

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

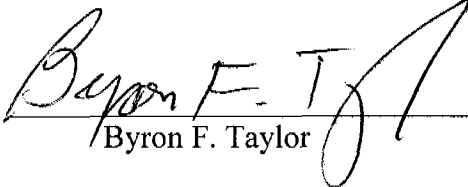
**NOTICE OF FILING**

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

Ann Alexander  
Paula Wheeler  
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 for Interlocutory Appeal of Order Denying Motions to Compel Discovery**, a copy of which is herewith served upon you.

  
Byron F. Taylor

Dated: May 31, 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,	)	
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v.	)	PCB No. 04-215
	)	(Trade Secret Appeal)
Illinois Environmental Protection Agency,	)	
	)	
Respondent.	)	

**COMMONWEALTH EDISON COMPANY'S MOTION FOR INTERLOCUTORY  
APPEAL OF ORDER DENYING MOTIONS TO COMPEL DISCOVERY**

Pursuant to 35 Ill. Admin. Code § 101.518, Commonwealth Edison Company ("ComEd") respectfully submits this Motion for Interlocutory Appeal of the Corrected Hearing Officer Order denying ComEd's Motion and 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.

**BACKGROUND**

1. This proceeding arises from the IEPA's April 23, 2004 determination denying trade secret protection (the "Denial"), allegedly pursuant to 35 Ill. Admin. Code. § 130.214(a) ("Section 130"), to excerpts from a confidential continuing property record ("CPR") and a four-page excerpt of Generating Availability Data System ("GADS") data concerning certain Illinois electric generating stations currently owned by Midwest Generation.<sup>1</sup> ComEd filed a Petition for Review of this determination, and the Pollution Control Board ("Board") accepted that Petition on June 17, 2004.

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<sup>1</sup> Commonwealth Edison Company formerly owned the electric generating stations.

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2. Consistent with the Hearing Officer's Scheduling Order in this matter, ComEd served IEPA with written discovery. ComEd's Interrogatories and Document Requests sought, among other things, information relating to IEPA's prior trade secret determinations pertaining to financial and operational data — the same type of data at issue in this trade secret dispute — submitted by other businesses. ComEd further requested the Agency's prior analyses and/or determinations of what constitutes "emissions data," because IEPA used a novel definition of that term to deny trade secret protection to the CPR and GADS excerpt. The relevant interrogatories and document requests are set forth below:

**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.

See Petitioner's Initial Interrogatories and Initial Document Requests attached hereto as Exhibit A.

3. IEPA provided no answers to the above-enumerated interrogatories and document requests, nor did it agree to undertake reasonable efforts to locate responsive information. IEPA

instead categorically objected that the discovery was overbroad, burdensome and vague. *See* Resp't Resp. to Interrogs. and Req. Produc. Docs. at 2, attached hereto as Exhibit B.

4. ComEd conferred with IEPA in a good-faith effort to resolve the discovery disputes but was unsuccessful. *See* Letter from Byron F. Taylor to Ann Alexander, January 25, 2006 (Exhibit C), *and* Letter from Ann Alexander to Byron F. Taylor, February 2, 2006 (Exhibit D).

5. To obtain IEPA's compliance with discovery, ComEd filed a Motion to Compel and an Amended Motion to Compel, seeking responses to these very important discovery requests. Therein, ComEd explained that the discovery requests were highly relevant to ComEd's reasonable expectation of what constituted "emissions data" at the time ComEd drafted its Statement of Justification. ComEd further contended that evidence of past agency interpretations of Section 130 (addressing trade secret determinations) necessarily informed and guided IEPA's application of those rules in reaching their trade secret determination in this case, and that such information was therefore plainly discoverable. In response to IEPA's argument that the requested discovery was burdensome and impractical, ComEd reminded IEPA of its obligations to respond to appropriate discovery by working with ComEd to narrow the scope of the requests instead of wholly ignoring them.

6. IEPA filed oppositions to the Motion to Compel and the Amended Motion to Compel.

7. On April 26, 2007, the Hearing Officer issued a Corrected Order denying ComEd's Motion to Compel. ComEd now appeals the entry of the Corrected Order. In support of this Motion, ComEd joins in and hereby incorporates as if fully stated herein the "Jurisdiction," "Argument," and "Conclusion" sections of the Motion for Interlocutory Appeal of

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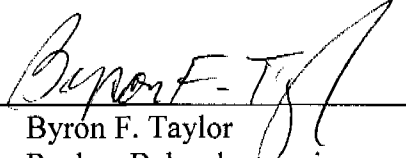
Order Denying Motions to Compel Discovery filed today by Midwest Generation EME, LLC in the related trade secret appeal PCB No. 04-216.

WHEREFORE, Commonwealth Edison Company respectfully requests that the Board grant its Motion for Interlocutory Appeal, reverse the Corrected Order of the Hearing Officer, and direct IEPA to provide full and complete responses to Commonwealth Edison Company's discovery requests.

Dated: May 31, 2007

Respectfully submitted,

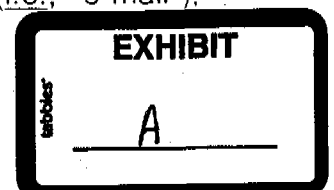
COMMONWEALTH EDISON COMPANY

By: 

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

Attorneys for Commonwealth  
Edison Company

PCB 04-215  
(Trade Secret Appeal)



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contracts, tables, tabulations, graphs, charts, diagrams, plans, schedules, appointment books, calendars, diaries, time sheets, reports, studies, analyses, drafts, telegrams, teletype, or telecopy messages, files, telephone logs and messages, checks, microfilms, microfiche, pictures, photographs, printouts, electronic data compilations, tapes, diskettes, computer drives, removable media, notes, minutes or transcripts of proceedings. "Document" and "documents" shall each include originals and non-identical copies (whether different from original because of notes made in or attached to such copy or different for any other reason), all other data compilations from which information can be obtained or translated, if necessary, and any preliminary versions, drafts and revisions of the foregoing.

3. "All documents" means every document within the custody, possession or control of the Respondents, their attorneys, representatives, agents, affiliates, consultants, divisions, and all other persons or entities of any kind now or at anytime acting or purporting to act on their behalf.

4. "Communicate" and "communication" mean every type or form of communication, including but not limited to all oral or verbal communication face to face, by telephone, or otherwise, all written communication by letter, correspondence, notes, memos, messages, or otherwise, all electronic communication, such as e-mail, telefaxes, or otherwise, and all other methods and manners of transmitting information. The terms "communicate" and "communication" shall be given the broadest construction possible.

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5. "ComEd Determination" means the April 23, 2004, letter from Chris Pressnall of IEPA to Byron Taylor of Sidley Austin Brown & Wood LLP, attached hereto as Exhibit 1.

6. The "Record" means the Administrative Record as filed in this action on July 13, 2004 by IEPA.

7. "Sierra Club's FOIA Requests" means all requests, whether written or oral, formal or informal, made by the Sierra Club to the IEPA or the United States Environmental Protection Agency ("USEPA") for information Commonwealth Edison or Midwest Generation submitted in response to the 2003 Section 114 Information Requests USEPA issued to ComEd and Midwest Generation.

8. "Statement of Justification" means any information submitted to IEPA to support a person's claim that information he submitted to IEPA is exempt from disclosure under Section 5/7 of the Illinois Environmental Protection Act 415 ILCS § 5/7 or under the Illinois Freedom of Information Act, 5 ILCS 140/1 et. seq., because the information constitutes confidential or proprietary business information or trade secrets.

9. "ComEd's Statement of Justification" means the March 11, 2004 letter from Byron F. Taylor to Chris Pressnall, regarding ComEd's claims that certain information submitted to IEPA by ComEd constitutes trade secrets, attached hereto as Exhibit 2.

10. "Related to" and "relating to" mean, in addition to the customary and usual meanings, directly or indirectly mentioning or describing, comprising, containing, mentioning, discussing, criticizing, contradicting, evidencing, concerning, embodying,



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containing, pertaining to, referring to, connected with, based upon, or reflecting upon a stated subject matter to any extent, whether logically or factually.

11. The conjunctions "and," "or" and "and/or" shall be interpreted either disjunctively or conjunctively so as to bring within the scope of each definition, instruction and document request any information you might otherwise construe as outside the scope of that definition, instruction or document request. Similarly, the singular shall include the plural and the plural shall include the singular. A masculine, feminine or neuter pronoun or description shall not exclude and shall include all other genders.

12. The term "person" means the plural as well as the singular, and shall include without limitation, individuals, associations, partnerships, corporations and other forms of legal entity.

13. "All" and "any" mean "any and all" and shall be inclusive.

14. "Identify" when used with respect to a document means to state the nature of the document (e.g. letter, memorandum, etc), the date such document was signed, prepared, sent and/or received, the identities of the sender and recipient(s) or addressee(s), and the present location and custodian of such document. In lieu of such document identification, you may produce a legible copy of the document you are asked to identify, indicating the Interrogatory to which the document is responsive or referring to the bates number or other identifying information in your answer to the Interrogatory.

15. "Identify" when used with respect to an individual means to state such individual's name, address, telephone number, occupation or profession, job title, and the name, address and telephone number of such individual's employer.

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16. "Identify" when used with respect to an organization (e.g. a corporation, partnership, or association) means to state the name of such organization, type of such organization, and the address and telephone number of its principal place of business.

17. "Describe" and "Identify" when used with respect to a statement or communication mean to identify the persons making the statement or communication, the date it was made, the person or persons to whom the communication was made, the person or persons who witnessed the communication, the substance of the communication and the place it was made.

18. "Describe" and "identify" when used with respect to a fact or facts mean, in addition to the recitation of each specific fact, the identification of all documents which substantiate any fact or from which a fact is drawn, and the identification of any oral communication upon which your knowledge of a fact is founded, or which supports the fact, including between whom and when the oral communication occurred, and the substance of the communication,

19. "Describe" when used in connection with an act shall mean to identify the actor, the specific nature of the act, the date and place of the act and the individuals present.

20. The "CPR" shall mean the documents bates numbered COM000001 through COM000086 that ComEd submitted to the USEPA in response to USEPA's 2003 Section 114 Information Request.

21. "GADS Data" shall mean the documents bates numbered COM000087 through COM000093 that ComEd submitted to the USEPA in response to USEPA's 2003 Section 114 Information Request.

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22. Any word contained in the Definitions and Instructions herein, or in the following Initial Request for Production, which is not defined above, shall have its plain and ordinary meaning as applied to the form of the word (noun, verb, etc.) and context in which it is used. For your reference, the plain and ordinary meaning of any word used herein may be found in Webster's Third New International Dictionary of the English Language, Copyright 1966.

**INSTRUCTIONS**

1. In construing these Interrogatories:

- (a) the singular includes the plural and the plural includes the singular;
- (b) the masculine includes the feminine and neuter genders;
- (c) "and" and "or" shall mean and/or;
- (d) the word "including" shall be construed without limitation;
- (e) the use of the past tense shall include the present tense and the use of the present tense shall include the past tense so as to make the Interrogatories inclusive rather than exclusive.

2. Pursuant to 35 Ill. Adm. Code §101.616(e), these Interrogatories are continuing. Therefore, if at any time prior to the hearing on this matter, Respondent obtains additional responsive information, it shall immediately provide that information to the undersigned.

3. Each paragraph and subparagraph of these Initial Interrogatories shall be construed independently and no other paragraph or subparagraph shall be referred to or relied on for the purpose of limiting its scope.

4. For each Interrogatory, identify the person or persons who provided any information relied upon in the formulation of the response.

**INTERROGATORIES**

1. Identify each person who participated in the ComEd Determination, including those present for any discussions of the ComEd Determination.

2. Identify each person having knowledge of facts relevant to the subject matter of this appeal, other than those persons already identified in Interrogatory #1 above.

3. Identify each person you intend to call as a fact witness at the hearing on this matter and for each person identify and describe the facts to which each such witness is expected to testify.

4. Identify each person you intend to call as an opinion witness at the hearing on this matter and for each person identify: the subject matter which each such witness is expected to testify; the conclusions and opinions of each such witness and the bases therefore; the qualifications of each such witness; the identity of any reports or analyses that have been prepared by each such witness relating to this matter; and the curriculum vitae and resume for each such witness.

5. Identify and describe all communications between the Sierra Club and the IEPA or the Illinois Attorney General, relating to any matters relating to IPCB 04-215 or IPCB 04-216 or related to the Sierra Club's FOIA Requests.

6. Identify and describe all communications between IEPA or the Illinois Attorney General and any other person, relating to any matters relating to IPCB 04-215 or IPCB 0-216 or related to the Sierra Club's FOIA Requests.

7. Describe in detail the reasons you relied on to support the following statement in the ComEd Determination: "ComEd and/or Midwest failed to adequately demonstrate that the information has not been published, disseminated, or otherwise

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become a matter of general public knowledge and/or failed to demonstrate that the information has competitive value."

8. Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR and/or GADS Data has been published, disseminated, or otherwise become a matter of general public knowledge.

9. Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR and/or GADS Data lacks competitive value.

10. Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR and/or GADS Data constitutes emissions data.

11. If you contend that the CPR and/or GADS Data constitutes emissions data, describe in detail the reasons supporting this contention.

12. Identify any determination you have made relating to the trade secret or confidential business information status of a business's financial information submitted to IEPA.

13. Identify any determination you have made relating to the trade secret or confidential business information status of any other electric utility company's GADS data or any similar data on the operations of any other type of manufacturing facility.

14. Identify any determination you have made that information constitutes "emission data" as that term as it 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.

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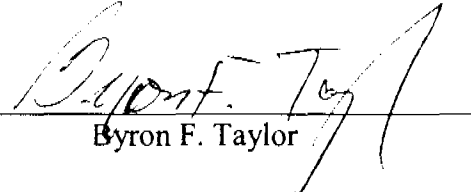
15. Identify any documents or communications not otherwise identified in response to these Interrogatories that you will present or otherwise reply upon at the hearing in this matter.

CH2\ 1307141.1

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served Commonwealth Edison Company's Initial Interrogatories by U.S. mail on this 27th day of October, 2005 upon the following persons:

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

  
Byron F. Taylor

**ILLINOIS POLLUTION CONTROL BOARD**

**COMMONWEALTH EDISON COMPANY,**  
**Petitioner,**

**v.**

**ILLINOIS ENVIRONMENTAL**  
**PROTECTION AGENCY,**  
**Respondent.**

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) **PCB 04-215**  
) **(Trade Secret Appeal)**  
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**COMMONWEALTH EDISON COMPANY'S**  
**INITIAL REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to 35 Ill. Adm. Code 101.616, Petitioner, Commonwealth Edison Company ("ComEd"), herein submits its Initial Request for Production of Documents ("Initial Request for Documents") to Respondent, Illinois Environmental Protection Agency ("IEPA"). ComEd requests Respondent to produce for inspection and copying the documents described herein at the Chicago, Illinois offices of Sidley Austin Brown and Wood LLP by November 28, 2005, or at such other time and place as the parties may agree.

**DEFINITIONS**

1. "You," "your," "Respondents" and "IEPA" each mean the Illinois Environmental Protection Agency and any of its agents.

2. "Document" and "documents" shall each be interpreted in the broadest possible sense and include, without limitation, all written, recorded, printed, typed, transcribed, filmed, digitized, or graphic matter and all other tangible things and media upon which any handwriting, typing, printing, drawing, representation, electrostatic or other copy, sound or video recording, magnetic or electrical impulse, visual reproduction



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or communication is recorded, reproduced or represented, including, but not limited to books, records, correspondence, reports, memoranda, electronic mail (i.e., "e-mail"), contracts, tables, tabulations, graphs, charts, diagrams, plans, schedules, appointment books, calendars, diaries, time sheets, reports, studies, analyses, drafts, telegrams, teletype, or telecopy messages, files, telephone logs and messages, checks, microfilms, microfiche, pictures, photographs, printouts, electronic data compilations, tapes, diskettes, computer drives, removable media, notes, minutes or transcripts of proceedings. "Document" and "documents" shall each include originals and non-identical copies (whether different from original because of notes made in or attached to such copy or different for any other reason), all other data compilations from which information can be obtained or translated, if necessary, and any preliminary versions, drafts and revisions of the foregoing.

3. "All documents" means every document within the custody, possession or control of the Respondents, their attorneys, representatives, agents, affiliates, consultants, divisions, and all other persons or entities of any kind now or at anytime acting or purporting to act on their behalf.

4. "Communicate" and "communication" mean every type or form of communication, including but not limited to all oral or verbal communication face to face, by telephone, or otherwise, all written communication by letter, correspondence, notes, memos, messages, or otherwise, all electronic communication, such as e-mail, telefaxes, or otherwise, and all other methods and manners of transmitting information. The terms "communicate" and "communication" shall be given the broadest construction possible.

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5. "ComEd Determination" means the April 23, 2004, letter from Chris Pressnall of IEPA to Byron F. Taylor of Sidley Austin Brown & Wood LLP, attached hereto as Exhibit 1.

6. The "Record" means the Administrative Record as filed in this action on July 13, 2004 by IEPA.

7. "Sierra Club's FOIA Requests" means all requests, whether written or oral, formal or informal, made by the Sierra Club to the IEPA or the United States Environmental Protection Agency ("USEPA") for information ComEd submitted in response to the 2003 Section 114 Information Requests USEPA issued to ComEd.

8. "Statement of Justification" means any information submitted to IEPA to support a person's claim that information he submitted to IEPA is exempt from disclosure under Section 5/7 of the Illinois Environmental Protection Act 415 ILCS 5/7 or under the Illinois Freedom of Information Act, 5 ILCS 140/1 et seq., because the information constitutes confidential or proprietary business information or trade secrets.

9. "ComEd's Statement of Justification" means the March 11, 2004 letter from Byron F. Taylor to Chris Pressnall, regarding ComEd's claims that certain information submitted to IEPA by ComEd constitutes trade secrets, attached hereto as Exhibit 2.

10. "Related to" and "relating to" mean, in addition to the customary and usual meanings, directly or indirectly mentioning or describing, comprising, containing, mentioning, discussing, criticizing, contradicting, evidencing, concerning, embodying, containing, pertaining to, referring to, connected with, based upon, or reflecting upon a stated subject matter to any extent, whether logically or factually.

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11. The conjunctions "and," "or" and "and/or" shall be interpreted either disjunctively or conjunctively so as to bring within the scope of each definition, instruction and document request any information you might otherwise construe as outside the scope of that definition, instruction or document request. Similarly, the singular shall include the plural and the plural shall include the singular. A masculine, feminine or neuter pronoun or description shall not exclude and shall include all other genders.

12. The term "person" means the plural as well as the singular, and shall include without limitation, individuals, associations, partnerships, corporations and other forms of legal entity.

13. "All" and "any" mean "any and all" and shall be inclusive.

14. Any word contained in the Definitions and Instructions herein, or in the following Initial Request for Production, which is not defined above, shall have its plain and ordinary meaning as applied to the form of the word (noun, verb, etc.) and context in which it is used. For your reference, the plain and ordinary meaning of any word used herein may be found in Webster's Third New International Dictionary of the English Language, Copyright 1966.

**INSTRUCTIONS**

1. In construing this Initial Request for Documents:
  - (a) the singular includes the plural and the plural includes the singular;
  - (b) the masculine includes the feminine and neuter genders;
  - (c) "and" and "or" shall mean and/or;

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(d) the word "including" shall be construed without limitation;

(e) the use of the past tense shall include the present tense and the use of the present tense shall include the past tense so as to make the document requests inclusive rather than exclusive.

2. Pursuant to 35 Ill. Adm. Code 101.616 (e), this Initial Request for Documents is continuing. Therefore, if at any time prior to the hearing on this matter, Respondent obtains additional responsive documents, they shall produce immediately to the undersigned such additional responsive documents.

3. All documents necessary for a correct understanding of any document responsive to the following requests shall be produced with the responsive document.

4. The documents produced shall be produced as they are kept in the usual course of business or organized and labeled to correspond to a specific request.

5. Each paragraph and subparagraph of this Initial Request for Documents shall be construed independently and no other paragraph or subparagraph shall be referred to or relied on for the purpose of limiting its scope

6. If any of these requests cannot be complied with in full, produce as many of the responsive documents as possible, identify the documents that cannot be produced, and specify the reason why those documents cannot be produced.

7. If any document described herein is withheld on the basis of any claim of privilege or otherwise, provide in writing the following information about each document: (1) its date, (2) the name, position and address of its author, (3) the name, position and address of each person who received, read or saw the document or copies thereof, (4) the subject matter and type of document (e.g. memorandum, letter etc.), (5) the nature of the privilege claimed (e.g. attorney/client privilege, work product doctrine, etc.) and

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(6) the grounds for the claimed privilege in sufficient detail to allow a ruling on the appropriateness of the claimed privilege.

**DOCUMENT REQUESTS**

Produce:

1. All documents as to which ComEd has requested or will request "identification" in any Interrogatory served or to be served upon Respondent.
2. All documents identified by Respondent in any response to any Interrogatory that has been or will be served upon Respondent by Commonwealth Edison.
3. All documents relating to your interpretation of the term "emission data" as that term as it is now or was in the past defined in 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 implementing regulations of either act, including determinations that certain information constitutes or does not constitute emissions data.
4. All Statements of Justification that were submitted to IEPA from January 1, 1990 to the present.
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.
6. All documents relating to the ComEd Determination, including all documents reflecting communications relating to that determination.

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7. All documents relating to each communication between the Sierra Club and IEPA, or the Illinois Attorney General, relating to any matters relating to IPCB 04-215 or IPCB 04-216 or the Sierra Club's FOIA Requests.

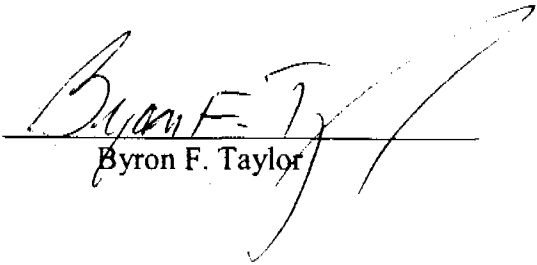
8. All documents relating to each communication between IEPA, or the Illinois Attorney General, and any other person, relating to any matters relating to IPCB 04-215 or IPCB 04-216 or the Sierra Club's FOIA Requests.

CH2\ 1307142.1

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served Commonwealth Edison Company's Initial Request for Production of Documents by U.S. mail on this 27th day of October, 2005 upon the following persons:

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

  
Byron F. Taylor

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OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

**Lisa Madigan**  
ATTORNEY GENERAL

November 22, 2005

Via overnight mail

Byron F. Taylor  
Sidley Austin Brown & Wood LLP  
Bank One Plaza  
10 S. Dearborn  
Chicago, Illinois 60603

*Re: PCB 4-215*

Dear Byron:

Enclosed please find a copy of Respondent's Response to Commonwealth Edison Company's Initial Interrogatories and Initial Request for Production of Documents.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ann Alexander", is written over the typed name.

Ann Alexander

Enc.

cc: Roshna Balasubramanian ✓

EXHIBIT

tabbies

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>Commonwealth Edison Company,</b>	)	
<b>Petitioner</b>	)	<b>PCB 04-215</b>
	)	<b>Trade Secret Appeal</b>
<b>v.</b>	)	
	)	
<b>Illinois Environmental Protection Agency,</b>	)	
<b>Respondent</b>	)	
	)	

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by LISA MADIGAN, Attorney General of the State of Illinois, and in response to Petitioner COMMONWEALTH EDISON COMPANY'S Initial Interrogatories, answers and objects as follows:

**I. GENERAL OBJECTIONS**

A. Respondent objects to the Initial Interrogatories on the ground that they seek information that is irrelevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. In particular, although the Pollution Control Board ("Board") specified in its June 17, 2004 order that hearings in this matter "will be based exclusively on the record before IEPA at the time it issued its trade secret determination" pursuant to 35 Ill. Admin. Code 105.214(a), and that "information developed after IEPA's decision typically is not admitted at hearing or considered by the Board"; and although the Board denied a motion in related case PCB 04-185 for reconsideration of this evidentiary restriction and a de novo hearing, Petitioner is seeking information not in or directly pertinent to the administrative record, and/or developed after Respondent IEPA's decision.

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B. Respondent objects to the Interrogatories on the ground that they call for information that is protected by, inter alia, the attorney-client privilege, the work product privilege, the joint prosecution privilege, and the deliberative process privilege.

C. Respondent objects to the Initial Interrogatories on the ground that they are overbroad and burdensome.

D. Respondent objects to the Initial Interrogatories on the ground that they are vague.

Responses to the Initial Interrogatories shall not be construed as a waiver of these objections.

**Interrogatory No. 1:** Identify each person who participated in the Com Ed Determination, including those present for any discussions of the Com Ed determination.

**Response to Interrogatory No. 1:**

Respondent objects to this interrogatory on the grounds specified in General Objections C and D. Without waiving these objections, Respondent states that the persons who participated in the Com Ed determination are as follows:

1. Christopher Romaine, Utilities Unit Manager, Illinois Environmental Protection Agency, 1021 North Grand Avenue East, Springfield, Illinois 62794-9276, 217-785-1882.
2. Julie Armitage, Chief of Compliance and Enforcement, Bureau of Air, 1021 North Grand Avenue East, Springfield, Illinois 62794-9276, 217-782-9846.
3. Christopher Presnall, Assistant Counsel, Bureau of Air, 1021 North Grand Avenue East, Springfield, Illinois 62794-9276, 217-524-3003.

**Interrogatory No. 2:** Identify each person having knowledge of facts relevant to the subject matter of this appeal, other than those persons already identified in Interrogatory #1 above.

**Response to Interrogatory No. 2:**

Respondent objects to this interrogatory on the grounds specified in General Objections A, C, and D. Without waiving such objections, Respondent states that to its knowledge, there are no other persons at IEPA with significant personal knowledge of the facts relevant to the subject matter of this appeal.

**Interrogatory No. 3:** Identify each person you intend to call as a fact witness at the hearing on this matter and for each person identify and describe the facts to which each such witness is expected to testify.

**Response to Interrogatory No. 3:**

Respondent objects to this interrogatory on the grounds specified in General Objection C to the extent it calls for an overbroad and burdensome level of detail concerning the anticipated testimony of witnesses. Without waiving this objection, Respondent states that it has not yet made a final determination as to which persons it will call as witnesses and the facts to which each will testify, and reserves the right to supplement this response when such determination is made in the future. At this time, Respondent anticipates that it will call the following persons as witnesses:

1. Christopher Romaine (previously identified). It is currently anticipated that Mr. Romaine will testify concerning the basis for the Com Ed determination, in particular the basis for IEPA's conclusion that the documents at issue in this case constitute emission data.
2. Julie Armitage (previously identified). It is currently anticipated that Ms. Armitage will testify concerning the basis for the Com Ed determination, in particular the basis for IEPA's conclusion that Com Ed and/or Midwest Generation failed to adequately

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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.

**Interrogatory No. 4:** Identify each person you intend to call as an opinion witness at the hearing on this matter and for each person identify: the subject matter which each such witness is expected to testify; the conclusions and opinions of each such witness and the bases therefore; the qualifications of each such witness; the identity of any reports or analyses that have been prepared by each such witness relating to this matter; and the curriculum vitae and resume for each such witness.

**Response to Interrogatory No. 4:**

Respondent objects to this interrogatory on the grounds specified in General Objection C to the extent it calls for an overbroad and burdensome level of detail concerning the anticipated testimony of witnesses. Without waiving this objection, Respondent states that it has not yet made a determination as to whether it will call an opinion witness, and reserves the right to supplement this response when such determination is made in the future.

**Interrogatory No. 5:** Identify and describe all communications between the Sierra Club and the IEPA or the Illinois Attorney General, relating to any matters relating to IPCB 04-215 or IPCB 04-216 or related to the Sierra Club's FOIA requests.

**Response to Interrogatory No. 5:**

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D. Without waiving such objections, Respondent identifies the following communications between Sierra Club and IEPA concerning the Sierra Club's FOIA requests:

1. Letter dated October 27, 2003 to Marilyn Clardy, IEPA FOIA Officer, from Adam Qhader, Sierra Club, setting forth FOIA request.

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2. Letter dated November 133, 2003 to Adam Qhader, Sierra Club from Joseph E. Svoboda, IEPA Chief Legal Counsel, regarding FOIA request.
3. E-mail dated February 12, 2004 to Marilyn Clardy, IEPA FOIA Officer, from Bruce Nilles, Sierra Club Senior Midwest Representative, setting forth FOIA request.

Respondent further states that to its knowledge, there were no other communications between IEPA or the Illinois Attorney General and Sierra Club prior to the Com Ed determination.

**Interrogatory No. 6:** Identify and describe all communications between IEPA or the Illinois Attorney General and any other person, relating to any matters relating to IPCB 04-215 or IPCB 04-216 or related to the Sierra Club's FOIA requests.

**Response to Interrogatory No. 6:**

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D. Without waiving such objections, Respondent states that to its knowledge, there were no communications between IEPA or the Illinois Attorney General and any other person other than those identified in response to Interrogatory No. 5 prior to the Com Ed determination.

**Interrogatory No. 7:** Describe in detail the reasons you relied on to support the following statement in the ComEd Determination: "Midwest and/or ComEd 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."

**Response to Interrogatory No. 7:**

Respondent objects to this interrogatory on the grounds specified in General Objection C to the extent it calls for an overbroad and burdensome level of detail concerning the anticipated testimony of witnesses. Without waiving this objection,

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Respondent states that it relied on, inter alia, the following reasons in support of the identified statement:

1. Petitioner's statement of justification is vague and lacking in detail, and provided insufficient information to support Petitioner's contentions that the information has not been published, disseminated, or otherwise become a matter of general public knowledge, and that the information has competitive value.

2. There was insufficient evidence that Petitioner "has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access to the article for limited purposes" per 35 Ill. Admin. Code 130.208(b), and that the information has been in fact protected from disclosure, because Petitioner failed to demonstrate, in its Statement of Justification or otherwise, that the information, in its compiled form or otherwise, was specifically designated and/or treated as confidential or proprietary in accordance with its general internal policies and procedures.

3. There was insufficient evidence that Petitioner "has taken reasonable measures to prevent the article from becoming available to persons other than those selected by the owner to have access to the article for limited purposes" per 35 Ill. Admin. Code 130.208(b), and that the information has been in fact protected from disclosure, because the information, in its compiled form or otherwise, is of a type that was or may have been known by or submitted to government agencies (e.g., the Department of Energy or the Illinois Commerce Commission) or third parties (e.g., contractors), but Petitioner failed to demonstrate, in its Statement of Justification or otherwise, that this information was protected from disclosure by such government

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agencies or third parties, or that Petitioner ever requested such protection from disclosure (e.g., by contract or pursuant to the Illinois Commerce Commission rules at 80 Ill.

Admin. Code 200.430). Thus, while Petitioner stated in its Statement of Justification that it had never provided the CPR to any third party, it failed to demonstrate that the information contained in the CPR had not been provided to a third party.

4. Petitioner provided insufficient information concerning the purported competitive value of the information, and in particular failed to provide convincing reason to believe that information that is more than five years old, with some of it more than three decades old, is of competitive value to Petitioner.

5. Some of the projects listed in the CPR were the subject of Respondent's permitting, and information concerning such projects set forth in permit applications submitted to Respondent is public, as Petitioner did not seek to protect such information as a trade secret.

6. Petitioner provided no basis for a conclusion that the information has competitive value in view of the fact that the information is historical in nature and Petitioner no longer owns the electric generating facilities to which the information pertains.

7. Respondent is mindful of the public's right to know information concerning Clean Air Act compliance of sources of air pollution, including the electric generating industry, and was unwilling to withhold such information from Freedom of Information Act requestors based on inadequate evidence that such withholding is legally necessary and appropriate.



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**Interrogatory No. 8:** Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR has been published, disseminated, or otherwise become a matter of public knowledge.

**Response to Interrogatory No. 8:**

Please see response to Interrogatory No. 7.

**Interrogatory No. 9:** Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR and/or GADS Data lacks competitive value.

**Response to Interrogatory No. 9:**

Please see response to Interrogatory No. 8.

**Interrogatory No. 10:** Identify the specific information in the record, if any, that supports your claim, if any, that the CPR and/or GADS Data constitutes emission data.

**Response to Interrogatory No. 10:**

Please see response to Interrogatory No. 11. The status of the CPR and the GADS Data as emission data is supported by, inter alia and in addition to legal definitions and interpretations of what constitutes emission data and the contents of the CPR and the GADS Data themselves, record documents Bates stamped 869 – 1527 and 1543 – 1554.

**Interrogatory No. 11:** If you contend that the CPR and/or GADS Data constitutes emissions data, describe in detail the reasons supporting this contention.

**Response to Interrogatory No. 11:**

Clean Air Act § 114 and federal regulations pursuant thereto, and counterpart Illinois regulations, provide that “emission data” includes any documents containing information necessary to determine how much a particular source was “authorized to emit” – i.e., that would determine whether the facility’s emissions comply with the Clean Air Act. 40 C.F.R. 2.301(a)(2)(i)(B), promulgated pursuant to § 114 of the Clean Air Act, includes in the definition of emission data “Information necessary to determine the

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identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source)." The Illinois definition at 35 Ill. Admin. Code. 130.110 is substantially the same.

The United States Environmental Protection Agency ("USEPA") information requests, the responses to which are the subject of this proceeding, were all directed specifically toward determining whether facilities it regulates were in compliance with the Clean Air Act New Source Review programs. The CPR contains a list of capital projects at Midwest Generation (previously ComEd) facilities, including activities at those facilities that may constitute modifications that triggered New Source Review. The GADS Data contains information concerning facility outages and restricted operation, which is relevant to the operational condition of the facilities and to assessing whether activities that were undertaken at the facilities should be considered modifications. Accordingly, since the information is necessary to determine whether modifications have occurred at Petitioner's facilities and the amount they were "authorized to emit" relative to New Source Review requirements, this information constitutes emission data.

This response is intended solely as a summary. Respondent reserves the right to clarify or elaborate upon it at any time during the course of this proceeding.

**Interrogatory No. 12:** Identify any determination you have made relating to the trade secret status of a business's financial information submitted to IEPA.

**Response to Interrogatory No. 12:**

Respondent objects to this interrogatory on the grounds specified in General Objections A, C, and D.

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**Interrogatory No. 13:** Identify any determination you have made relating to the trade secret or confidential business information status of any other electric utility company's GADS data or any similar data on the operations or any other type of manufacturing facility.

**Response to Interrogatory No. 13:**

Respondent objects to this interrogatory on the grounds specified in General Objections A, C, and D.

**Interrogatory No. 14:** Identify any determination you have made that information constitutes "emission data" as that term as it is [sic] 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.

**Response to Interrogatory No. 14:**

Respondent objects to this interrogatory on the grounds specified in General Objections A, C, and D.

**Interrogatory No. 15:** Identify any documents or communications not otherwise identified in response to these Interrogatories that you will present or otherwise reply [sic] upon at the hearing in this matter.

**Response to Interrogatory No. 15:**

At this time, Respondent has not yet made a determination to present or rely on at the hearing any documents or communications not otherwise identified in response to Petitioner's interrogatories.

Dated: Chicago, Illinois  
November 28, 2005

Respectfully submitted,

LISA MADIGAN, Attorney General of the  
State of Illinois

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MATTHEW DUNN, Chief, Environmental  
Enforcement/  
Asbestos Litigation Division

BY: Ann Alexander

Ann Alexander, Assistant Attorney  
General and Environmental Counsel  
Paula Becker Wheeler, Assistant  
Attorney General  
188 West Randolph Street, Suite 2001  
Chicago, Illinois 60601  
312-814-3772  
312-814-2347 (fax)

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**Commonwealth Edison Company,**

**Petitioner**

**v.**

**Illinois Environmental Protection Agency,**

**Respondent**

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**PCB 04-215**

**Trade Secret Appeal**

**CERTIFICATE OF SERVICE**

I hereby certify that I did on the 22<sup>nd</sup> day of November, 2005 send by overnight mail a copy of Respondent's Response to Petitioner Commonwealth Edison's Initial Interrogatories, to:

Byron F. Taylor  
Roshna Balasubramanian  
Sidley Austin Brown & Wood LLP  
Bank One Plaza  
10 S. Dearborn  
Chicago, Illinois 60603

Dated: Chicago, Illinois  
November 22, 2005

LISA MADIGAN, Attorney General of the  
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/  
Asbestos Litigation Division

BY: 

Ann Alexander, Assistant Attorney General and  
Environmental Counsel  
Paula Becker Wheeler, Assistant Attorney General  
188 West Randolph Street, Suite 2000  
Chicago, Illinois 60601  
312-814-3772  
312-814-2347 (fax)

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**PCB 04-215**  
**Trade Secret Appeal**

## I. GENERAL OBJECTIONS

1

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B. Respondent objects to the Document Requests on the ground that they call for information that is protected by, inter alia, the attorney-client privilege, the work product privilege, the joint prosecution privilege, and the deliberative process privilege.

C. Respondent objects to the Document Requests on the ground that they are overbroad and burdensome.

D. Respondent objects to the Document Requests on the ground that they are vague.

Responses to the Document Requests shall not be construed as a waiver of these objections.

**Document Request No. 1:** All documents as to which ComEd has requested or will request "identification" in any Interrogatory served or to be served upon Respondent.

**Response to Document Request No. 1:**

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C and D, and the grounds specified in response to the interrogatories. Without waiving such objection, Respondent provides herewith the documents identified in response to Interrogatory No. 5. Respondent further states that Petitioner is already in possession of the record documents identified in response to the interrogatories.

**Document Request No. 2:** All documents identified by Respondent in any response to any Interrogatory that has been or will be served upon Respondent by Commonwealth Edison.

**Response to Document Request No. 2:**

Please see response to Document Request No. 1.

**Document Request No. 3:** All documents relating to your interpretation of the term "emission data" as that term as it is [sic] 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 implementing regulations

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of either act, including determinations that certain information constitutes or does not constitute emissions data.

**Response to Document Request No. 3:**

Respondent objects to this request on the grounds specified in General Objections A, B, C, and D. Without waiving such objections, Respondent states that documents in the administrative record supporting Respondent's determination that the information that is the subject of this proceeding constitutes emission data are identified in response to Petitioner's Initial Interrogatories.

**Document Request No. 4:** All Statements of Justification that were submitted to IEPA from January 1, 1990 to the present.

**Response to Document Request No. 4:**

Respondent objects to this request on the grounds specified in General Objections A, C, and D.

**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.

**Response to Document Request No. 5:**

Respondent objects to this request on the grounds specified in General Objections A, C, and D.

**Document Request No. 6:** All documents relating to the ComEd Determination, including all documents reflecting communications relating to that determination.

**Response to Document Request No. 6:**

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D, except to the extent that the requested documents are contained in the administrative record. Without waiving such objection, Respondent states that to its knowledge, it is not in possession of any documents reflecting



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communications relating to the Com Ed determination prior to the date of that determination other than those contained in the record and those identified in response to Interrogatory No. 5.

**Document Request No. 7:** All documents relating to each communication between the Sierra Club and IEPA, or the Illinois Attorney General, relating to any matters relating to IPCB 04-215 or IPCB 04-216 or the Sierra Club's FOIA requests.

**Response to Document Request No. 7:**

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D. Without waiving such objection, Respondent provides herewith the documents identified in response to Interrogatory No. 5. Respondent further states that to its knowledge, there were no other communications between IEPA or the Illinois Attorney General and Sierra Club prior to the Com Ed determination.

**Document Request No. 8:** All documents relating to each communication between IEPA, or the Illinois Attorney General, and any other person, relating to any matters relating to IPCB 04-215 or IPCB 04-216 or the Sierra Club's FOIA requests.

**Response to Document Request No. 8:**

Respondent objects to this interrogatory on the grounds specified in General Objections A, B, C, and D. Without waiving such objections, Respondent states that to its knowledge, there were no communications between IEPA or the Illinois Attorney General and any other person, other than those identified in response to Interrogatory No. 5, relating to IPCB 04-215, IPCB 04-216 or the Sierra Club's FOIA requests prior to the date of the Com Ed determination.

Dated: Chicago, Illinois  
November 28, 2005

**Electronic Filing, Received, Clerk's Office, May 31, 2007**

Respectfully submitted,

LISA MADIGAN, Attorney General of the  
State of Illinois

MATTHEW DUNN, Chief, Environmental  
Enforcement/  
Asbestos Litigation Division

BY:

A handwritten signature in cursive script, appearing to read "Ann Alexander", written over a horizontal line.

Ann Alexander, Assistant Attorney  
General and Environmental Counsel

Paula Becker Wheeler, Assistant  
Attorney General

188 West Randolph Street, Suite 2001  
Chicago, Illinois 60601

312-814-3772

312-814-2347 (fax)

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**Commonwealth Edison Company,**  
**Petitioner**

**v.**

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

)  
) **PCB 04-215**  
) **Trade Secret Appeal**  
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)

**CERTIFICATE OF SERVICE**

I hereby certify that I did on the 22<sup>rd</sup> day of November, 2005 send by overnight mail a copy of Respondent's Response to Petitioner Commonwealth Edison's Initial Request for the Production of Documents, to:

Byron F. Taylor  
Roshna Balasubramanian  
Sidley Austin Brown & Wood LLP  
Bank One Plaza  
10 S. Dearborn  
Chicago, Illinois 60603

Dated: Chicago, Illinois  
November 22, 2005

LISA MADIGAN, Attorney General of the  
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/  
Asbestos Litigation Division

BY: 

Ann Alexander, Assistant Attorney General and  
Environmental Counsel  
Paula Becker Wheeler, Assistant Attorney General  
188 West Randolph Street, Suite 2000  
Chicago, Illinois 60601  
312-814-3772  
312-814-2347 (fax)



**SIERRA  
CLUB**  
FOUNDED 1892

MIDWEST OFFICE - Chicago

October 27, 2003

Ms. Marilyn Clardy, FOIA Officer  
Illinois Environmental Protection Agency  
Bureau of Air  
1340 North Ninth Street  
P.O. Box 19506  
Springfield, IL 62794

**RECEIVED**

NOV 03 2003

IEPA-DAPC-SPFLD.

SENT BY FAX AND CERTIFIED MAIL

Re: FOIA Request For Records Relating To All Coal-Fire Generating Facilities That  
Have Been Reported To Illinois Environmental Protection Agency Pursuant To  
Section 114 (a) Of The Clean Air Act.

*[Handwritten signature]*

Dear Ms. Clardy:

I have received your response to Sierra Club's FOIA request concerning Midwest Generation coal-fire generating facilities, dated August 27, 2003. Thank you for your attention to that matter. Unfortunately Midwest Generation has provided very little relevant information that is responsive to IEPA oversight.

Sierra Club now requests all records relating to any coal-fire generating facilities that have reported to the IEPA, pursuant to Section 114 (a) of the Clean Air Act, 42 U.S.C. Section 7414 (a), excluding the Illinois Power/Dynergy Baldwin power plant.

Such records may have been originally requested by the EPA in order to determine compliance with the Illinois State Implementation Plan and applicable provisions of the New Source Performance Standards at 40 C.F.R. Part 60.

This request is intended to be inclusive of any coal-fire facilities owned by any power company in Illinois, and not limited to only Midwest Generation, L.I.C.

Pursuant to the Illinois Freedom of Information Act, please provide all records relating to the above request that the IEPA is in receipt of.

Please see the attached "Appendix A" enumerating the specific information requested.

Appendix A

1. Provide a list of all coal-fired generating units for which you are owner or operator which are currently operational or have been retired in the past 10 years. For each such unit, identify the generating station location, the boiler and turbine unit identification number, the date or year commercial operation began, the original design and current boiler heat input capacity (mmbtu/hr), the original design and current gross and net generating capacity (MWg/MWn), the original design and current steam flow output capacity (lbs steam/hr), the current operating status, for any unit retired or inactive the applicable date or year, current fuel(s) being fired, type of particulate emissions control and year installed, type of sulfur dioxide emissions control and year installed, type of nitrogen oxides emissions control and year installed.
2. For all currently active coal-fired generating units provide monthly and annual total gross and net generation (MW-hr), monthly and annual average heat rate (BTU/KW-hr) and monthly and annual average coal heat content (BTU/lb) and percent sulfur for all years from 1975 through 2002.
3. For all currently active coal-fired generating units provide a list of all capital projects, of an amount greater than \$100,000.00, approved or completed between January 1, 1975 and the date of this request. For each such capital project identify the work performed, the date completed or projected to be completed, the project work order number and the dollar amount approved and/or expended.
4. Provide a copy of the Generating Availability Data System(GADS) data for the period 1/1/75 through 12/31/02 identifying all boiler and turbine related forced, maintenance and planned outages and curtailments for all currently active coal-fired generating units.
5. Provide copies of the summary results page of all stack tests for particulate matter, sulfur dioxide, nitrogen oxides, mercury, lead and hydrogen chloride for the period 1/1/75 through 6/30/02 for all currently active coal-fired generating units.
6. Provide copies of all PSD/NSR permits received and permit applications submitted for the period 1/1/75 to present.
7. Provide copies of all reports, correspondences, memoranda



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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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

ROD R. BLAGOJEVICH, GOVERNOR

RENEE CIPRIANO, DIRECTOR

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

November 13, 2003

Adam Qhader  
Sierra Club  
200 North Michigan  
Suite 505  
Chicago, Illinois 60601-5908

**Re: Freedom of Information Act Request**

Dear Mr. Qhader:

This letter responds to your October 27, 2003, request for information pursuant to the Illinois Freedom of Information Act ("FOIA") received by the Illinois Environmental Protection Agency ("Illinois EPA") on November 3, 2003, relative to coal-fire generating facilities in Illinois. Specifically, you request that the Illinois EPA provide all records relating to any coal-fire generating facilities that have reported to the Illinois EPA, pursuant to Section 114(a) of the Clean Air Act, 42 U.S.C. Section 7414(a), excluding the Illinois Power Dynegy Baldwin power plant.

On November 10, 2003, the Illinois EPA received Midwest Generation EME, LLC's ("Midwest Generation") response to the USEPA Request for Information pursuant to Section 114 of the Clean Air Act dated February 13, 2003. Midwest Generation has claimed a considerable amount of the information in the response confidential. The Illinois EPA is providing all documents not marked "confidential". The Illinois EPA will evaluate all information marked "confidential" in accordance with "Procedures for Claiming and Determining that Public Information Records are Exempt From Disclosure", 2 Ill. Adm. Code 1828, Subpart D to determine whether the claim is valid. Should the Illinois EPA determine that the information was not properly claimed confidential and/or does not qualify as confidential information pursuant to 2 Ill. Adm. Code 1828.202(a)(1)(F), the Agency will supplement this FOIA response.

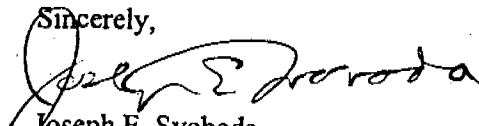
Given the Illinois EPA's decision not to provide to you some of the information requested, you have the right to appeal this matter by sending, to the Director of the Illinois EPA, a written notice of appeal pursuant to 2 Ill. Adm. Code 1826.406(b)(3). The notice should be mailed to the Illinois EPA at 1021 North Grand Avenue, East, Springfield, Illinois 62794.

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Enclosed are the non-exempt documents.

Should you have questions or comments with regard to this matter, please contact Illinois EPA Assistant Counsel, Chris Pressnall.

Sincerely,



Joseph E. Svoboda  
Chief Legal Counsel

w/enclosures

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**From:** b-nilles@mindspring.com  
**To:** "Marilyn Clardy" <marilyn.clardy@epa.state.il.us>  
**Date:** 2/12/2004 3:43:38 PM  
**Subject:** FOIA: Midwest Generation

Hi Marilyn,

Pursuant to the state's Freedom of Information Act, please provide me with a copy of all records that the agency has received from either Midwest Generation and/or Commonwealth Edison in response to the USEPA Section 114 request these companies received in February 2003.

Sincerely,

Bruce Nilles  
Senior Midwest Representative  
Sierra Club  
200 N. Michigan Ave., Ste 505  
Chicago, IL 60601  
p. 312.251.1511  
c. 312.217.9725  
f. 312.251.1780  
e. bruce.nilles@sierraclub.org  
w. www.illinois.sierraclub.org

**CC:** "Julie Armitage" <jarmitage@epa.state.il.us>, "Dave Kolaz" <dkolaz@epa.state.il.us>, "Keith Harley" <Kharley@kentlaw.edu>

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FEB 13 2004

IEPA-DAPC-SPFLD.



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ONE SOUTH DEARBORN  
CHICAGO, IL 60603  
(312) 853 7000  
(312) 853 7036 FAX

bftaylor@sidley.com  
(312) 853-4717

BRUSSELS HONG KONG SHANGHAI  
CHICAGO LONDON SINGAPORE  
DALLAS LOS ANGELES TOKYO  
NEW YORK WASHINGTON, DC

FOUNDED 1866

January 25, 2006

**Via Messenger**

Ann Alexander  
Environmental Counsel and Assistant Attorney General  
Office of the Attorney General  
188 West Randolph Street  
Chicago, IL 60601

Re: Commonwealth Edison Co. ("ComEd") v. Illinois Environmental  
Protection Agency ("IEPA"), PCB 04-215

Dear Ms. Alexander:

We are in receipt of the IEPA's Responses to ComEd's Initial Interrogatories and Initial Request for the Production of Documents. IEPA objected to several Interrogatories and Document Requests by stating, without further explanation, that they are overbroad and burdensome, vague, and irrelevant, and it provided no responses to these discovery requests. As discussed below, we believe that additional responses and production of documents are required of IEPA pursuant to the Illinois rules of discovery and the Illinois Pollution Control Board's (hereinafter "the Board's") procedural rules. Please consider this letter as our effort to resolve these discovery matters informally without the assistance of the Board or the Hearing Officer assigned to this case.

**Initial Interrogatories and Initial Request for the Production of Documents.**

In its Initial Interrogatories, ComEd requested information about IEPA's prior trade secret determinations, as well as information about any prior agency interpretations of what constitutes emissions data. In its document requests, ComEd sought copies of statements of justification relating to trade secrets or confidential/proprietary business information that had been submitted to IEPA within the last ten years and the agency's responses to same.

More specifically, the relevant interrogatories and document requests sought the following:

- Interrogatory No. 12 requested IEPA to identify any determinations it has made relating to the trade secret status of a business's financial information.

EXHIBIT

C

- Interrogatory No. 13 requested identification of agency determinations of the trade secret or confidential business information status of any other electric utility company's Generating Availability Data System ("GADS") data or other similar operational data.
- Interrogatory No. 14 requested IEPA to identify determinations it has made that information has constituted "emissions data" as that term is defined by Section 5/7 of the Environmental Protection Act, 415 ILCS 5/7, or the Section 114(c) of the federal Clean Air Act, 42 U.S.C. § 7414(c).
- Document Request No. 4 sought production of 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 sought copies of IEPA's responses—including preliminary and final agency determinations and correspondence related to the same—to such statements of justification.

### **Responses Generally.**

IEPA answered the discovery requests enumerated above by referencing "General Objections A, C, and D," which state, respectively, that the 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). No substantiation of any of the objections was provided, nor was there any explanation of how the general objections applied to the specific requests. Board rules prohibit such responses and require that "[g]rounds for an objection to an interrogatory must be stated *with specificity*...." 35 Ill. Admin. Code § 101.620(c)(emphasis added). Moreover, written objections do not excuse complete refusal to respond to a discovery request. Where written objections are made to part of a request, the remainder of the request "shall be complied with." SUP. CT. R. 214.<sup>1</sup>

### **Irrelevance & Inadmissibility of Evidence Objection.**

In General Objection A, IEPA objected to all initial interrogatories and all document requests by citing to 35 Ill. Admin. Code § 105.214(a), the provision that governs admissibility of evidence at Board hearings in which an agency's final determination is appealed. Because § 105.214(a) deals with the admission of evidence at Board hearings, not with the scope of permissible discovery, this Board rule does not provide a basis for IEPA's objection and

<sup>1</sup> The Board looks for guidance to the Illinois Code of Civil Procedure and Illinois Supreme Court Rules concerning discovery. *Illinois v. C&S Recycling, Inc. et al.*, PCB 97-9, 2000 WL890179, \*1 (June 22, 2000).

refusal to respond. IEPA has not demonstrated that the information sought by ComEd's interrogatories and document requests would be deemed inadmissible at the hearing, nor has IEPA adequately established that admissibility determinations are relevant to the scope of discovery requests. The Illinois Administrative Code and the Board clearly state that "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). The information sought by ComEd's Initial Interrogatory Nos. 12, 13, and 14 and ComEd's document request Nos. 4 and 5, is relevant to this case. ComEd is challenging a negative agency determination of the trade secret status of sensitive financial and operational data and has asked to review the agency's trade secret analyses of other financial and operational data, including GADS data, prior to the date on which the decision now being appealed was made. Please comply with these discovery requests by providing responses and documents. Otherwise, please provide with specificity the basis on which you believe this objection wholly excuses compliance with ComEd's discovery requests, or withdraw this objection.

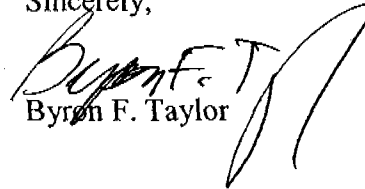
**Overly Broad and Burdensome Objection.**

IEPA has objected to all of the above-enumerated discovery requests as overly broad and burdensome. It has not set forth, however, how these requests are overly board, and consequently, how compliance with them would be unduly burdensome. For instance, does the volume of responsive documents comprise an amount of pages not reasonably produced in the course of discovery? IEPA's generalized objection, without more, does not provide sufficient basis for its failure to respond or produce any responsive documents. As already noted, objections must be stated with specificity. IEPA is further obligated to respond to the request to the extent possible or by initially limiting the scope of its response, 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*, 351 Ill. App. 3d 627, 633 (2004) ("despite these requests' somewhat broad wording, surely [the party resisting production] could have provided the records related to the surgery at issue in this case.").

In an effort to obtain responses to our interrogatories and document requests, we are willing to discuss an initial refinement of the scope of certain requests that you claim are overbroad and unduly burdensome. Prior to such discussion, however, please provide specific objections to the above-discussed requests that identify how the requests are overbroad and unduly burdensome, such as by estimating the volume of responsive documents or identifying the method by which responsive documents will be located, or withdraw this objection.

Please call me if you wish to discuss resolution of the discovery matters identified above. Given our current discovery schedule, we would appreciate your prompt reply.

Sincerely,

  
Byron F. Taylor

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**OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS**

**Lisa Madigan**  
ATTORNEY GENERAL

February 2, 2006

Via facsimile (312-853-7036)  
and United States mail

Byron F. Taylor  
Sidley Austin Brown & Wood LLP  
Bank One Plaza  
One South Dearborn Street  
Chicago, Illinois 60603

*Re: Commonwealth Edison Co. ("ComEd") v. Illinois Environmental Protection  
Agency ("IEPA"), PCB 04-215 – discovery issues*

Dear Mr. Taylor:

I am in receipt of your letter dated January 25 concerning our response to ComEd's discovery. It remains our position that the information sought is plainly outside the scope of allowable discovery in this matter. Through this letter, however, I hope to clarify the basis for that position.

As you are aware, the Board ruled in PCB 04-185 (in a decision I assume you would concede applies substantively to this matter as well) that the hearing was to be held exclusively on the administrative record, rather than de novo as Petitioner Midwest Generation had requested. The discovery requests you cite in your letter, to which we declined to respond on relevance grounds, all seek information concerning Agency decisions in unrelated matters that is not in the administrative record, and could not therefore be considered by the hearing examiner.

The fact that discovery is allowed if it is "calculated to lead to relevant information," 35 Ill. Admin. Code 101.616(a), does not somehow automatically expand the scope of discovery to allow gathering of information entirely unconnected to the record, such as 15 years' worth of IEPA decisions in other matters. The only type of inquiry that could be "calculated to lead to relevant information" in this matter – i.e., lead to information in the record – would be questions directed at whether the administrative record as submitted by IEPA was in fact complete. Accordingly, IEPA was willing to

**EXHIBIT**

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respond to requests to identify communications concerning Sierra Club's FOIA request that took place prior to the Agency's final decision, as such communications could arguably be included in the record. However, ComEd presents no reason, nor could it, why information concerning past trade secret determinations in other matters should have been included in the record of this case. Such information is therefore not discoverable.

IEPA's position is fully supported by prior Board rulings. In Oscar Meyer & Co. v. Environmental Protection Agency, PCB 78-14 (June 8, 1978), where the petitioner had sought discovery concerning its *own* prior permit applications in connection with a permit hearing required to be held exclusively on the administrative record, the Board denied the discovery, holding, "How or why the Agency arrived at a different conclusion on the same facts is simply not relevant to the Board determination." The Board held that in a record-only proceeding, discovery is allowable only "to insure that the record filed by the Agency is complete and contains all of the material concerning the permit application that was before the Agency when the denial statement was issued." Similarly, in Owens-Illinois, Inc. v. Environmental Protection Agency, PCB 77-288 (February 2, 1978), also in connection with a hearing held exclusively on the administrative record, the Board held that the petitioner's interrogatories concerning Agency decisions not contained in the record were beyond the scope of permissible discovery because "Agency policy in the granting of other permits is not properly at issue and the discovery sought is not relevant."

In Joliet Sand and Gravel Co. v. Environmental Protection Agency, PCB 86-159, again addressing the question of the scope of discovery in proceedings held exclusively on the administrative record, the Board noted that, while "the Board could properly determine whether the Agency reviewed all facts 'available to' or 'in possession of' the Agency when making its permitting decision, the Board does not construe this holding as authorizing unlimited discovery in permit appeals." It concluded, in disallowing the petitioner's discovery requests, "Were the Agency a natural person, Joliet's discovery requests would amount to an attempt to hold the person upside down, to shake that person, and to see what fell out of the person's pockets, without differentiating between lint and items of value." The same description might well be applied to ComEd's requests at issue here.

Although, for these reasons, Respondent IEPA is clearly not required to respond to the requests for information concerning decisions in unrelated matters, it is worth noting as well that the Agency could not provide that information even if it had to. ComEd requests information concerning trade secret decisions dating back to 1990. Yet IEPA maintains no central recordkeeping for trade secret determinations. Those decisions are made in particular matters as they come up, and relevant information kept in the files of those matters, but no one at the agency keeps track of those decisions in any general or global way. The only way to gather any information at all concerning past trade secret determinations would be anecdotally – *i.e.*, asking current staff if they recall making any such decisions, or whether they recall others making them. This haphazard approach would succeed only in obtaining a fractional, non-random sampling of the more recent decisions, which by its very nature would be useless for drawing larger evidentiary



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conclusions. Thus, ComEd's requests are clearly overbroad and burdensome in addition to being irrelevant.

For these reasons, we must continue to decline to respond either in whole or in part to the discovery requests at issue. However, if you would like to discuss this matter further, please feel free to contact me again.

Very truly yours,



Ann Alexander

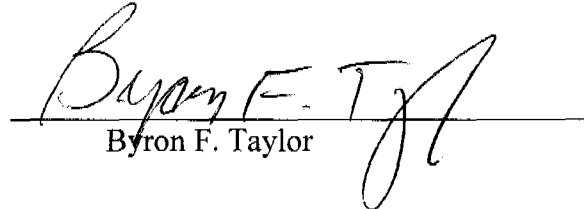
**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served the attached Commonwealth Edison Company's Motion for Interlocutory Appeal of Order Denying Motions to Compel Discovery by U.S. mail on this 31st day of May, 2007 upon the following persons:

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Paula Wheeler  
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Illinois Pollution Control Board  
100 West Randolph  
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Byron F. Taylor