

ILLINOIS POLLUTION CONTROL BOARD

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)	
MIDWEST GENERATION EME, LLC)	
Petitioner,)	PCB 04-216
)	(Trade Secret Appeal)
v.)	
)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

**MIDWEST GENERATION EME, LLC'S AMENDED MOTION TO COMPEL
RESPONDENT'S DISCOVERY RESPONSES**

Comes Now MIDWEST GENERATION EME, LLC ("Midwest Generation"), 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 Midwest Generation'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 Midwest Generation'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 Midwest Generation's discovery requests are overbroad and unduly burdensome.¹ This testimony should be considered in connection with Midwest Generation's request for an Order compelling IEPA's discovery responses. In support thereof, Midwest Generation states as follows:

¹ This matter was stayed on April 6, 2006. The Stay is now lifted and it is anticipated that the Hearing Officer will set a new discovery schedule at the next Status Conference on April 12, 2007.

1. Consistent with Hearing Officer's Scheduling Order in this matter ("Order"), Midwest Generation served IEPA with written discovery. Midwest Generation'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. Midwest Generation further requested the Agency's prior analyses and/or determinations of what constitutes "emissions data." The relevant interrogatories and document requests are set forth below:

Interrogatory No. 13: Identify any determination you have made relating to the trade secret status of a business's financial information submitted to IEPA.

Interrogatory No. 14: Identify any determination you have made that information constitutes "emission 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 that were submitted to IEPA from January 1, 1990 to the present.

Document Request No. 5: All agency responses to Statements of Justification submitted to IEPA from January 1, 1990 to the present, including preliminary and final agency determinations and correspondence related to the same.

See Petitioner's Initial Interrogatories and Initial Document Requests attached to the Motion to Compel as Exhibit 1.

2. IEPA provided no answers to the above-enumerated interrogatories, nor did it agree to undertake reasonable efforts to locate responsive information. IEPA instead stated that the discovery was overbroad, burdensome and vague. *See Resp't Resp. to Interrogs. and Req. Produc. Docs. at 2.* No substantiation of any of the objections was provided.

3. As explained in Midwest Generation's February 16, 2006 Motion to Compel, the parties were not able to negotiate a mutually satisfactory resolution of these discovery issues. Accordingly, Midwest Generation 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. Midwest Generation incorporates by reference its Motion to Compel, filed on February 16, 2006, as if fully set forth herein.

4. IEPA filed an Opposition to Midwest Generation's Motion to Compel, in which it flatly refused to produce any information responsive to Interrogatory Nos. 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.* Midwest Generation 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. Midwest Generation's Reply at 4.

5. Since the motions relating to Midwest Generation's Motion to Compel were filed, several depositions of IEPA employees have been taken. Testimony provided during these depositions demonstrates that Midwest Generation'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. A") 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. B") 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. B at 31-33, 107; Romaine Dep, Mar. 16, 2006, ("Ex. C") 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 Midwest Generation's. (Ex. B 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. B at 31-33, 107). Clearly, these determinations could be retrieved with little effort.

8. The above-cited deposition testimony establishes that IEPA employees know where to locate some of the Agency's prior trade secret determinations; furthermore, these determinations may be retrieved from the Agency's centrally located filing system. Midwest Generation'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, Midwest Generation respectfully requests that the Hearing Officer grant its Motion to Compel.

Dated: March 23, 2007

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: /s/ Mary Ann Mullin

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Julie Armitage

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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.

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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.
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Chicago, Illinois 60601
On behalf of Respondent.

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S T I P U L A T I O N

It is stipulated and agreed, by and between the parties hereto, through their attorneys, that the discovery deposition of JULIE ARMITAGE may be taken before Rhonda K. O'Neal, a Notary Public, Certified Shorthand Reporter, and Registered Professional Reporter, upon oral interrogatories, on the 15th of March A.D., 2006, at the instance of the Complainants/Petitioners at the hour of 4:59 o'clock P.M., 1021 North Grand Avenue East, Springfield, Sangamon County, Illinois;

That the oral interrogatories and the answers of the witness may be taken down in shorthand by the Reporter and afterwards transcribed;

That all requirements of the rules and regulations promulgated under the Pollution Control Board of the State of Illinois and the Rules of the Supreme Court as to deimus, are expressly waived;

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.

1 (Pages 1 to 4)

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<p>Page 21</p> <p>1 typical or not.</p> <p>2 Q Who here at IEPA could make that call?</p> <p>3 A Maybe somebody in the permit section</p> <p>4 would know better whether it's a typical practice</p> <p>5 or not.</p> <p>6 Q Who in the permit section?</p> <p>7 A One of the managers perhaps.</p> <p>8 Q What are their names?</p> <p>9 A Well, Chris Romaine's a manager and Don</p> <p>10 Sutton's a manager and Mike Reed is a manager, Bob</p> <p>11 Bernoteit's a manager, and Charlie Zeal's (sp) a</p> <p>12 manager.</p> <p>13 Q Once the engineers in the permit section</p> <p>14 give Marilyn their determination about whether or</p> <p>15 not to grant or deny a company's trade secret or</p> <p>16 confidentiality claims, what happens after that?</p> <p>17 A They won't actually give Marilyn the</p> <p>18 determination. It's just that Marilyn has pointed</p> <p>19 out that a determination needs to be made to them,</p> <p>20 and then they will make whatever determination</p> <p>21 needs to be made. And then Marilyn will know on</p> <p>22 the heels of that whether there's more or less</p> <p>23 documentation that's going out the door in</p> <p>24 response to the FOIA.</p>	<p>Page 23</p> <p>1 permit section's signature. But I do know that</p> <p>2 that has been an issue that's been up for debate.</p> <p>3 I don't know that an assigned engineer has ever</p> <p>4 signed a denial. I think that a denial would at a</p> <p>5 minimum kick to Don or, like I say, to chief legal</p> <p>6 counsel, but it could potentially kick to just a</p> <p>7 staff attorney as well.</p> <p>8 Q Is there a central file where the chief</p> <p>9 legal counsel would keep all the denials that have</p> <p>10 come out under his signature?</p> <p>11 A No.</p> <p>12 Q Where would those letters go?</p> <p>13 A My understanding is that whoever signs a</p> <p>14 letter, or whoever is the signatory to a letter</p> <p>15 around here, the letter would go into a chron (sp)</p> <p>16 file, just a running chron file.</p> <p>17 Q Okay. Excuse me. Would it be that</p> <p>18 individual's chron file?</p> <p>19 A Yes. So anything they sign would be in</p> <p>20 that file. And then a copy of decisions that are</p> <p>21 made that relate to bureau matters would typically</p> <p>22 end up in source files in the general files in the</p> <p>23 bureau there.</p> <p>24 Q Is Don Sutton the head of the permit</p>
<p>Page 22</p> <p>1 Q Do the permit engineers give any kind of</p> <p>2 written documentation to Marilyn or anybody else</p> <p>3 at IEPA about their determination?</p> <p>4 A No. No. Short of whatever the</p> <p>5 determination is, we either--one of three things</p> <p>6 is going to happen. You're either going to, the</p> <p>7 claim isn't--you're not going to react to the</p> <p>8 claim or you're going to accept the claim or</p> <p>9 you're going to deny the claim. And so there's</p> <p>10 either going to be a denial if it's denied. And</p> <p>11 I'm not, I believe they put together a letter if</p> <p>12 it's granted, but I'm not a hundred percent</p> <p>13 convinced of that. And there wouldn't be anything</p> <p>14 else.</p> <p>15 Q So if the trade secret claim is denied,</p> <p>16 does the permit engineer issue a letter to the</p> <p>17 company denying their trade secret claim?</p> <p>18 A Probably not the assigned permit</p> <p>19 engineer.</p> <p>20 Q Who would do that?</p> <p>21 A There's not necessarily a set person to</p> <p>22 do that. To my knowledge, the denials are</p> <p>23 typically going to go under either chief legal</p> <p>24 counsel's signature or under the head of the</p>	<p>Page 24</p> <p>1 section?</p> <p>2 A Yes.</p> <p>3 Q And how long has he held that position?</p> <p>4 A I don't know.</p> <p>5 Q As long as you've been at the agency?</p> <p>6 A I don't think Don was the permit section</p> <p>7 manager when I first came to the bureau of air,</p> <p>8 no.</p> <p>9 Q And you said there's been between one and</p> <p>10 10 staff attorneys at the bureau of air since</p> <p>11 you've been here, is that accurate?</p> <p>12 A I'd say it ranges between there, yeah.</p> <p>13 (Whereupon a document</p> <p>14 was duly marked for</p> <p>15 purposes of</p> <p>16 identification as</p> <p>17 Exhibit Number 3 as of</p> <p>18 this date.)</p> <p>19 MS. MULLIN: Q I'm handing you a document</p> <p>20 that's been marked Exhibit 3. I'll represent</p> <p>21 that this is a copy of the FOIA regulations at</p> <p>22 2 Illinois Administrative Code 1828. Are you</p> <p>23 familiar with these regulations?</p> <p>24 A Yes.</p>

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Christopher R. Pressnall

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 19 Rhonda K. O'Neal, CSR, RFR, a Notary Public of
 20 Sangamon County, acting within and for the County
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 21 Assistant Attorneys General
 22 188 Randolph Street
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 24 Chicago, Illinois 60601
 On behalf of Respondent.

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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
 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 deimus, 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
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 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.

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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'm 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

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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

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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.

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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

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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

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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

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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?

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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 say
 23 direct experience in business or industry?
 24 MS. ALEXANDER: Can you clarify that by, what

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<p>Page 29</p> <p>1 Administrative Code part 1328. 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 1328 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 1328? 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 120, 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,</p>	<p>Page 31</p> <p>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 1328 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. It 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 DEPARTMENT: Could you repeat the question 20 or read it back? 21 MS. MILLIN: 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?</p>
<p>Page 30</p> <p>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 1328 regulations, 14 Exhibit 37 15 MS. ALEXANDER: Do you mean other than the 16 determination that he participated in before? 17 MS. MILLIN: 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 1328? 24 A Yes. I understand. If you're talking</p>	<p>Page 32</p> <p>1 A I believe there was a matter called 2 MITCO, 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 Teyman, 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 an 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.</p>

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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

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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 1823
 5 regulations?
 6 A May I look at the regulation?
 7 Q Sure.
 8 A As far as determinations made under the
 9 part 1823 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

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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

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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

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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

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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 C That's right.
 23 A I have, I have vaguely referred to
 24 matters in which we have bounced ideas off of.

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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

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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)

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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.

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Page 2

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15 Commonwealth Edison Company.
16 MS. ANN ALEXANDER
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18 Assistant Attorneys General
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20 Twentieth floor
21 Chicago, Illinois 60601
22 On behalf of Respondent.
23
24

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1 I N D E X
2 DEPONENT PAGE NUMBER
3 Christopher Romaine
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 (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

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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
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 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 deffimus, 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.

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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 other denials that 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?

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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

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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

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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?

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Amended Motion to Compel Respondent's Discovery Responses, by U.S. Mail, upon the following persons:

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Hearing Officer
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Dated: March 23, 2007

Respectfully submitted,

MIDWEST GENERATION EME, LLC

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