seeking to negotiate a mutually satisfactory resolution of these discovery issues. By letter dated January 25, 2006, ComEd responded to IEPA's objections by identifying the relevance of, and need for, the requested discovery. (Exhibit D). Additionally, ComEd requested greater specificity of IEPA's overbreadth and vagueness objections. IEPA indicated by letter dated February 2, 2006 that it is unwilling to provide responses to the contested discovery requests. (Exhibit E). The parties have been unable to reach an accord with respect to these matters. Because the requested information goes to issues that are central to this appeal, and to avoid further prejudicing ComEd as it prepares for depositions and other discovery without the benefit of IEPA's documents and written responses, ComEd respectfully seeks the Hearing Officer's intervention in this matter.

**THE DISCOVERY SOUGHT IS REASONABLY CALCULATED TO
LEAD TO RELEVANT INFORMATION**

7. IEPA has refused to respond to this discovery on the insupportable grounds that ComEd "seek[s] information that is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence." (Exhibits C, E). Respondent relies on an improper standard for refusing to respond to discovery. Under the Board's rules, "all relevant information and information **calculated to lead to relevant information** is discoverable." 35 Ill. Admin. Code § 101.616(a) (emphasis added); *Illinois v. Skokie Valley Asphalt et al.*, PCB 96-98, 2003 WL 22134512, *2 (Sept. 4, 2003). Whether the information sought is admissible at the hearing, or whether it will lead to admissible information, is simply not the Board's standard of discoverability. The Board's rules state explicitly that "it is not a ground for objection that the testimony of a deponent or person interrogated will be inadmissible at hearing, if the information sought is reasonably calculated to lead to relevant information." 35 Ill. Admin. Code § 101.616(e). The Agency's reliance on 35 Ill. Admin. Code § 105.214(a) is misplaced, because

that provision governs the admissibility of evidence at Board hearings, not the permissible scope of discovery. IEPA is obligated to undertake reasonable efforts to respond to ComEd's written discovery, *People v. Williford*, 649 N.E.2d 941, 944 (Ill. App. Ct. 1995), and as an agency, it has a duty during discovery to disclose evidence in its possession that might be helpful to an opponent. *Wilson v. Norfolk & W. Ry. Co.*, 440 N.E.2d 238, 244 (Ill. App. Ct. 1982); *Wegmann v. Dep't of Registration & Educ.*, 377 N.E.2d 1297, 1301 (Ill. App. Ct. 1978).

8. Additionally, IEPA has not demonstrated that the information sought by ComEd's interrogatories and document requests would be deemed inadmissible at the hearing. It is well-established that, even where appeals of final agency determinations are limited to a review of the record, discovery is permitted to determine whether the record is complete. "It is proper to inquire, and discovery should be allowed, to insure that the record filed by the Agency is complete and contains all of the material...that was before the Agency when the denial statement was issued." *Oscar Mayer & Co. v. Environmental Protection Agency*, PCB 78-14 (June 8, 1978). The Board has found that matters properly discoverable need not have been relied on or considered by the Agency at the time of its determination. *Grigoleit Co. v. IEPA*, PCB 89-184, 1990 WL 263955, at *7 (Nov. 29, 1990)("[D]iscovery in Illinois is designed to allow a broad and liberal transfer of information which may lead to the development of relevant evidence," therefore, "[d]iscoverable matters need not in themselves be relevant or have been relied upon or considered by the Agency."). See also *Midwest Generation EME, LLC v. Illinois Environmental Protection Act*, PCB 04-185, Board Order at 21 (Nov. 4, 2004)(at the hearing, petitioner may "challenge the reasons given to the Board" and present "testimony which would 'test the validity of the information (relied upon by the Agency).'").

9. The documents and information ComEd is seeking are relevant and reasonably calculated to lead to relevant information. If IEPA had previously determined that an electric utility's GADS data did not constitute "emissions data," for example, such information arguably should have been incorporated into the record before the Agency. Alternatively, IEPA's lack of experience with GADS data would be of equal relevance, since the Agency's refusal to protect ComEd's GADS data is at issue. IEPA also appears to be claiming that the CPR may have been "emissions data." Petitioner therefore is interested in the Agency's previous interpretations of the term "emissions data," to learn what, if any, similar determinations the Agency has made and whether the denial of ComEd's trade secret claims departs from the Agency's historic interpretations of that term. Review of such information bears directly on Petitioner's ability to develop its arguments regarding the "emissions data" issue.

10. IEPA has also put at issue whether ComEd's Statement of Justification was adequate. For instance, the Agency claimed that ComEd "failed to adequately demonstrate that the information has not been published, disseminated, or otherwise become a matter of general public knowledge...." Illinois trade secret regulations provide that a claimant is entitled to a rebuttable presumption that its trade secret articles have not been published, disseminated, or otherwise become a matter of general knowledge, if the claimant has taken reasonable measures to prevent the article from becoming publicly available, and if the statement of justification contains a certification from the owner that the article has never been published or otherwise become a matter of general public knowledge. See 35 Ill. Admin. Code §130.208(b). In its statement of justification, ComEd set forth the extensive measures the company has used to safeguard the CPR and provided the necessary certification from the company. The applicable trade secret regulations do not set forth the standards for overcoming this presumption, nor did

IEPA articulate any basis for its determination that the presumption in favor of trade secret status was rebutted. By reviewing the Agency's other determinations, Petitioner and the Board can evaluate whether IEPA has applied this regulation consistently. Furthermore, the standard against which ComEd's statement of justification as a whole was evaluated, or should have been evaluated, is of central importance to any review of the Agency's Denial. That standard cannot be ascertained clearly until the Agency's position with respect to other companies' similar proprietary data has been disclosed.

**THE DISCOVERY SOUGHT IS NEITHER OVERBROAD
NOR UNDULY BURDENSOME**

11. IEPA has objected to all of the above-enumerated discovery requests as overly broad and burdensome. It did not set forth, however, how these requests are overly broad, and consequently, how compliance with them would be unduly burdensome. Responding to counsel for ComEd's January 25, 2006 letter, counsel for IEPA flatly refused to look for the requested information. (Exhibit E). It further noted that, because the agency does not maintain "central recordkeeping for trade secret determinations" and that such decisions are filed according to the particular matter to which they belong, "the only way to gather any information at all concerning past trade secret determinations would be anecdotally." *Id.* That responding to a discovery request may take some effort is not a recognized basis for refusing to respond. *See People v. Williford*, 649 N.E.2d 941, 944 (Ill. App. Ct. 1995)(to comply with discovery obligation, respondent must do what is "reasonably practicable"). By its own account, IEPA has done nothing to date toward responding to the relevant interrogatories and document requests. ComEd's discovery requests, which primarily targeted trade secret analyses concerning operational and financial data, including GADS data, are neither impermissibly broad nor undefined as to render compliance with them impossible. Furthermore, ComEd indicated during

its good-faith attempts to confer that it would be willing to discuss an initial refinement of the scope of its discovery requests. IEPA should be required to respond to the extent possible, even where it is true that a response to the entire scope of an overly broad request would be unduly burdensome. *See Welton v. Ambrose*, 35 Ill. App. 3d 627, 633 (2004).

THE DISCOVERY SOUGHT IS NOT VAGUE

12. Finally, IEPA has objected to all of the above-enumerated discovery requests as being vague. It has not indicated, however, what is vague about them. Should a vagueness be identified, ComEd would be willing to clarify the discovery as necessary.

* * *

WHEREFORE, ComEd respectfully requests that the Hearing Officer grant its Motion to Compel.

Dated: February 22, 2006

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 

Byron F. Taylor
Roshna Balasubramanian

SIDLEY AUSTIN LLP

One South Dearborn
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Commonwealth
Edison Company


CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Notice of Filing and Commonwealth Edison Company's Motion to Compel by U.S. mail on this 22nd day of February, 2006 upon the following persons:

Ann Alexander
Assistant Attorney General and
Environmental Counsel
188 West Randolph Street
Suite 2000
Chicago, Illinois 60601

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Brad Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601


Roshna Balasubramanian

THIS FILING SUBMITTED ON RECYCLED PAPER

3/15/06

Julie Armitage

Midwest/Commonwealth v. IEPA

Page 1

1 ILLINOIS POLLUTION CONTROL BOARD
2
3 COMMONWEALTH EDISON COMPANY,
4 Complainant/Petitioner,
5 vs. No. PCB 04-215
6 ILLINOIS ENVIRONMENTAL
7 PROTECTION AGENCY,
8
9 Respondent.
10
11 MIDWEST GENERATION EME, LLC,
12 Complainant/Petitioner,
13 vs. No. PCB 04-216
14 ILLINOIS ENVIRONMENTAL
15 PROTECTION AGENCY,
16
17 Respondent.
18
19 DISCOVERY DEPOSITION of JULIE ARMITAGE,
20 taken in the above-entitled case before Rhonda K.
21 O'Neal, CSR, RPR, a Notary Public of Sangamon
22 County, acting within and for the County of
23 Sangamon, State of Illinois, at 4:59 o'clock P.M.,
24 on March 15, 2006, at 1021 North Grand Avenue
East, Springfield, Sangamon County, Illinois,
pursuant to subpoena.

BALDWIN REPORTING & LEGAL-VISUAL SERVICES
SERVING ILLINOIS, INDIANA & MISSOURI
24 hrs (217) 788-2835 Fax (217) 788-2838
1-800-248-2835

Page 2

1 APPEARANCES:
2 SCHIFF HARDIN, LLP
3 BY: Mary Ann Mullin, Attorney at Law
4 Sheldon A. Zabel, Esq.
5 6600 Sears Tower
6 Chicago, Illinois 60606
7 On behalf of Complainant/Petitioner
8 Midwest Generation EME, LLC.
9
10 SIDLEY AUSTIN, LLP
11 BY: Byron F. Taylor, Esq.
12 One South Dearborn
13 Chicago, Illinois 60603
14 On behalf of Complainant/Petitioner
15 Commonwealth Edison Company.
16
17 MS. ANN ALEXANDER
18 MS. PAULA BECKER WHEELER
19 Assistant Attorneys General
20 188 Randolph Street
21 Twentieth floor
22 Chicago, Illinois 60601
23 On behalf of Respondent.
24

Page 3

1 I N D E X
2 DEPONENT PAGE NUMBER
3 Julie Armitage
4 Examination by Ms. Mullin 5
5
6
7
8
9
10

11 E X H I B I T S
12 NUMBER MARKED FOR IDENTIFICATION
13 Exhibit Number 1 5
14 Exhibit Number 2 14
15 Exhibit Number 3 24
16 Exhibit Number 4 32
17 Exhibit Number 5 33
18
19
20
21
22
23
24

COPY

Page 4

1 S T I P U L A T I O N
2 It is stipulated and agreed, by and
3 between the parties hereto, through their
4 attorneys, that the discovery deposition of JULIE
5 ARMITAGE may be taken before Rhonda K. O'Neal, a
6 Notary Public, Certified Shorthand Reporter, and
7 Registered Professional Reporter, upon oral
8 interrogatories, on the 15th of March A.D., 2006,
9 at the instance of the Complainants/Petitioners at
10 the hour of 4:59 o'clock P.M., 1021 North Grand
11 Avenue East, Springfield, Sangamon County,
12 Illinois;
13 That the oral interrogatories and the
14 answers of the witness may be taken down in
15 shorthand by the Reporter and afterwards
16 transcribed;
17 That all requirements of the rules and
18 regulations promulgated under the Pollution
19 Control Board of the State of Illinois and the
20 Rules of the Supreme Court as to dedimus, are
21 expressly waived;
22 That any objections as to competency,
23 materiality or relevancy are hereby reserved, but
24 any objection as to the form of question is waived
unless specifically noted;
That the deposition, or any parts thereof
may be used for any purpose for which discovery
depositions are competent, by any of the parties
hereto, without foundation proof;
That any party hereto may be furnished
copies of the deposition at his or her own
expense.

1 (Pages 1 to 4)

3/15/06
Julie Armitage

Midwest/Commonwealth v. IEPA

Page 21

1 typical or not.
2 Q Who here at IEPA could make that call?
3 A Maybe somebody in the permit section
4 would know better whether it's a typical practice
5 or not.
6 Q Who in the permit section?
7 A One of the managers perhaps.
8 Q What are their names?
9 A Well, Chris Romaine's a manager and Don
10 Sutton's a manager and Mike Reed is a manager, Bob
11 Bernoteit's a manager, and Charlie Zeal's (sp) a
12 manager.
13 Q Once the engineers in the permit section
14 give Marilyn their determination about whether or
15 not to grant or deny a company's trade secret or
16 confidentiality claims, what happens after that?
17 A They won't actually give Marilyn the
18 determination. It's just that Marilyn has pointed
19 out that a determination needs to be made to them,
20 and then they will make whatever determination
21 needs to be made. And then Marilyn will know on
22 the heels of that whether there's more or less
23 documentation that's going out the door in
24 response to the FOIA.

Page 22

1 Q Do the permit engineers give any kind of
2 written documentation to Marilyn or anybody else
3 at IEPA about their determination?
4 A No. No. Short of whatever the
5 determination is, we either--one of three things
6 is going to happen. You're either going to, the
7 claim isn't--you're not going to react to the
8 claim or you're going to accept the claim or
9 you're going to deny the claim. And so there's
10 either going to be a denial if it's denied. And
11 I'm not, I believe they put together a letter if
12 it's granted, but I'm not a hundred percent
13 convinced of that. And there wouldn't be anything
14 else.
15 Q So if the trade secret claim is denied,
16 does the permit engineer issue a letter to the
17 company denying their trade secret claim?
18 A Probably not the assigned permit
19 engineer.
20 Q Who would do that?
21 A There's not necessarily a set person to
22 do that. To my knowledge, the denials are
23 typically going to go under either chief legal
24 counsel's signature or under the head of the

Page 23

1 permit section's signature. But I do know that
2 that has been an issue that's been up for debate.
3 I don't know that an assigned engineer has ever
4 signed a denial. I think that a denial would at a
5 minimum kick to Don or, like I say, to chief legal
6 counsel, but it could potentially kick to just a
7 staff attorney as well.
8 Q Is there a central file where the chief
9 legal counsel would keep all the denials that have
10 come out under his signature?
11 A No.
12 Q Where would those letters go?
13 A My understanding is that whoever signs a
14 letter, or whoever is the signatory to a letter
15 around here, the letter would go into a chron (sp)
16 file, just a running chron file.
17 Q Okay. Excuse me. Would it be that
18 individual's chron file?
19 A Yes. So anything they sign would be in
20 that file. And then a copy of decisions that are
21 made that relate to bureau matters would typically
22 end up in source files in the general files in the
23 bureau there.
24 Q Is Don Sutton the head of the permit

Page 24

1 section?
2 A Yes.
3 Q And how long has he held that position?
4 A I don't know.
5 Q As long as you've been at the agency?
6 A I don't think Don was the permit section
7 manager when I first came to the bureau of air,
8 no.
9 Q And you said there's been between one and
10 10 staff attorneys at the bureau of air since
11 you've been here, is that accurate?
12 A I'd say it ranges between there, yeah.
13 (Whereupon a document
14 was duly marked for
15 purposes of
16 identification as
17 Exhibit Number 3 as of
18 this date.)
19 MS. MULLIN: Q I'm handing you a document
20 that's been marked Exhibit 3. I'll represent
21 that this is a copy of the FOIA regulations at
22 2 Illinois Administrative Code 1828. Are you
23 familiar with these regulations?
24 A Yes.

6 (Pages 21 to 24)

3/15/06

Commonwealth Edison/Midwest Generation v. IEPA

Christopher R. Pressnall

Page 1

1 ILLINOIS POLLUTION CONTROL BOARD
 2
 3 COMMONWEALTH EDISON COMPANY,
 4 Complainant/Petitioner,
 5 vs. No. PCB 04-215
 6 ILLINOIS ENVIRONMENTAL
 7 PROTECTION AGENCY,
 8
 9 Respondent.
 10
 11 MIDWEST GENERATION EME, LLC,
 12 Complainant/Petitioner,
 13 vs. No. PCB 04-216
 14 ILLINOIS ENVIRONMENTAL
 15 PROTECTION AGENCY,
 16
 17 Respondent.
 18
 19 DISCOVERY DEPOSITION of CHRISTOPHER R.
 20 PRESSNALL, taken in the above-entitled case before
 21 Rhonda K. O'Neal, CSR, RPR, a Notary Public of
 22 Sangamon County, acting within and for the County
 23 of Sangamon, State of Illinois, at 10:12 o'clock
 24 A.M., on March 15, 2006, at 1021 North Grand
 Avenue East, Springfield, Sangamon County,
 Illinois, pursuant to subpoena.

BALDWIN REPORTING & LEGAL-VISUAL SERVICES
 SERVING ILLINOIS, INDIANA & MISSOURI
 24 hrs: (217) 788-2835 Fax (217) 788-2838
 1-800-248-2835

Page 2

1 APPEARANCES:
 2 SCHIFF HARDIN, LLP
 3 BY: Mary Ann Mullin, Attorney at Law
 4 Sheldon A. Zabel, Esq.
 5 6600 Sears Tower
 6 Chicago, Illinois 60606
 7 On behalf of Complainant/Petitioner
 8 Midwest Generation EME, LLC.
 9
 10 SIDLEY AUSTIN, LLP
 11 BY: Byron F. Taylor, Esq.
 12 One South Dearborn
 13 Chicago, Illinois 60603
 14 On behalf of Complainant/Petitioner
 15 Commonwealth Edison Company.
 16
 17 MS. ANN ALEXANDER
 18 MS. PAULA BECKER WHEELER
 19 Assistant Attorneys General
 20 188 Randolph Street
 21 Twentieth floor
 22 Chicago, Illinois 60601
 23 On behalf of Respondent.
 24

COPY

Page 3

1 INDEX
 2 DEPONENT PAGE NUMBER
 3 Christopher Pressnall
 4 Examination by Ms. Mullin 5
 5 Examination by Mr. Taylor 113
 6
 7
 8
 9
 10
 11 EXHIBITS
 12 NUMBER MARKED FOR IDENTIFICATION
 13 Exhibit Number 1 (Marked prior to deposition.)
 14 Exhibit Numbers
 15 2 and 3 28
 16 Exhibit Number 4 40
 17 Exhibit Number 5 41
 18 Exhibit Number 6 62
 19 Exhibit Number 7 64
 20 Exhibit Number 8 68
 21 Exhibit Number 9 79
 22 Exhibit A 114
 23 Exhibit B 118
 24 Exhibit C 119
 Exhibit D 130
 Exhibit E 153

Page 4

1 STIPULATION
 2 It is stipulated and agreed, by and
 3 between the parties hereto, through their
 4 attorneys, that the discovery deposition of
 5 CHRISTOPHER R. PRESSNALL may be taken before
 6 Rhonda K. O'Neal, a Notary Public, Certified
 7 Shorthand Reporter, and Registered Professional
 8 Reporter, upon oral interrogatories, on the 15th
 9 of March A.D., 2006, at the instance of the
 10 Complainants/Petitioners at the hour of 10:12
 11 o'clock A.M., 1021 North Grand Avenue East,
 12 Springfield, Sangamon County, Illinois;
 13 That the oral interrogatories and the
 14 answers of the witness may be taken down in
 15 shorthand by the Reporter and afterwards
 16 transcribed;
 17 That all requirements of the rules and
 18 regulations promulgated under the Pollution
 19 Control Board of the State of Illinois and the
 20 Rules of the Supreme Court as to dedimus, are
 21 expressly waived;
 22 That any objections as to competency,
 23 materiality or relevancy are hereby reserved, but
 24 any objection as to the form of question is waived
 unless specifically noted;
 That the deposition, or any parts thereof
 may be used for any purpose for which discovery
 depositions are competent, by any of the parties
 hereto, without foundation proof;
 That any party hereto may be furnished
 copies of the deposition at his or her own
 expense.

1 (Pages 1 to 4)

3/15/06
Christopher R. Pressnall

Commonwealth Edison/Midwest Generation v. IEPA

Page 9

1 course, part of my duties at the time and then
2 would have developed more so recently as to
3 provide legal counsel to the bureau of air, and it
4 could be on any number of miscellaneous matters.

5 I handled help fill FOIA requests such as
6 that, but I would say generally characterize my
7 duties over time as getting more and more complex.
8 The fact of the matter is if you look at what I
9 do, I do a lot of asbestos enforcement action,
10 enforcement actions and then just a variety of
11 other types of enforcement actions. I do fill a
12 lot of FOIAs and from time to time look at trade
13 secret matters.

14 Q What is your current title?

15 A It's assistant counsel.

16 Q You mentioned your responsibilities
17 regarding FOIA requests. Can you explain those to
18 me?

19 A Yes. Oftentimes when I am working on an
20 enforcement matter, somebody, it could be a
21 citizen, it could be defense counsel, it could be
22 the company itself that we're enforcing against,
23 would like to view the file to see what's
24 contained in the file, and so therefore, a FOIA

Page 11

1 FOIA.

2 There may be some in the compliance and
3 enforcement section which is in a different area
4 that may be responsive to the FOIA because it's
5 ongoing. And so my, to make sure that the Freedom
6 of Information Act request is filled as fully as
7 possible, I will go look at the request. And as a
8 side note, oftentimes, people submit very broad
9 Freedom of Information Act requests, so I will
10 call back and say, do you realize you've just
11 requested two drawers of documents? What do you
12 really want?

13 So then I'll call them and they'll say,
14 well, what I really want is the inspection
15 reports. I don't need all that other stuff. I
16 didn't realize I was requesting it, so I'll--the
17 FOIA section doesn't routinely do it. They just
18 have their procedure that's where they do it. I'm
19 more pragmatic with it. So I'll say, well, I
20 called them, this is what they need, I'll--and
21 that's what I mean. I'll facilitate, I'll gather
22 the documents. I'll say, here, you send them out,
23 or occasionally I'll send them out myself under my
24 signature.

Page 10

1 request would come into the bureau of air FOIA
2 personnel.

3 They would see that there would be, for
4 instance, a legal flag on the file suggesting that
5 there's something going on, a legal matter going
6 on. They would contact me and say, there's a FOIA
7 request, do you have any documents responsive to
8 this request, and I would either provide the
9 documents or help facilitate the filling of a
10 Freedom of Information Act request.

11 Q What do you mean help facilitate the, I
12 think you said responding to a Freedom of
13 Information Act request?

14 A When a FOIA request comes in, there's the
15 central file which contains the bulk of--in the
16 bureau of air; the central file in the bureau of
17 air, that contains the bulk of the documents.
18 Permit files, field operation section or FOS
19 files, just all the files that we maintain. But
20 if there's an ongoing enforcement action, my legal
21 files will not have made it to the central file,
22 so not only are there documents that I may possess
23 that are responsive to the FOIA, there may be some
24 in the central file that are responsive to the

Page 12

1 Q So you would routinely look at several
2 different files to answer a FOIA request?

3 A Yes.

4 Q Is your involvement primarily when you
5 have a file that is responsive to the FOIA
6 request?

7 A Yes.

8 Q Are there times when you facilitate the
9 response to a FOIA request when you're not working
10 on a pending file?

11 A I would say it's rare, but I, oftentimes
12 I could see where it may arise if, for instance,
13 there is an asbestos matter, which are treated a
14 little bit differently because we don't have--the
15 central files are organized by ID number and
16 facility. Asbestos removal might go on in that
17 building across the street that has no ID number,
18 and so if a FOIA request comes in on that, there's
19 no central file, I do a lot of asbestos.

20 I may not actually have a case, but I
21 work with the asbestos section, so they give it to
22 me to help again facilitate filling of the
23 request. But really I'd say nine times out of 10,
24 the way I'm working on a FOIA is because it's my

3 (Pages 9 to 12)

3/15/06

Christopher R. Pressnall

Commonwealth Edison/Midwest Generation v. IEPA

Page 17

1 MS. ALEXANDER: I'm sorry. Can we clarify
2 that? Asked for. Do you mean asked for in a FOIA
3 request?

4 MS. MULLIN: Q Right. You had said that
5 there was a lot of information that folks claim as
6 trade secret. But if the agency doesn't have any
7 reason to believe that somebody else wants that
8 information either through a FOIA request or
9 otherwise, you don't go ahead and make a
10 determination?

11 A Right, right.

12 Q So in the situation, in the instance in
13 which the agency is going to make a determination
14 about whether or not something is trade secret, in
15 that situation is it fairly typical for a permit
16 engineer or someone to give the company a heads-up
17 to explain that, to explain that under the IEPA
18 rules, the IEPA doesn't think that that
19 information is trade secret?

20 A I guess the reason I'm having difficulty
21 answering that question--I mean, I'll answer it,
22 but why I was having difficulty thinking about it
23 is just simply to my knowledge this is the only
24 determination I've been involved in, so what's

Page 18

1 typical, I suppose, then it's--I can't tell you
2 what's typical based on one determination. The
3 previous things that I were talking about, the
4 previous matters I was talking about, there was
5 never any determination that was made.

6 Q Right. I understand where the confusion
7 is. I wasn't talking about a formal determination
8 that was issued by the agency, but I was talking
9 about that period of time before the formal
10 determination is issued when an engineer comes to
11 speak with you to get your opinion about whether
12 or not the information is trade secret.

13 A I suppose that it may depend on the
14 complexity of the matter. When I was talking
15 before about the couple that I can sort of recall,
16 we're talking about--I'm going to struggle to even
17 remember exactly what it was, but we're talking
18 about one or two data points that are critical to
19 calculating emissions data, or actually I, there's
20 a time when somebody stamped something
21 confidential and they didn't mean to stamp it
22 confidential.

23 And so these are very minor--the ones
24 that I remember were things that were very easily

Page 19

1 resolved and it seemed fairly clear on its face
2 that either, well, maybe there was an error in
3 stamping it confidential or maybe it's just, hey,
4 company, we definitely, we need this. This part
5 that you claim is emissions data. We need it to
6 calculate it, so can we resolve this and it's
7 resolved. But again, that's--I'm only just
8 operating off of really one or maybe two matters I
9 can think of where there has arisen other than the
10 instant matter.

11 Q Okay. How many statements of
12 justification under the trade secret rules have
13 you reviewed during your time here at the IEPA?

14 A I couldn't give you an exact number. I
15 would imagine that it is less than 10.

16 Q And in those situations, did either you
17 or someone else from the IEPA make a determination
18 about whether the information claimed confidential
19 or trade secret was confidential or trade secret?

20 A Could you repeat the question or have it
21 read back?

22 Q I'll repeat the question.

23 In what context did you review the
24 statement of justification?

Page 20

1 A Well, of course, I received two in this
2 matter, so that's two. And then when I said that
3 less than 10, I vaguely recall at some point
4 looking at a statement of justification in perhaps
5 one of these other matters I was talking about.
6 Beyond that I, I'm not sure what your question was
7 getting at as to whether we made a determination
8 or--I just can't recall too much of the substance.
9 Again, it never just rose to this level. But if
10 you want to ask the question again maybe--

11 Q I appreciate your answer. I think that's
12 satisfactory.

13 A Okay.

14 Q What percentage of your time would you
15 say is spent responding to FOIA requests?

16 A Of course, it varies, but I would say it
17 could be upwards of 10 percent to 15 percent. It
18 seems to me that it takes up a lot of my time, and
19 I'd consider that quite a bit of my time when
20 that's not my job, quote, unquote. My job is to
21 be an enforcement attorney.

22 Q Is it fair to say that you don't have any
23 direct experience in business or industry?

24 MS. ALEXANDER: Can you clarify that by, what

5 (Pages 17 to 20)

3/15/06

Commonwealth Edison/Midwest Generation v. IEPA

Christopher R. Pressnall

Page 29

1 Administrative Code part 1828. Are you familiar
 2 with these regulations?
 3 A Yes.
 4 Q Part 130 is the trade secret regulation,
 5 correct?
 6 A Correct.
 7 Q And part 1828 are the FOIA regulations,
 8 correct?
 9 A Yes.
 10 Q Can you explain to me when the agency
 11 gets a request for information that's been marked
 12 as confidential whether the agency typically
 13 handles it under part 130 or part 1828?
 14 A I suppose that it would have to be it's
 15 not a mutually exclusive process. I
 16 suppose--well, it would be handled partly with
 17 cognizance of both sets of regulations. Now,
 18 having said that, the trade secret aspect, the
 19 part 130 regulations, I guess in a sense I don't
 20 know if you'd say supersede the 128, but the
 21 Illinois EPA of course is going to be very, it is
 22 very, very sensitive towards materials that
 23 companies claim as trade secret or confidential.
 24 And so if we're looking at the interplay,

Page 30

1 we're looking at something's been claimed trade
 2 secret, then we're really going to pay attention
 3 to in that matter part 130 regulations to make
 4 sure that we don't haphazardly release something
 5 that should not be released.
 6 Q You mentioned earlier that you had only
 7 made one determination under the trade secret
 8 regulations that certain information was not trade
 9 secret or confidential, is that accurate?
 10 A That is accurate.
 11 Q Have you been involved in determinations
 12 about whether or not information is trade secret
 13 or confidential under the part 1828 regulations,
 14 Exhibit 3?
 15 MS. ALEXANDER: Do you mean other than the
 16 determination that he participated in before?
 17 MS. MULLIN: Q That's right. Other than the
 18 ComEd and Midwest Gen determinations.
 19 Well--
 20 A Again--
 21 Q (Continuing)--those were determinations
 22 under 130, so I mean, any determinations under
 23 1828?
 24 A Yes. I understand. If you're talking

Page 31

1 about a formal determination again, and I will use
 2 the term formal determination to mean a written
 3 document, something that I sent out saying I've
 4 made a determination on this, here's what it is,
 5 no. Have I looked at part 1828 and thought about
 6 it or had some background knowledge on it, would
 7 it factor into I guess my thought process, yes.
 8 Generally speaking.
 9 Q Are you aware of other agency formal
 10 determinations under part 130 other than the two
 11 determinations at issue today?
 12 MS. ALEXANDER: Let me just stop here and say
 13 that we object to any substantive questions
 14 concerning determinations that are not at issue
 15 here and are not part of the agency record. I'm
 16 not going to cut the witness off for a couple of
 17 general questions, but I will if this goes too far
 18 afield.
 19 THE DEPONENT: Could you repeat the question
 20 or read it back?
 21 MS. MULLIN: Q Are you aware of other agency
 22 formal determinations under 35 Illinois
 23 Administrative Code part 130 that a company's
 24 information was not confidential or trade secret?

Page 32

1 A I believe there was a matter called
 2 WITCO, but I didn't work on that and I'm only
 3 vaguely familiar with it. But I think it went to
 4 the Illinois Pollution Control Board as a trade
 5 secret matter.
 6 Q What else do you know about that
 7 determination?
 8 A I believe it had to do with emissions
 9 data and product formulation, but I might be
 10 wrong.
 11 Q Who else was, who was involved in that
 12 determination?
 13 A I think it was Rob Layman, who is
 14 assistant counsel in my unit.
 15 Q And what emissions data did that
 16 determination involve?
 17 A If I remember correctly, it was product,
 18 some sort of product formulation was at issue.
 19 Again, I could be wrong. I might be mixing two
 20 different trade secret matters up. But I have
 21 seen before it's a very sensitive issue of your
 22 recipe, sort of the Coke, the recipe to Coke is
 23 going to be trade secret. The recipe towards your
 24 chemical process may very well be trade secret,

8 (Pages 29 to 32)

3/15/06

Commonwealth Edison/Midwest Generation v. IEPA

Christopher R. Pressnall

Page 33

1 but it also, it becomes a little bit more
2 difficult because the different raw materials
3 actually directly impact your emissions.
4 So then it becomes a tough call as to
5 what's emissions data and what's trade secret.
6 Because the amount of your raw materials in
7 certain proportions may give a clue to another
8 company of what your formulation is, then showing
9 competitive advantage, but then again, that also
10 constitutes, it's what your emissions--it's going
11 to have emissions consequences.

12 Q Are you familiar with any other formal
13 determinations that IEPA made under the part 130
14 regs?

15 A I don't believe so.

16 Q About what year would you say the WIT
17 determination was made?

18 A I think it's WITCO, W-I-T-C-O, all one
19 word.

20 Q Okay.

21 A Probably '98 or '99 I think when I first
22 started working here but I, again, I don't
23 specifically recall.

24 Q So it sounds like most of these issues

Page 34

1 are resolved informally, is that accurate?

2 A To my knowledge, yes.

3 Q Are you familiar with any formal
4 determinations by the IEPA under the part 1828
5 regulations?

6 A May I look at the regulation?

7 Q Sure.

8 A As far as determinations made under the
9 part 1828 regulations, I've probably made hundreds
10 of them.

11 Q Are these formal determinations under
12 these regulations?

13 A Again, I think--and it's probably my
14 fault--but I'm getting hinged up on
15 determinations. When I say I've made hundreds, in
16 looking at these regulations as I just did, it of
17 course contains the FOIA exemptions. If, for
18 instance, somebody is requesting a file broadly
19 and my attorney notes are in that file, then I
20 will make a determination that we're not
21 disclosing them; they are exempt from disclosure.

22 I will put that in the cover letter and
23 tell them they have a right to appeal. There
24 could be opinions expressed, there could be draft

Page 35

1 information that's--there could be draft
2 memorandums, opinions, items that would interfere
3 with my enforcement case. We could have a
4 criminal investigation going on. I would make a
5 determination that those are exempt from
6 disclosure.

7 Q When you make that determination that
8 items are exempt from disclosure, what is your
9 practice? Would you write--I understand that you
10 would write the letter, but would there be any
11 other documentation that you would put in the file
12 regarding that?

13 A Not other than stamp, taking a red stamp
14 and stamping it confidential for me and for the
15 person copying the file to know that I have made a
16 determination that this is not releasable.

17 Q If you determined that it is releasable,
18 what is your practice at that point, or do you
19 create any document at that point?

20 A No. Just, it's either released or it
21 isn't, and we say in the cover letter that here's
22 all the nonexempt materials, we've held back some
23 exempt materials, X, Y and Z reasons. And you
24 have to also I suppose understand what when I

Page 36

1 talk, I talk about the bureau of air.

2 Q I understand.

3 A Every bureau does it differently.

4 Q I understand.

5 A You might get a itemized list from
6 another bureau.

7 Q Does the bureau of air have set policies
8 or procedures for how to handle a FOIA request
9 under 1828?

10 A Yes. The bureau of air does.

11 Q And what are those policies--

12 A And then again, when you talk about
13 bureau of air, am I in the bureau of air or am I
14 in the division of legal counsel? It's kind of
15 a--and that's a rhetorical question. It's kind of
16 a, it's a nether world that I exist in, so when
17 you ask about the bureau of air, I'm going to
18 answer about the bureau of air which is
19 downstairs. The FOIA unit. Yes, they do.

20 They have sheets, carbon sheets that
21 they'll get a file--when I was talking about
22 screening a file--they'll look at it, they'll have
23 the exemptions listed out on that sheet, they'll
24 write a description of the document and put a code

9 (Pages 33 to 36)

3/15/06

Christopher R. Pressnall

Commonwealth Edison/Midwest Generation v. IEPA

Page 105

1 about whether or not information has competitive
2 value to a company?

3 A What do you mean by similar?

4 Q Have you made any other determinations
5 regarding whether or not release of information
6 will cause a company competitive harm?

7 A If you're asking--we're going back to
8 that determination question. If you're asking
9 have I authored or issued any determinations
10 making that decision, the answer would be no.
11 Have I at some point perhaps encountered
12 information such as I talked about before whether
13 it would be a recipe or raw material usage and
14 whether that would--I am familiar with the concept
15 of competitive value and thinking about and
16 addressing those issues but--that's my answer.

17 Q Okay. In the past--you testified that in
18 the past you had either called companies or
19 directed your project engineers to call companies
20 before you issued a denial regarding their trade
21 secret or confidential information. Why didn't
22 you call Midwest Generation to discuss this issue
23 with them before you issued your denial?

24 A I did not testify that I've ever made

Page 107

1 There's just a few of them that I can even recall,
2 and they did from my best of my recollection
3 involve the issue of emissions data.

4 Q Do you remember the name of the companies
5 those matter involved?

6 A I believe one of them was Fleischmann's
7 vinegar, something similar to that.

8 Q Was that a determination regarding
9 whether or not raw material data information
10 constituted emissions data?

11 A I don't know if it was particular--I'm
12 not sure exactly. I don't recall the exact
13 particulars of it. I believe it had to do with
14 emissions data. I don't know if it was--actually
15 I don't think it was necessarily raw material
16 usage. I think it might have had to do with them
17 claiming their stack flow rate as trade secret.

18 Q Was there an IEPA determination
19 regarding?

20 A No. That was a matter that was resolved.

21 Q How was that resolved?

22 A Informally with the company withdrawing
23 their claim. To the best--this is what I have
24 heard. I didn't, wasn't involved in it

Page 106

1 such calls. What I stated was that I am aware in
2 the past that individual engineers had contacted
3 companies in attempt to resolve some issues with
4 information that was claimed. It wasn't even
5 necessarily at my counsel that this was done.

6 It was brought to my attention that the
7 material and the claims were being made. Because
8 I've had some past experience with trade secret
9 matters, they bounced ideas off of me as to
10 whether it should be claimed or not. I provided
11 my input. Where it went from there, I was not
12 involved.

13 Q Other than the WITCO determination that
14 we talked about previously and the Midwest
15 Generation/ComEd determinations, have you been
16 involved in any determination either formal or
17 informal under the trade secret rules or the part
18 1828 rules regarding whether or not information
19 constitutes emissions data?

20 A You said other than the WITCO which we
21 previously spoke of and the instant matter?

22 Q That's right.

23 A I have, I have vaguely referred to
24 matters in which we have bounced ideas off of.

Page 108

1 personally. I just, it was relayed to me through
2 the grapevine, so to speak, that the matter had
3 been resolved, the company had withdrawn the
4 at-issue claims.

5 Q So someone from IEPA called the company?

6 A That is correct.

7 Q Are you aware of any other determinations
8 regarding the definition of emissions data in the
9 context of the trade secret and FOIA rules?

10 A None that I could--no.

11 Q Are you aware of any agency guidance
12 either formal or informal on the interpretation of
13 the term emissions data?

14 A No, I'm not. What is the normal course
15 of business is to look at the definition of
16 emissions data, perhaps the CFR federal definition
17 and the discussion that may accompany that, and
18 then try to think through it logically in any
19 given situation whether this would constitute
20 emissions data or not. As I've testified to
21 before, sometimes it gets to be a very gray line
22 as to trade secret versus emissions data.

23 Q You mentioned discussions of the CFR
24 rules. I presume you're referring to the

27 (Pages 105 to 108)

3/16/06

Christopher P. Romaine

Midwest/Commonwealth v. IEPA

Page 1

1 ILLINOIS POLLUTION CONTROL BOARD
 2
 3 COMMONWEALTH EDISON COMPANY,
 4 Complainant/Petitioner,
 5 vs. No. PCB 04-215
 6 ILLINOIS ENVIRONMENTAL
 7 PROTECTION AGENCY,
 8 Respondent.
 9
 10 MIDWEST GENERATION EME, LLC,
 11 Complainant/Petitioner,
 12 vs. No. PCB 04-216
 13 ILLINOIS ENVIRONMENTAL
 14 PROTECTION AGENCY,
 15 Respondent.
 16
 17 DISCOVERY DEPOSITION of CHRISTOPHER P.
 18 ROMAINE, taken in the above-entitled case before
 19 Rhonda K. O'Neal, CSR, RPR, a Notary Public of
 20 Sangamon County, acting within and for the County
 21 of Sangamon, State of Illinois, at 3:00 o'clock
 22 P.M., on March 16, 2006, at 1021 North Grand
 23 Avenue East, Springfield, Sangamon County,
 24 Illinois, pursuant to subpoena.

BALDWIN REPORTING & LEGAL-VISUAL SERVICES
 SERVING ILLINOIS, INDIANA & MISSOURI
 24 hrs (217) 788-2835 Fax (217) 788-2838
 1-800-248-2835

Page 2

1 APPEARANCES:
 2 SCHIFF HARDIN, LLP
 3 BY: Mary Ann Mullin, Attorney at Law
 4 Sheldon A. Zabel, Esq.
 5 6600 Sears Tower
 6 Chicago, Illinois 60606
 7 On behalf of Complainant/Petitioner
 8 Midwest Generation EME, LLC.
 9
 10 SIDLEY AUSTIN, LLP
 11 BY: Byron F. Taylor, Esq.
 12 Roshna Balasubramanian, Attorney at Law
 13 One South Dearborn
 14 Chicago, Illinois 60603
 15 On behalf of Complainant/Petitioner
 16 Commonwealth Edison Company.
 17
 18 MS. ANN ALEXANDER
 19 MS. PAULA BECKER WHEELER
 20 Assistant Attorneys General
 21 188 Randolph Street
 22 Twentieth floor
 23 Chicago, Illinois 60601
 24 On behalf of Respondent.

Page 3

1 INDEX
 2 DEPONENT PAGE NUMBER
 3 Christopher Romaine
 4 Examination by Ms. Mullin 5
 5
 6
 7
 8
 9
 10
 11 EXHIBITS
 12 NUMBER MARKED FOR IDENTIFICATION
 13 Exhibit Number 1 (Marked prior to deposition.)
 14 Exhibit Number 2 30
 15 Exhibit Number 3 44
 16 Exhibit Number 4 52
 17 Exhibit Number 5 53
 18 Exhibit Number 6 65
 19 Exhibit Number 7 71
 20
 21
 22
 23
 24

COPY

Page 4

1 STIPULATION
 2 It is stipulated and agreed, by and
 3 between the parties hereto, through their
 4 attorneys, that the discovery deposition of
 5 CHRISTOPHER P. ROMAINE may be taken before Rhonda
 6 K. O'Neal, a Notary Public, Certified Shorthand
 7 Reporter, and Registered Professional Reporter,
 8 upon oral interrogatories, on the 16th of March
 9 A.D., 2006, at the instance of the
 10 Complainants/Petitioners at the hour of 3:00
 11 o'clock P.M., 1021 North Grand Avenue East,
 12 Springfield, Sangamon County, Illinois;
 13 That the oral interrogatories and the
 14 answers of the witness may be taken down in
 15 shorthand by the Reporter and afterwards
 16 transcribed;
 17
 18 That all requirements of the rules and
 19 regulations promulgated under the Pollution
 20 Control Board of the State of Illinois and the
 21 Rules of the Supreme Court as to dedimus, are
 22 expressly waived;
 23
 24 That any objections as to competency,
 materiality or relevancy are hereby reserved, but
 any objection as to the form of question is waived
 unless specifically noted;
 That the deposition, or any parts thereof
 may be used for any purpose for which discovery
 depositions are competent, by any of the parties
 hereto, without foundation proof;
 That any party hereto may be furnished
 copies of the deposition at his or her own
 expense.

3/16/06

Christopher P. Romaine

Midwest/Commonwealth v. IEPA

Page 25

1 between a utility and an independent power
2 producer?

3 A No. By that I mean that there's a lot of
4 terminology going on, and I think I knew what a
5 utility used to be, but I'm not sure I understand
6 what a utility is anymore.

7 MR. ZABEL: Off the record.

8 (Discussion off the record.)

9 MS. MULLIN: Q Is it fair to say that you've
10 never been involved in a formal agency denial of
11 trade secret status apart from the Midwest Gen and
12 ComEd matters at issue in this case and the 04-185
13 matter?

14 A No.

15 Q What were the ones, the details, the
16 other denials you were involved with?

17 A I think I was peripherally involved in
18 the matter involving Clorox bleach. There was a
19 matter involving a company in Danville with trade
20 secret.

21 Q Let's go back to Clorox bleach for one
22 second. About what time was that denial?

23 A I don't recall.

24 Q Can you give me a decade?

Page 26

1 A I think it was in probably the late 90s,
2 early 2000.

3 Q What kinds of information did that denial
4 involve?

5 MS. ALEXANDER: At this point I'm just going
6 to state for the record my objection I've made in
7 the other two cases, which is that we object to
8 any questions regarding previous determinations as
9 being--

10 MS. MULLIN: Relevancy objection, right.

11 MS. ALEXANDER: As irrelevant, and we're going
12 to continue it subject to that objection until we
13 don't allow it.

14 MS. MULLIN: Q What was--?

15 A I think it went to the nature of the raw
16 materials and the amounts of raw materials being
17 used as to whether those were emission data or
18 not.

19 Q Could those materials be used to
20 calculate emissions from the unit?

21 A My recollection is that is what the
22 source did in terms of preparing its emission
23 calculations.

24 Q And where was the Clorox bleach facility

Page 27

1 located?

2 A Somewhere in the Chicago Bedford Park
3 area is what I recall.

4 Q You also indicated that you were involved
5 in a denial of trade secret protection related to
6 a facility in Danville?

7 A It was the Tepak (sp) facility. They
8 were represented by Air Floyd (sp).

9 Q And what kinds of information did the
10 denial involve?

11 A I don't recall that case as clearly. I
12 could only speculate at this point on the types of
13 information that was involved.

14 Q Was the basis, was the agency's basis for
15 denial that the information constituted emissions
16 data?

17 A Yes. That's my recollection.

18 Q In both of these matters, did the sources
19 submit statements of justification?

20 A I don't specifically recall.

21 Q Do you recall who signed the denials?

22 A No.

23 Q Were they formal agency denials?

24 A Since they both led to actions before the

Page 28

1 board, I believe they were.

2 Q Okay. What other trade secret denials
3 were you involved in?

4 A I don't recall whether we issued a trade
5 secret denial to Conoco Phillips or not. Maybe
6 Conoco Phillips in Hartford.

7 -Q And what was the kind of information at
8 issue in the denial in the Conoco Phillips?

9 A It was information described in the
10 change in emissions that would occur with the
11 project, the subject of the application. That's,
12 again, my recollection.

13 Q About what time was that Conoco Phillips
14 denial issued?

15 A Within the last two years, I think.
16 Maybe the last three years.

17 Q Was that one the subject of a board
18 action also?

19 A No, it was not.

20 Q Was there any informal resolution of the
21 matter between the source and the board after the
22 denial was issued?

23 A No. We resolved it with Conoco Phillips.

24 Q The denial resolved it?

7 (Pages 25 to 28)

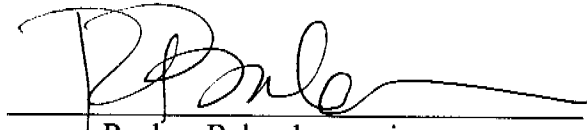
CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Commonwealth Edison Company's Amended Motion to Compel Respondent's Discovery Responses by U.S. mail on this 23rd day of March, 2007 upon the following persons:

Ann Alexander
Assistant Attorney General and
Environmental Counsel
188 West Randolph Street
Suite 2000
Chicago, Illinois 60601

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Brad Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601


Roshna Balasubramanian