

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.)	

NOTICE OF FILING

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

Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
Office of the Attorney General
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board Midwest Generation EME, LLC's Midwest Generation EME, LLC's Motion for Interlocutory Appeal of Order Denying Motions to Compel Discovery, a copy of which is herewith served upon you.

/s/ Mary Ann Mullin
Mary Ann Mullin

Dated: May 31, 2007

Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606
(847) 295-4318

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MIDWEST GENERATION EME, LLC'S MOTION FOR INTERLOCUTORY APPEAL OF ORDER DENYING MOTIONS TO COMPEL DISCOVERY

Comes Now MIDWEST GENERATION EME, LLC (“Midwest Generation”), through the undersigned counsel and pursuant to 35 Ill. Admin. Code. § 101.518, hereby files this Motion for Interlocutory Appeal of the Corrected Hearing Officer Order denying Midwest Generation’s Motion and 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.

BACKGROUND

1. These proceedings arise 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”) concerning certain Illinois electric generating stations currently owned by Midwest Generation.¹ Midwest

¹ The Continuing Property Record was maintained by Commonwealth Edison Company, the former owner of the electric generating stations.

Generation filed a Petition for Review of this determination, and the Pollution Control Board (“Board”) accepted that Petition on June 17, 2004.

2. Consistent with the Hearing Officer’s Scheduling Order in this matter, Midwest Generation served IEPA with written discovery. Midwest Generation’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. Midwest Generation 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. 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.

(Petitioner’s Initial Interrogatories and Initial Document Requests, Exhibit A).

3. IEPA provided no answers to the above-enumerated interrogatories, 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* (Respondent’s Responses to Interrogatories and Request for Production of Documents at 2, Exhibit B).

4. Midwest Generation conferred with IEPA in an effort to resolve the discovery disputes, but was unsuccessful. (Affidavit of M. Mullin, Ex. C).

5. To obtain IEPA's compliance with discovery, Midwest Generation filed its Motion to Compel and Amended Motion to Compel, seeking responses to these very important discovery requests. Therein, Midwest Generation explained that the discovery requests were highly relevant to Midwest Generation's reasonable expectation of what constituted "emissions data" at the time Midwest Generation drafted its Statement of Justification. Midwest Generation 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, Midwest Generation reminded IEPA of its obligations to respond to appropriate discovery by working with Midwest Generation to narrow the scope of the requests, as opposed to stonewalling Midwest Generation.

6. IEPA filed responses to the Motion to Compel and the Amended Motion to Compel, opposing both motions.

7. On April 26, 2007, the Hearing Officer issued a Corrected Order denying Midwest Generation's Motion to Compel (attached hereto as Exhibit G). Midwest Generation now appeals the entry of the Corrected Order.

JURISDICTION

8. The Board has jurisdiction to hear interlocutory appeals, by motion, from an adverse order of the Hearing Officer. 35 Ill. Admin. Code § 101.518. Section 101.518 does not specify the time period during which that appellate motion must be filed. However, other

regulations within the Code provide a 35-day time period for seeking reconsideration or appeal of an adverse determination. *E.g.*, 35 Ill. Admin. Code §§ 101.520, 105.404. Accordingly, this motion should be deemed timely because it is filed within 35 days of the Corrected Order being appealed, i.e., on or before May 31, 2007.

ARGUMENT

The Requested Discovery is Relevant to the Subject Matter of this Proceeding and Reasonably Calculated to Lead to Evidence Bearing Upon Midwest Generation's Appeal

9. Under Board regulations, “all relevant information and information calculated to lead to relevant information is discoverable.” 35 Ill. Admin. Code § 101.616(a) (emphasis added). “Relevancy is determined by reference to the issues, for generally, something is relevant if it tends to prove or disprove something in issue.” *Bauter v. Reding*, 68 Ill. App. 3d 171, 175 (1979). Discovery is designed to ensure a fair and just proceeding. *See Youle v. Ryan*, 349 Ill. App. 3d 377, 380–81 (2004) (citation omitted). Discovery is particularly warranted when useful facts are in the exclusive possession of the opposing party. *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21, 44-45 (2001) (citation omitted).

10. In this case, Midwest Generation seeks discovery about prior IEPA interpretations of the trade secrets regulation, Section 130, particularly its use of the term “emissions data.” The document at issue in this proceeding — a Commonwealth Edison accounting document — contains no emissions measurements whatsoever. Nonetheless, the IEPA has taken the remarkable position that the CPR is “emissions data” exempt from trade secret protection under Section 130 of the Code, because the information contained therein could be used to enforce compliance with air laws. (C. Romaine 3/17/06 Depo. at 27, Ex. E). IEPA admits that there is no formal guidance on the definition of emissions data, that the guidance to the regulated community comes from the IEPA’s “evolving practice,” as seen in trade secret determinations,

and the IEPA's denial of the CPR is a new evolution in the agency's interpretation of the term "emissions data." (Romaine 3/16/06 Depo. at 64–66, 3/17/06 Depo. at 126, Ex. E). Midwest Generation will argue that this is a new interpretation of the term "emissions data," and the interpretation is so broad and unprincipled that Midwest Generation could not have been on notice that IEPA would consider the CPR "emissions data." Put simply, under this new approach, IEPA now apparently considers any document IEPA chooses to review in its inspections or investigations of a business' compliance with the Environmental Protection Act to be "emissions data," thereby allowing the "emissions data" exception to swallow the rule that trade secret documents submitted to IEPA are entitled to protection from disclosure.

11. Under Illinois precedents, prior agency interpretations of a regulation are indisputably relevant in subsequent proceedings involving that same regulation. An agency ordinarily is constrained by its prior interpretations, and cannot treat subsequent parties differently without substantial justification. *Central Illinois Public Service Co. v. Pollution Control Board*, 165 Ill. App. 3d 354, 366 (1988). "[A]dministrative agencies are bound by their long-standing policies and customs of which affected parties had prior knowledge." *Id.* at 363. "While an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary." *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 506 (Ill. 1988).

12. At the hearing on Midwest Generation's petition, Midwest Generation will be entitled to cross-examine IEPA personnel on the basis for their decision to adopt a novel definition of the term "emissions data." If, in fact, IEPA's expansive interpretation of this term is a departure from prior practice, as Midwest Generation believes, then this fact is powerful evidence that the IEPA's trade secret determination was arbitrary and unsupportable in law. Although documents relating to prior interpretations of the term "emissions data" may not

become part of the record, they nonetheless will substantiate and inform Midwest Generation's cross-examination and refutation of the IEPA's Denial in this case. "Basic notions of fair play require that parties have an opportunity to cross-examine, explain or refute facts which form the basis for an administrative agency's adjudication." *Six-Brothers King Drive Supermarket, Inc. v. Department of Revenue*, 192 Ill. App. 3d 976, 983-94 (1989). Accordingly, discovery of IEPA's prior trade secret rulings and/or interpretations of the term "emissions data" is reasonably calculated to lead to evidence that may be presented at the Board's hearing.

13. The Hearing Officer erred in finding to the contrary. The Hearing Officer concluded that the evidence relating to prior trade secret determinations was irrelevant because "the Board's purpose is not to determine whether the Agency treated other companies differently," and because prior trade secret determinations are not part of the record in this case. (Corrected Order at 5). Both findings are erroneous, and should be rejected. As an initial matter, the Hearing Officer's ruling is contrary to Illinois law. As indicated above, it is the IEPA's duty to interpret regulations consistently for each party before it. If IEPA has applied a different standard to Midwest Generation than it applied to other parties, than the Board likely will be compelled to sustain Midwest Generation's appeal. *See Alton Packaging Corp. v. Pollution Control Board*, 146 Ill. App. 3d 1090, 1094 (1986).

14. The Hearing Officer also incorrectly assumed that material outside the record is not capable of being relied upon, or introduced for some limited purpose, at the Board hearing on Midwest Generation's appeal. This assumption was erroneous for multiple reasons. First, Midwest Generation is entitled to cross-examine IEPA's representatives about their basis for denying Midwest Generation's trade secret claims in light of prior, similar claims that apparently were sustained. *Six-Brothers*, 192 Ill. App. 3d at 983. Due process requires that a party's right to cross-examination, be meaningful, i.e., informed by appropriate facts and circumstances. *See*

Northern State Home Builders Ass'n, Inc. v. County of Du Page, 165 Ill.2d 25, 45 (Ill. 1995); *Midwest Generation v. IEPA*, No. 04-216, at 21 (PCB June 17, 2004). Without the requested discovery, Midwest Generation's cross-examination of IEPA at the Board hearing will be meaningless: Midwest Generation's counsel will ask about prior interpretations of "emissions data," and IEPA personnel, having successfully resisted the demand to review and disclose their prior interpretations, will respond that they don't know the answer to this essential question. Second, evidence of inconsistent prior rulings can be used for impeachment purposes, and even admitted for the limited purpose of constituting a prior inconsistent statement. 35 Ill. Admin. Code § 101.626(f). Third, the Code specifically directs the Hearing Officer to admit evidence based on "a good faith argument as to the interpretation of substantive law." 35 Ill. Admin Code § 101.626(b). That is the case here. Midwest Generation contends that the trade secret regulation, Section 130, by exempting "emissions data" from protection, means exactly what it says, while IEPA contends that it means something broader. Under the Code, Midwest Generation is entitled to present evidence of the reason for its belief that IEPA has misinterpreted Section 130. Finally, Midwest Generation is permitted to supplement the record with "new information" not available to Midwest Generation at the time of the original trade secret determination, particularly when that information supports the notion that IEPA's decision was fundamentally unfair, and is thus unlikely to be included by the IEPA in the written record.² *Land & Lakes v. Illinois Pollution Control Board*, 319 Ill. App. 3d 41, 48 (2000); *see also*

² That concern is particularly warranted in this case. In their depositions, IEPA employees admitted that a number of the materials later inserted into the "record" were not specifically reviewed by the Bureau of Air in reaching its trade secret determination. (Pressnell 3/15/06 Depo. at 153-155, Ex. D; J. Armitage 3/16/06 Depo. at 61-62, Ex. F). It is troubling that the IEPA has included in the record materials it did not review in issuing the Denial, while simultaneously arguing that prior interpretations of the term "emissions data," which the IEPA is required to consider, are not even discoverable.

Midwest Generation v. IEPA, No. 04-216, at 21–22 (PCB June 17, 2004). IEPA has exclusive knowledge about its prior interpretations and rulings. The fact that the requested information lies exclusively in the custody of the opposing party is, once again, a strong argument in favor of permitting discovery. *Burger*, 198 Ill. 2d at 44-45. If the requested discovery proves that IEPA has abruptly changed course without substantial justification, then Midwest Generation will be able to supplement the record with this new information, and such information will be fully admissible at the hearing on Midwest Generation’s appeal.

To the Extent the Requested Discovery is Unduly Burdensome, IEPA Should Offer a Subset of the Known Materials for Inspection

15. The Hearing Officer further found that it would be unduly burdensome for the IEPA to comply with Midwest Generation’s discovery requests, because trade secret determinations are catalogued by site, rather than by subject matter. The Hearing Officer expressed particular concern about the prospect of the IEPA searching all of its files for the last 17 years. (Exhibit G at 5).

16. These concerns are misplaced. Midwest Generation’s discovery requests were understandably broad because it lacks IEPA’s full knowledge of prior trade secret determinations. Midwest Generation has repeatedly offered to meet and confer with IEPA to narrow its requests to a few known determinations, as a starting point. (Mullin Aff. ¶ 6, Ex. C). IEPA, unfortunately, has suggested that Midwest Generation will be satisfied only with a complete review of every project over the past two decades. This is not true. When a party’s discovery requests, tendered in good faith, turn out to be overbroad or unduly burdensome, the proper approach is to respond with a subset of known information that is responsive and reasonably attainable. The responding party should not simply refuse to comply with the discovery request altogether. *See Welton v. Ambrose*, 351 Ill. App. 3d 627 (2004).

17. “To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of discovery rules.” *Alliance to End Repression v. Rochford*, 75 F.R.D. 441, 447 (N.D. Ill. 1977) (citation omitted). Nonetheless, as contemplated by *Welton*, there is a middle path through the parties’ positions, which IEPA pretends does not exist, and the Hearing Officer erred by refusing to consider. As Midwest Generation pointed out in the proceedings below, IEPA employees deposed in these proceedings have identified particular claimants whom they believe may have been involved in trade secret proceedings before the agency. (C. Romaine 3/16/06 Depo. at 25–28, Ex. E; C. Pressnall 3/15/06 Depo. at 31–33, 107, Ex. D). Another employee explained that trade secret determinations are tracked by source. (J. Armitage 3/15/06 Depo. at 23, Ex. F).³ It should not be unduly burdensome for the IEPA to review and produce the files of a few, specified sources within the Bureau of Air for trade secret determinations made in those cases. Midwest Generation is willing to accept this production as a starting point, and has been for over a year.

CONCLUSION

18. It is time for the IEPA to stop obstructing Midwest Generation’s reasonable investigation into past interpretations of the trade secrets regulation, and particularly the term “emissions data.” Without this information, the Board cannot determine if the IEPA’s refusal to confer trade secret protection on the CPR at issue on this appeal constituted an arbitrary

³ Although IEPA has been critical of attempts to rely on the memories of its own employees, it is fair to assume that cases still in the mind of these IEPA employees at the time of their depositions likely also would have been in their mind at the time they decided to deny trade secret protection to Midwest Generation’s continuing property record. Furthermore, being supported by sworn testimony, an investigation of the trade secret determinations made in the identified cases is reasonably targeted, and thereby also reasonably calculated to lead to the discovery of pertinent evidence.

departure from past practice, as Midwest Generation and its counsel in good faith believe. The Hearing Officer erred by misunderstanding the significance of the information sought, and by accepting without question IEPA's exaggerated claims of undue burden, without recognizing that a small subset of the materials could be produced in a manner that would still advance the merits of this appeal, and ensure that the ends of justice are served. The Board should reverse the Corrected Order of the Hearing Officer, and direct that the IEPA produce the materials requested for the sources identified by the IEPA deponents.

WHEREFORE, Midwest Generation 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 Midwest Generation's discovery requests.

Dated: May 31, 2007

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: /s/ Mary Ann Mullin

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Attorney for
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EXHIBIT A

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.

5. "Midwest Generation Determination" means the April 23, 2004, letter from Chris Pressnall of IEPA to Andrew N. Sawula of Schiff Hardin LLP (f/k/a Schiff Hardin &

Waite) regarding Midwest Generation's trade secret justification, attached hereto as Exhibit 1.

6. "ComEd Determination" means the April 23, 2004, letter from Chris Pressnall of IEPA to Byron Taylor of Sidley Austin Brown & Wood, attached hereto as Exhibit 2.

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

8. "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.

9. "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.

10. "Midwest Generation's Statement of Justification" means the March 11, 2004 letter from Andrew N. Sawula to Chris Pressnall, regarding Midwest Generation's claims that certain information submitted to IEPA by Commonwealth Edison constitutes trade secrets, attached hereto as Exhibit 3.

11. "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.

12. 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.

13. 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.

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

15. "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.

16. "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.

17. "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.

18. "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.

19. "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,

20. "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.

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

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 Midwest Generation Determination or the ComEd Determination, including those present for any discussions of the Midwest Generation or 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 04-185, IPCB 04-215, 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 04-185, IPCB 04-215, IPCB 0-216 or related to the Sierra Club's FOIA Requests.

7. Identify and describe all communications between IEPA, or the Illinois Attorney General, and the Sierra Club, relating to Midwest Generation's or

Commonwealth Edison's compliance with the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq., or the Clean Air Act, 42 U.S.C. § 7401 et seq.

8. Describe in detail the reasons you relied on to support the following statement in the Midwest Generation 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."

9. 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 general public knowledge.

10. Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR lacks competitive value.

11. Identify the specific information in the Record, if any, that supports your claim, if any, that the CPR constitutes emission data.

12. If you contend that the CPR constitutes emissions data, describe in detail the reasons supporting this contention.

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

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.

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.

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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.

5. "Midwest Generation Determination" means the April 23, 2004, letter from Chris Pressnall of IEPA to Andrew N. Sawula of Schiff Hardin LLP (f/k/a Schiff Hardin & Waite) regarding Midwest Generation's trade secret justification, attached hereto as Exhibit 1.

6. "ComEd Determination" means the April 23, 2004, letter from Chris Pressnall of IEPA to Byron Taylor of Sidley Austin Brown & Wood, attached hereto as Exhibit 2.

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10. "Midwest Generation's Statement of Justification" means the March 11, 2004 letter from Andrew N. Sawula to Chris Pressnall, regarding Midwest Generation's claims that certain information submitted to IEPA by Commonwealth Edison constitutes trade secrets, attached hereto as Exhibit 3.

11. "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.

12. 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.

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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;
 - (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 (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 Midwest Generation 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 Midwest Generation or 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 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 Midwest Generation Determination or the ComEd Determination, including all documents reflecting communications relating to these determinations.

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 04-185, IPCB 04-215, 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 04-185, IPCB 04-215, IPCB 04-216 or the Sierra Club's FOIA Requests.

9. All documents relating to each communication between IEPA, or the Illinois Attorney General, and the Sierra Club, relating to Midwest Generation's or Commonwealth Edison's compliance with the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq., or the Clean Air Act, 42 U.S.C. § 7401 et seq.

CH2\1307142.1

EXHIBIT B



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 22, 2005

Via overnight mail

Sheldon A. Zabel
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

Re: PCB 4-216

Dear Mr. Zabel:

Enclosed please find a copy of Respondent's Response to Midwest Generation EME, LLC'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 above the printed name.

Ann Alexander

Enc.

cc: Mary A. Mullin ✓
Andrew N. Sawula ✓

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by LISA MADIGAN, Attorney General of the State of Illinois, and in response to Petitioner MIDWEST GENERATION EME, LLC's Initial Request for the Production of Documents ("Document Requests"), answers and objects as follows:

I. GENERAL OBJECTIONS

A. Respondent objects to the Document Requests 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.

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 Midwest Generation 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 Midwest Generation or 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

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 Midwest Generation determination or 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 communications relating to the Midwest Generation determination or 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 04-185, IPCB 04-215, 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 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 04-185, IPCB 04-215, IPCB 04-216 or the Sierra Club's FOIA requests prior to the date of the Com Ed and Midwest Generation determinations.

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 04-185, IPCB 04-215, 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 04-185, IPCB 04-215, IPCB 04-216 or the Sierra Club's FOIA requests prior to the date of the Com Ed and Midwest Generation determinations.

Document Request No. 9: All documents relating to each communication between IEPA, or the Illinois Attorney General, and the Sierra Club, relating to Midwest Generation's or Commonwealth Edison's compliance with the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq., or the Clean Air Act, 42 U.S.C. § 7401 et seq.

Response to Document Request No. 9:

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

Dated: Chicago, Illinois
November 28, 2005

Respectfully submitted,

LISA MADIGAN, Attorney General of the
State of Illinois

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

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

CERTIFICATE OF SERVICE


I hereby certify that I did on the 22nd day of November, 2005 send by overnight mail a copy of Respondent's Response to Petitioner Midwest Generation EME, LLC's Initial Request for the Production of Documents, to:

Sheldon A. Zabel
Mary A. Mullin
Andrew N. Sawula
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

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
188 West Randolph Street, Suite 2000
Paula Becker Wheeler, Assistant Attorney General
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.

~~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.~~

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/Dynegy 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.



**SIERRA
CLUB**
FOUNDED 1892

MIDWEST OFFICE - Chicago

This request is eligible for a fee waiver for the following reasons:

1. Request concerns identifiable operations or activities of government.

The Sierra Club's request relates to the IEPA oversight and regulation of coal-fired power plants in Illinois and possible violations of federal and state clean air act New Source Review requirements. The request includes information about the compliance history of the facilities in question and the IEPA's response to ongoing compliance issues.

2. Disclosure likely to contribute to public understanding of government operations.

The Sierra Club is seeking these records because such records, including their compliance with all applicable requirements, and the IEPA's role in ensuring compliance, will contribute to the public's understanding of IEPA's operations. I am not aware of these records being already in the public domain.

3. Disclosure will not serve Sierra Club's commercial interests.

Sierra Club has no commercial interest in the requested records. Sierra Club is a non-profit organization.

4. The identifiable public interest in disclosure outweighs any commercial interest.

The public interest in disclosing how the IEPA has enforced regulations on this large source of air pollution far outweighs any commercial interest in these records and Sierra Club is a non-profit organization.

Please let me know if you need any additional information in order to grant Sierra Club a fee waiver for the information I requested. Thank you for your time and attention to this matter.

Sincerely,


Adam Quader
Sierra Club

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.

and phone discussion summaries, etc. regarding PSD/NSR/NSPS applicability for any modification between 1975 and present.

8. Provide copies of all life extension/life optimization/reliability enhancement, etc. studies, evaluations, assessments, reports related to extending the life of or increasing the reliability of any generating unit since 1/1/75.
9. Provide copies of original design and current boiler cross-sectional diagrams.
10. Provide a list of the dates of replacement of pulverizers, cyclones, economizers, reheaters and superheaters for each operating unit.



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.

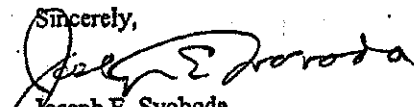
On November 10, 2003, the Illinois EPA received Midwest Generation EME, LLC's ("Midwest Generation") response to the USEPA Request for Information pursuant to Section 114 of the Clean Air Act dated February 13, 2003. Midwest Generation has claimed a considerable amount of the information in the response 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.

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

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>

RECEIVED
FEB 13 2004
IEPA-DAPC-SPFLD.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by LISA MADIGAN, Attorney General of the State of Illinois, and in response to Petitioner MIDWEST GENERATION EME, LLC's Initial Interrogatories, answers and objects as follows:

L. 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.

determinations, in particular the basis for IEPA's conclusion that Com Ed and/or Midwest Generation 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.

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 04-185, IPCB 04-215, 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.

2. Letter dated November 13, 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 and Midwest Generation determinations.

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 04-185, IPCB 04-215, 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 and Midwest Generation determinations.

Interrogatory No. 7: Identify and describe all communications between IEPA, or the Illinois Attorney General, and the Sierra Club, relating to Midwest Generation's or Commonwealth Edison's compliance with the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq., or the Clean Air Act, 42 U.S.C. § 7402 et seq.

Response to Interrogatory No. 7:

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

Interrogatory No. 8: Describe in detail the reasons you relied on to support the following statement in the Midwest Generation 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. 8:

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 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 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. 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.

Interrogatory No. 9: 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. 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 lacks competitive value.

Response to Interrogatory No. 10:

Please see response to Interrogatory No. 8.

Interrogatory No. 11: Identify the specific information in the record, if any, that supports your claim, if any, that the CPR constitutes emission data.

Response to Interrogatory No. 11:

Please see response to Interrogatory No. 12. The status of the CPR 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 itself, record documents Bates stamped 869 – 1527 and 1543 – 1554.

Interrogatory No. 12: If you contend that the CPR constitutes emissions data, describe in detail the reasons supporting this contention.

Response to Interrogatory No. 12:

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 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. 13: 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. 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

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 2001
Chicago, Illinois 60601
312-814-3772
312-814-2347 (fax)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC
Petitioner

)
)
)
)
)
)
)

PCB 04-216
Trade Secret Appeal

v.

Illinois Environmental Protection Agency,
Respondent

CERTIFICATE OF SERVICE

I hereby certify that I did on the 22nd day of November, 2005 send by overnight mail a copy of Respondent's Response to Petitioner Midwest Generation EME, LLC's

Initial Interrogatories, to:

Sheldon A. Zabel
Mary A. Mullin
Andrew N. Sawula
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

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

EXHIBIT C

grounds for its objections to the Disputed Discovery: the Disputed Discovery sought "information that is irrelevant to (the) proceeding and not reasonably calculated to lead to the discovery of admissible evidence", the Disputed Discovery was overbroad and burdensome, and the Disputed Discovery was vague. See Respondent's Response to Initial Interrogatories and Initial Document Requests, attached to the accompanying Motion to Compel.

4. On or about January 5, 2006, I called IEPA's counsel, Ann Alexander, in an attempt to resolve this discovery issue. Ms. Alexander stated that Respondent would not produce documents and information in response to the Disputed Discovery because Respondent believed the information was outside the scope of discovery. Ms. Alexander stated that Respondent's primary objection to the Disputed Discovery was to the perceived lack of relevance of the material. Ms. Alexander and I discussed our relative positions on the relevancy and discoverability of the Disputed Discovery, but were unable to resolve our differences or reach a compromise.

5. When asked for the basis for the objection that the discovery was overbroad and burdensome, Ms. Alexander stated that the trade secret determinations were not kept in a central file. Ms. Alexander opined that looking for the past trade secret determinations was fruitless because she believed they were irrelevant and therefore not discoverable. Ms. Alexander acknowledged that other than finding out the past trade secret determinations were not kept in a central file, she took no actions to identify or collect the determinations.

6. In response to Respondent's contention that the past determinations are difficult to find, I suggested we attempt to narrow the scope of the request. Ms. Alexander indicated that this exercise would be fruitless because she believed the Disputed Discovery was outside the scope of discovery and Respondent did not intend to produce any of the Disputed Discovery.

7. To date, Respondent has not produced any of the Disputed Discovery.

By: Mary Ann Mulca

STATE OF ILLINOIS

)

) ss.

COUNTY OF COOK

)

Subscribed and sworn to before me
this 16th day of February, 2006.

Lana Teninga
Notary Public

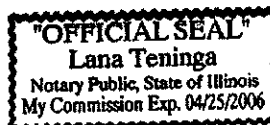


EXHIBIT D

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Christopher R. Pressnall

Commonwealth Edison/Midwest Generation v. IEPA

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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 R.
 18 PRESSNALL, 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 10:12 o'clock
 22 A.M., on March 15, 2006, at 1021 North Grand
 23 Avenue East, Springfield, Sangamon County,
 24 Illinois, pursuant to subpoena.

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 24 hrs (217) 788-2835 Fax (217) 788-2838
 1-800-248-2835

Page 2

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

Page 3

1 I N D E X
 2 DEPONENT PAGE NUMBER
 3 Christopher Pressnall
 4 Examination by Ms. Mullin 5
 5 Examination by Mr. Taylor 113
 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 Numbers
 15 2 and 3 28
 16 Exhibit Number 4 40
 17 Exhibit Number 5 41
 18 Exhibit Number 6 62
 19 Exhibit Number 7 64
 20 Exhibit Number 8 68
 21 Exhibit Number 9 79
 22 Exhibit A 114
 23 Exhibit B 118
 24 Exhibit C 119
 Exhibit D 130
 Exhibit E 153

Page 4

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

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

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

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

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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 1828
 5 regulations?
 6 A May I look at the regulation?
 7 Q Sure.
 8 A As far as determinations made under the
 9 part 1828 regulations, I've probably made hundreds
 10 of them.
 11 Q Are these formal determinations under
 12 these regulations?
 13 A Again, I think--and it's probably my
 14 fault--but I'm getting hinged up on
 15 determinations. When I say I've made hundreds, in
 16 looking at these regulations as I just did, it of
 17 course contains the FOIA exemptions. If, for
 18 instance, somebody is requesting a file broadly
 19 and my attorney notes are in that file, then I
 20 will make a determination that we're not
 21 disclosing them; they are exempt from disclosure.
 22 I will put that in the cover letter and
 23 tell them they have a right to appeal. There
 24 could be opinions expressed, there could be draft

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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 definition of emissions data in the federal rules,
2 is that right?

3 A Yes.

4 Q Would those be the rules at 40 CFR part
5 2.103?

6 MS. ALEXANDER: If I can just interject,
7 Annie, you're aware that you have about five
8 minutes of time left?

9 MS. MULLIN: Yes. Sheldon's keeping my time.

10 MR. ZABEL: I have a little more than that.

11 MS. WHEELER: I've got almost 10.

12 MS. ALEXANDER: Okay.

13 MR. ZABEL: Yes. That's about what I have too
14 because we had a break in the morning.

15 MS. MULLIN: Q Would they be the rules at
16 40 CFR part 2?

17 A I can't say exactly. If--I tend to
18 remember things--

19 Q Here we are. 40 CFR part 2.301 sub
20 (a)(2)(i) emissions data.

21 A Certainly that's what this is, but the
22 way I remember things is very visually, so I can
23 remember words on a page and I don't necessarily
24 tie it to any particular section. And

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1 furthermore, the format seems a little bit
2 different. It could maybe when it was originally
3 published and there was more discussion of it.

4 Q So what I'm trying to get at is you
5 referred to a discussion of the rules in the CFR.
6 And I'm trying to figure out what that discussion
7 is. Is it--?

8 A A discussion. What I was saying was that
9 in looking at a trade secret claim for, say,
10 Fleischmann's vinegar, the process I would go
11 through if it came to me and said all right,
12 they're claiming this as trade secret, is it trade
13 or is it emissions data, which trumps trade secret
14 and must be released, then I would then look at
15 federal definition of emissions data, I'd look
16 at--it's just kind of the thought process I would
17 go through. I don't know if that's the particular
18 document itself that I referred to or a different
19 version of it.

20 Q Are you aware of any IEPA determination
21 other than the determination in the present matter
22 that the cost of pieces of equipment constitute
23 emissions data?

24 A No.

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1 Q Are you aware of any IEPA determination
2 other than the determination in the present matter
3 that the in-service date of equipment constitutes
4 emissions data?

5 A No.

6 Q Are you aware of any IEPA determination
7 other than the determination in the present matter
8 that descriptions of maintenance projects at a
9 facility constitute emissions data?

10 A No.

11 Q Are you aware of any IEPA determination
12 that accounting records constitute emissions data?

13 A No.

14 Q Does, is it possible to calculate
15 emissions from the various plants, the various
16 Midwest Generation plants? Is it possible to
17 calculate emissions from those plants using the
18 CPR?

19 A I'm not qualified to answer that
20 question.

21 Q Who would be?

22 A If anyone would be, it would be an
23 engineer that regularly works with this type of
24 information to calculate emissions.

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1 Q Would that be Chris Romaine?

2 A Could be Chris Romaine, yeah.

3 Q Did you assist in preparing Donald Sutton
4 or Debra Williams in their testimony before the
5 Illinois Pollution Control Board in the 2000
6 rule-making on the trade secret regulation?

7 A No.

8 Q Do you know who did?

9 A No.

10 MS. MULLIN: Okay. Let me just take a quick
11 break.

12 (Whereupon a short recess
13 was taken at 2:40 p.m.)

14 MS. MULLIN: Q Did IEPA determine that the
15 CPR is emissions data?

16 A I think--. It's my understanding yes, we
17 did.

18 Q Okay. And what was the basis of that
19 determination?

20 A It is my understanding that that decision
21 was made based on the potential for new source
22 review applicability.

23 Q Why would the potential for new source
24 review applicability make the CPR emissions data?

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1 A Again, it's my understanding that certain
2 of those replacement equipment changeout projects
3 could potentially lead to an increase in emissions
4 or be relevant as to the particular emissions
5 limitations that might apply to the facility at
6 question. Therefore, it would constitute
7 emissions data.
8 Q Is there a different definition of
9 emissions data in the NSR context than in other
10 contexts?
11 A I don't know.
12 Q If information has NSR implications,
13 would it automatically be considered emissions
14 data?
15 A I don't really know.
16 MS. MULLIN: Did you make the determination
17 that the CPR--well, never mind. Strike that.
18 I think that's all I have.
19 EXAMINATION
20 BY MR. TAYLOR:
21 Q Mr. Pressnall, my name's Byron Taylor,
22 and you've been deposed by counsel for Midwest
23 Gen. I am counsel for Commonwealth Edison
24 Company. Were you aware that there are two cases

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1 that you're being deposed under today?
2 A Yes, I was.
3 Q Okay.
4 (Whereupon a document
5 was duly marked for
6 purposes of
7 identification as
8 Exhibit A as of this
9 date.)
10 MR. TAYLOR: Q You've been shown what's been
11 marked as Exhibit A. Have you seen this document
12 before?
13 A I don't believe I have.
14 Q Are you aware that we issued a subpoena
15 for your testimony today?
16 A Yes.
17 Q Okay. Does that appear to be a copy of
18 that subpoena?
19 A Yes, it does.
20 Q As we get started, I'd like to agree that
21 you agreed with Ms. Mullin earlier about a set of
22 ground rules to generally answer the questions
23 with oral answers to the extent possible. And I
24 know it's been a long day, so I just want to try

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1 to remind you to do that as we move forward.
2 A Okay.
3 Q Can you agree to those same set of ground
4 rules?
5 A Yes. I agree.
6 Q I want to start with one of the earlier
7 exhibits, Exhibit 5. There's a letter attached to
8 Exhibit 5 from the Sierra Club dated October 27,
9 2003?
10 A Yes.
11 Q And you reviewed this letter earlier.
12 Did IEPA receive any other records relating to
13 coal-fired generating facilities pursuant to a 114
14 information request other than what was submitted
15 by Midwest Gen and what was submitted by
16 Commonwealth Edison Company?
17 A Could you repeat the question?
18 Q I will back up. This letter in the
19 second paragraph, the Sierra Club has filed a FOIA
20 request for all records relating to any coal-fired
21 generating facilities. Do you see that in the
22 second paragraph?
23 A Yes, I do.
24 Q And I'm asking you to your knowledge are

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1 there any records that the agency has received
2 other than the Midwest Gen records, the ComEd
3 records, and in this paragraph there's an
4 exemption for the Illinois Power/Dynegy Baldwin
5 plant?
6 A I can't recall.
7 Q So you're not going through this same
8 exercise regarding trade secrets with respect to
9 any other utility that you're aware of?
10 A No.
11 Q About three pages later in that same
12 Exhibit 5 is an e-mail from Bruce Nilles to
13 Marilyn Clardy dated February 12, 2004. Do you
14 see that?
15 A Yes, I do.
16 Q Is this the Freedom of Information Act
17 request that has led to the determinations about
18 the ComEd filed information?
19 A I don't believe so.
20 Q Is there another Freedom of Information
21 Act request from the Sierra Club?
22 A The one we were just referring to.
23 October 27, 2003.
24 Q Also in this Exhibit 5 there's a letter

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1 statements of justification as a model or a
2 yardstick to compare against?
3 A No. Not that I'm aware of.
4 MR. TAYLOR: Off the record.
5 (Discussion off the record.)
6 (Whereupon a document
7 was duly marked for
8 purposes of
9 identification as
10 Exhibit E as of this
11 date.)
12 MR. TAYLOR: Q Mr. Pressnall, I'm going to
13 ask you actually about a series of documents
14 that's been marked Exhibit E. Can you take a
15 quick look at that, and you do not have to read
16 every page.
17 A Okay.
18 Q And I will represent to you that these
19 are copies of various documents that are in the
20 administrative record and bear the Bates label
21 00869 through 01527. Can you describe generally
22 to me what those are?
23 A The first document in the series is a
24 complaint filed in a case that the United States

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1 of America filed against Duke Energy Corporation
2 in the Middle District of North Carolina. Second
3 document is an opinion in that same case with the
4 United States against Duke Energy but now with an
5 intervenor and a plaintiff. Then there's an order
6 and judgment in that same case. There's an
7 opinion and order in the United States of America
8 versus Ohio Edison Company in the Southern
9 District of Ohio, Eastern Division. And the last
10 document is a new source review workshop manual.
11 Q Are these records that you reviewed prior
12 to the issuance of the trade secret determination
13 in this case?
14 A I don't recall reviewing these, no.
15 Q Do you know who added them to the record?
16 A I know, I know who put--again, I know who
17 put together the original record--Sally Carter and
18 Rob Layman--and I believe, I am aware that these
19 documents were put into the record in the 185
20 matter and thus probably got carried over to the
21 instant matter and its record. I don't know who,
22 if anyone, reviewed these in preparation or in
23 rendering their decision in the determination,
24 trade secret determination.

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1 Q So you mentioned that you did not review
2 the documents. Do you recall discussing these
3 documents with Mr. Romaine or Ms. Armitage prior
4 to issuance of the determination in the 215
5 matter?
6 A Not specifically. I'm aware of these
7 documents generally speaking having to do with new
8 source review, the Illinois Power case. And
9 again, Chris Romaine is the new source review, for
10 lack of a better term, guru, and I really didn't
11 have much input on the NSR portion of this, so
12 thus, I wouldn't have reviewed these documents.
13 And nor did I get really too much into the
14 substance of any of this with Chris Romaine.
15 Q You mentioned Illinois Power. What does
16 that have to do with this set of documents?
17 A It was a reference simply to the fact
18 that I attended some depositions in that matter,
19 some of these documents were at issue in that
20 matter, and therefore, they are familiar to me.
21 Q Does the Illinois Power case have
22 anything to do with the Commonwealth Edison trade
23 secret appeal in case caption 215?
24 A Not specifically, no.

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1 I, CHRISTOPHER R. PRESSNALL, having read the
2 above and foregoing, find the same to be true and
3 correct with the following additions and/or
4 corrections, if any:
5 Page _____ Line _____ Change:
6 Page _____ Line _____ Change:
7 Page _____ Line _____ Change:
8
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22
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24 Christopher R. Pressnall (03/15/06) DATE

EXHIBIT E

3/16/06

Midwest/Commonwealth v. IEPA

Christopher P. Romaine

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

BALDWIN REPORTING & LEGAL-VISUAL SERVICES
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1-800-248-2835

Page 2

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

Page 3

1 I N D E X
2 DEPONENT PAGE NUMBER
3 Christopher Romaine
4 Examination by Ms. Mullin 5
5
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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

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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
18 That all requirements of the rules and
19 regulations promulgated under the Pollution
20 Control Board of the State of Illinois and the
21 Rules of the Supreme Court as to dedimus, are
22 expressly waived;
23
24 That any objections as to competency,
25 materiality or relevancy are hereby reserved, but
26 any objection as to the form of question is waived
27 unless specifically noted;
28 That the deposition, or any parts thereof
29 may be used for any purpose for which discovery
30 depositions are competent, by any of the parties
31 hereto, without foundation proof;
32
33 That any party hereto may be furnished
34 copies of the deposition at his or her own
35 expense.

3/16/06

Midwest/Commonwealth v. IEPA

Christopher P. Romaine

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1 Q Can you identify the emission data in
 2 permit applications? Are those operating permit
 3 applications?
 4 A It could be a construction permit
 5 application or an operating permit application.
 6 Q In an operating permit application, what
 7 information would be considered emissions data?
 8 A Well, the application identifies specific
 9 emission units at the source with some degree of
 10 specificity, it provides information on typical
 11 emissions, maximum emissions, so it provides data
 12 on actual emissions. It also provides data on the
 13 applicable rules that an emission unit is subject
 14 to with some information on what the unit is
 15 allowed to emit.
 16 Q The application provides information
 17 about the applicable rules that the unit is
 18 subject to?
 19 A That is correct.
 20 Q And so would the statement of applicable
 21 rules be considered emissions data?
 22 A I haven't thought about that question
 23 before. I'd have to think about it before I
 24 answer. I'd like to review the actual definitions

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1 of emission data before I answered it. I think
 2 the answer should be yes, but again, not having
 3 the actual definitions in front of me, the
 4 definitions talk about information from which
 5 allowable emissions can be determined.
 6 I'm not sure if you read that literally
 7 that simply a statement of the allowable emission
 8 rules would per se be emission data. I don't
 9 think it would be something that would be entitled
 10 to trade secret status, but it almost goes to
 11 being a category of data that is beyond what
 12 people traditionally think of when they're saying
 13 emission data.
 14 Q What do people think of traditionally
 15 when they're saying emissions data?
 16 A Well, they think of actual emissions and
 17 the information that's needed to determine actual
 18 emissions. They're also thinking about data
 19 that's needed to determine what a source is
 20 allowed to emit. And what I was just pondering
 21 upon was if you know directly what rules apply, is
 22 that sufficient or do you need to know further
 23 information or what degree of information do you
 24 need to know to be able to determine what rules

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1 apply.
 2 Q Let's go back an answer. You said there
 3 are two things that are generally thought of as
 4 emissions data. And the first thing is actual
 5 emissions?
 6 A Well, actually I should back up and say
 7 there are really three things. Information to
 8 identify which unit you're talking about and then
 9 information on actual emissions and information on
 10 what the unit's allowed to emit.
 11 Q Earlier when you were referring to the
 12 definition of emissions data, were you referring
 13 to the definition of emissions data that is in
 14 35 Illinois Administrative Code part 130?
 15 A Yes.
 16 Q Section 110?
 17 A But not to the exclusion of the federal
 18 definition of emission data.
 19 Q And is that the federal definition that's
 20 found in 40 CFR part 2?
 21 A Yes.
 22 Q What do you see as a distinction between
 23 those two definitions of emissions data?
 24 A I don't have any defined distinction. I

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1 have to check it periodically to see what I'm
 2 dealing with to see if the wording is slightly
 3 different.
 4 Q Is there any agency guidance on the
 5 definition of emissions data?
 6 A I guess what do you mean by guidance?
 7 Q Is there any either formal or informal
 8 interpretation of the term emissions data that the
 9 agency uses?
 10 A I think there is an interpretation of the
 11 term that's established by practice and evolving
 12 practice.
 13 Q So is the agency's interpretation of the
 14 term emissions data evolving?
 15 A I wouldn't say it's evolving. It's in
 16 the sense of how rules evolve by precedent. So I
 17 wouldn't say that's an interpretation. It's our
 18 understanding of the circumstances that we've
 19 dealt with grow over time so we have more points
 20 of reference to make subsequent determinations.
 21 Q And would the precedent for the agency's
 22 interpretation of emissions data be found in trade
 23 secret determinations?
 24 A As a general matter, yes.

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Christopher P. Romaine

Midwest/Commonwealth v. IEPA

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1 Q Is there any other precedent, are there
2 any other, is there any other source of precedent
3 for the agency's interpretation of the term
4 emissions data?
5 A I'm not aware of one.
6 (Whereupon a document
7 was duly marked for
8 purposes of
9 identification as
10 Exhibit Number 6 as of
11 this date.)
12 MS. MULLIN: Q Other than the agency's
13 practice in regards to their interpretation of the
14 term emissions data, is there any written guidance
15 as to what this term means?
16 A I'm not aware of any written guidance. I
17 don't know if you'd say it's interpretation. It's
18 applying a definition and making determinations
19 over time with subsequent determinations being
20 taken, you know, building upon previous
21 determinations.
22 Q I'm handing you Exhibit Number 6.
23 Exhibit Number 6 is the printout from IEPA's web
24 site. Could you turn your attention to the second

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1 page in that exhibit and read where it says
2 emission data fields. Could you read out loud the
3 sentence that begins with specific data fields.
4 A Specific data fields related to emission
5 parameters and facility identification which the
6 IEPA presently considers to constitute emission
7 data are listed in the following paragraphs.
8 Emission parameters.
9 Q You can read the rest of that--if you can
10 read the emission parameters listed 1 through 16
11 below. You can just read that to yourself.
12 Do you think that this web site
13 accurately reflects the IEPA's current
14 interpretation of the term emissions data?
15 A Not for the purpose of the proceeding
16 that we're dealing with.
17 Q Look above the definition of the term
18 emissions data above emissions data field. If you
19 can read that to yourself. Does that definition
20 of emissions data represent IEPA's current
21 interpretation of the term emissions data?
22 A I don't think there's any interpretation
23 in this statement. I'm curious how closely it
24 reflects the statutory def--or the regulatory

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1 definition of the term emission data. It's
2 interesting that that definition under emission
3 data is inconsistent with the subsequent
4 statement, but look for you to pursue that.
5 Q You indicated in one of your previous
6 responses that the term emissions data fields--I
7 forget how you said it. I think you said that it
8 doesn't represent IEPA's current interpretation as
9 related to the trade secret matter at issue?
10 A That's correct.
11 Q Has the IEPA's interpretation evolved
12 since this information was put on the web site?
13 A I don't think so. My understanding, this
14 information that's provided, these are part of
15 instructions for completing annual emission
16 reports which is not the context in which we're
17 having a disagreement about what constitutes
18 emission data.
19 Q Is there any other guidance whether it be
20 IEPA guidance or other guidance that IEPA relies
21 upon in understanding the term emissions data?
22 A Nothing comes to mind.
23 Q In a permit application, what types of
24 information would be information regarding what a

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1 unit is allowed to emit?
2 A Well, ignoring sort of the issue of the
3 amount of emissions, but information that
4 identifies the type of pollutants that are
5 emitted, information that identifies the types of
6 regulations or regulatory requirements that apply
7 to those emissions.
8 In terms of the quantitative evaluation,
9 it's information that's provided that allows the
10 allowable emissions to be calculated or determined
11 if calculations are necessary. It is also
12 information that allows the actual emissions to be
13 determined if those emissions have been determined
14 by a means that requires some form of calculation
15 from subsidiary data.
16 Q Okay. Thank you.
17 A And of course, identification of the unit
18 and something to distinguish from other units at
19 the source.
20 Q You listed approximately seven types of
21 emissions data that Midwest Generation submits.
22 The annual--
23 A Thought the question was submission of
24 reports or emission data. What was the question?

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Christopher P. Romaine

Midwest Generation v. IEPA

Page 1

1 ILLINOIS POLLUTION CONTROL BOARD
 2
 3 COMMONWEALTH EDISON COMPANY,
 4 Complainant/Petitioner,
 5 vs. No. PCB 04-215
 6 ILLINOIS ENVIRONMENTAL
 7 PROTECTION AGENCY,
 8 Respondent.

9 MIDWEST GENERATION EME, LLC,
 10 Complainant/Petitioner,
 11 vs. No. PCB 04-216
 12 ILLINOIS ENVIRONMENTAL
 13 PROTECTION AGENCY,
 14 Respondent.

15 CONTINUED DISCOVERY DEPOSITION of
 16 CHRISTOPHER P. ROMAINE, taken in the
 17 above-entitled case before Rhonda K. O'Neal, CSR,
 18 RPR, a Notary Public of Sangamon County, acting
 19 within and for the County of Sangamon, State of
 20 Illinois, at 9:34 o'clock A.M., on March 17, 2006,
 21 at 1021 North Grand Avenue East, Springfield,
 22 Sangamon County, Illinois, pursuant to subpoena.

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

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I N D E X

DEPONENT	PAGE NUMBER
Christopher Romaine	
Examination by Ms. Mullin	5
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E X H I B I T S

NUMBER	MARKED FOR IDENTIFICATION
Exhibits 8 abd 9	28
Exhibit A	53
Exhibit B	55
Exhibit C	56
Exhibit D	59
Exhibit E	67
Exhibit F	76
Exhibit G	91
Exhibit H	108

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 2 between the parties hereto, through their
 3 attorneys, that the continued discovery deposition
 4 of CHRISTOPHER P. ROMAINE may be taken before
 5 Rhonda K. O'Neal, a Notary Public, Certified
 6 Shorthand Reporter, and Registered Professional
 7 Reporter, upon oral interrogatories, on the 17th
 8 of March A.D., 2006, at the instance of the
 9 Complainants/Petitioners at the hour of 9:34
 10 o'clock A.M., 1021 North Grand Avenue East,
 11 Springfield, Sangamon County, Illinois;

12 That the oral interrogatories and the
 13 answers of the witness may be taken down in
 14 shorthand by the Reporter and afterwards
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16 That all requirements of the rules and
 17 regulations promulgated under the Pollution
 18 Control Board of the State of Illinois and the
 19 Rules of the Supreme Court as to *dedimus*, are
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 22 materiality or relevancy are hereby reserved, but
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That the deposition, or any parts thereof
 may be used for any purpose for which discovery
 depositions are competent, by any of the parties
 hereto, without foundation proof;

That any party hereto may be furnished
 copies of the deposition at his or her own
 expense.

3/17/06
Christopher P. Romaine

Midwest Generation v. IEPA

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1 or not a modification had been done at the
 2 facility, is that accurate?
 3 A That is correct.
 4 Q Okay. Is any fact that may be relevant
 5 to determine whether NSR is applicable emissions
 6 data?
 7 A I think that's the issue that's going to
 8 be before the board.
 9 Q What is the IEPA's position on that, if
 10 you know?
 11 A I don't think, I'm not sure we have a
 12 position on that.
 13 Q Do you have a personal position on that?
 14 MS. WHEELER: Objection. You can answer.
 15 THE DEPONENT: I guess I'm looking at it
 16 pragmatically that there may be ways to approach
 17 the information, the ultimate issue at hand, which
 18 is whether modification has occurred, that could
 19 allow certain information to be treated as trade
 20 secret or confidential because other information
 21 adequately responds to the relevant aspect of
 22 whether a modification has occurred.
 23 Accordingly, I would take the position
 24 that the ultimate issue is whether you can

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1 determine with an appropriate degree of accuracy
 2 and certainty whether a modification has occurred,
 3 how do you achieve that end result, not so much
 4 going into it whether a particular piece of data
 5 could have contributed to that determination.
 6 The challenge with this data is that we
 7 haven't reached a conclusion yet whether a
 8 modification has occurred, and we're dealing with
 9 information that has been requested and provided
 10 in a very general form that is very, includes
 11 things that appear to be extraneous to the
 12 determination.
 13 MS. MULLIN: Q Thank you.
 14 Is it IEPA's position that all
 15 information that can be used to determine
 16 compliance with air laws and regulations
 17 constitutes emissions data?
 18 A I don't believe it is, no. It's, that--I
 19 think we have a better formulation of that that
 20 the question again is can you determine
 21 compliance, and you have to have a certain body of
 22 data that looking at it as a whole gets you to
 23 that determination, but once you've made that
 24 determination, other data that isn't relied upon

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1 or necessary to make that determination with
 2 reasonable accuracy and certainty can be protected
 3 as confidential information.
 4 You don't have to be able to get to every
 5 single possible way to determine whether a source
 6 is in compliance. That's sort of a contradiction
 7 of the concept of credible evidence, but in some
 8 regards that a source or an individual is allowed
 9 to use other data, but I don't think that
 10 precludes a source once they've come up with their
 11 showing of compliance necessarily trying to rely
 12 on that as an adequate showing of compliance.
 13 Q Would it be your position, then, that any
 14 information that is necessary to show compliance
 15 with air laws and regulations constitutes
 16 emissions data?
 17 A If it's part of a set that's been relied
 18 upon to determine compliance, yes.
 19 Q Where do the regulations say that?
 20 A I would say that that is the clear
 21 language of the definition of emission
 22 data.
 23 Q Are you speaking of the--
 24 A Of both the federal--certainly the

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1 federal definition, and I would hope that the
 2 state definition also incorporates that concept.
 3 (Whereupon documents
 4 were duly marked for
 5 purposes of
 6 identification as
 7 Exhibit Numbers 8 and 9
 8 as of this date.)
 9 MS. MULLIN: Q You've been handed Exhibit 8,
 10 which is the 40 CFR part 2.301. Is that the
 11 federal definition you were referring to in your
 12 response to the last question?
 13 A Yes, it is. 40 CFR 2.301(a)(2)(i)(B).
 14 Q Can you read the relevant regulatory
 15 language into the record?
 16 A Information necessary to determine the
 17 identity, amount--that's the key term--frequency,
 18 concentration, or other characteristics to the
 19 extent related to air quality of the emissions
 20 which, under an applicable standard or limitation,
 21 the source was authorized to emit. Including to
 22 the extent necessary for such purposes a
 23 description of the manner or rate of operation of
 24 the source.

3/17/06
Christopher P. Romaine

Midwest Generation v. IEPA

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1 with chemical companies, for example?
 2 A That's correct.
 3 Q Was that during a permitting exercise?
 4 A It would primarily have been with regard
 5 to permitting activities, but it may have also
 6 been involved in the enforcement context.
 7 Q Do you know whether there are P&IDs for
 8 utility boilers also?
 9 A I'm sure there are.
 10 Q Whether it was in an enforcement context
 11 or a permitting exercise, did you consider whether
 12 the P&IDs constituted emissions data?
 13 MS. WHEELER: I'm going to object to this line
 14 of questioning. Unless it's part of the GADS data
 15 or the CPR, I don't think we need to go into what
 16 every bit of information that concerns a power
 17 plant as to whether or not it's emissions data. I
 18 will allow him to continue answering at this
 19 point, but I have a continuing objection to this.
 20 THE DEPONENT: I don't recall that there was
 21 much consideration given to whether P&ID diagrams
 22 were properly treated as emission data or not.
 23 MR. TAYLOR: Q Just as a header, I'm going to
 24 go back to the evolution issue. Have you ever

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1 participated before in a decision about whether a
 2 comprehensive accounting document such as a CPR is
 3 subject to trade secret protection prior to the
 4 185, 215, and 216 matters?
 5 A Not that I recall.
 6 Q Would you characterize the agency's
 7 evaluation of the CPR as another evolution?
 8 A Yes.
 9 Q And if you had to date this
 10 determination, would it be now essentially with
 11 this process?
 12 A Yes, it would be.
 13 MR. TAYLOR: Let's go off the record.
 14 (Discussion off the record.)
 15 MR. TAYLOR: Q I have one more question for
 16 you about the evolution issue before we turn to
 17 the GADS data that is the subject of this matter.
 18 A Uh-huh.
 19 Q Was there an evolution between--let me
 20 start over.
 21 The issue of the process weight rate and
 22 that particular evolution. The data that you need
 23 to calculate whether you're in compliance with the
 24 process weight rate rule is data to plug into an

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1 emissions calculation. Is that a fair--?
 2 A Yes, it is.
 3 Q A fair description? And your answer's
 4 yes?
 5 A Yes, it is.
 6 Q What we have talked about in conjunction
 7 with the continuing property record is more of, it
 8 seems to me to be another leap from taking
 9 information to put into a formula to taking
 10 information to evaluate compliance with any
 11 regulatory program that's not tied to plugging
 12 data into a formula. Would you agree with that or
 13 disagree with that?
 14 A Clearly it is not information that's
 15 plugged into a formula. I look at it as more
 16 similar to the qualitative information that's
 17 needed to define what is the applicable rule, what
 18 type of process is it, what type of fuel is it
 19 burning. So it is clearly a qualitative type of
 20 information, it is not a quantitative type of
 21 information. And in terms of qualitative
 22 information, it is certainly another step beyond
 23 the types of qualitative information that we
 24 typically look for in terms of when was this unit

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1 constructed, are they coating paper, are they
 2 coating steel, other things to determine which is
 3 the applicable regulation that applies to a unit.
 4 Q You called that a qualitative step. Is
 5 that an evolution or a qualitative step?
 6 A It's an evolution in a qualitative
 7 dimension of this discussion about what
 8 constitutes emission data.
 9
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EXHIBIT F

3/15/06
Julie Armitage

Midwest/Commonwealth v. IEPA

Page 1

1 ILLINOIS POLLUTION CONTROL BOARD
2
3 COMMONWEALTH EDISON COMPANY,
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14 PROTECTION AGENCY,
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16
17 DISCOVERY DEPOSITION of JULIE ARMITAGE,
18 taken in the above-entitled case before Rhonda K.
19 O'Neal, CSR, RPR, a Notary Public of Sangamon
20 County, acting within and for the County of
21 Sangamon, State of Illinois, at 4:59 o'clock P.M.,
22 on March 15, 2006, at 1021 North Grand Avenue
23 East, Springfield, Sangamon County, Illinois,
24 pursuant to subpoena.

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Page 4

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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 *dedimus*, 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;

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That any party hereto may be furnished copies of the deposition at his or her own expense.

3/15/06
Julie Armitage

Midwest/Commonwealth v. IEPA

Page 21

1 typical or not.

2 Q Who here at IEPA could make that call?

3 A Maybe somebody in the permit section

4 would know better whether it's a typical practice

5 or not.

6 Q Who in the permit section?

7 A One of the managers perhaps.

8 Q What are their names?

9 A Well, Chris Romaine's a manager and Don

10 Sutton's a manager and Mike Reed is a manager, Bob

11 Bernoteit's a manager, and Charlie Zeal's (sp) a

12 manager.

13 Q Once the engineers in the permit section

14 give Marilyn their determination about whether or

15 not to grant or deny a company's trade secret or

16 confidentiality claims, what happens after that?

17 A They won't actually give Marilyn the

18 determination. It's just that Marilyn has pointed

19 out that a determination needs to be made to them,

20 and then they will make whatever determination

21 needs to be made. And then Marilyn will know on

22 the heels of that whether there's more or less

23 documentation that's going out the door in

24 response to the FOIA.

Page 22

1 Q Do the permit engineers give any kind of

2 written documentation to Marilyn or anybody else

3 at IEPA about their determination?

4 A No. No. Short of whatever the

5 determination is, we either--one of three things

6 is going to happen. You're either going to, the

7 claim isn't--you're not going to react to the

8 claim or you're going to accept the claim or

9 you're going to deny the claim. And so there's

10 either going to be a denial if it's denied. And

11 I'm not, I believe they put together a letter if

12 it's granted, but I'm not a hundred percent

13 convinced of that. And there wouldn't be anything

14 else.

15 Q So if the trade secret claim is denied,

16 does the permit engineer issue a letter to the

17 company denying their trade secret claim?

18 A Probably not the assigned permit

19 engineer.

20 Q Who would do that?

21 A There's not necessarily a set person to

22 do that. To my knowledge, the denials are

23 typically going to go under either chief legal

24 counsel's signature or under the head of the

Page 23

1 permit section's signature. But I do know that

2 that has been an issue that's been up for debate.

3 I don't know that an assigned engineer has ever

4 signed a denial. I think that a denial would at a

5 minimum kick to Don or, like I say, to chief legal

6 counsel, but it could potentially kick to just a

7 staff attorney as well.

8 Q Is there a central file where the chief

9 legal counsel would keep all the denials that have

10 come out under his signature?

11 A No.

12 Q Where would those letters go?

13 A My understanding is that whoever signs a

14 letter, or whoever is the signatory to a letter

15 around here, the letter would go into a chron (sp)

16 file, just a running chron file.

17 Q Okay. Excuse me. Would it be that

18 individual's chron file?

19 A Yes. So anything they sign would be in

20 that file. And then a copy of decisions that are

21 made that relate to bureau matters would typically

22 end up in source files in the general files in the

23 bureau there.

24 Q Is Don Sutton the head of the permit

Page 24

1 section?

2 A Yes.

3 Q And how long has he held that position?

4 A I don't know.

5 Q As long as you've been at the agency?

6 A I don't think Don was the permit section

7 manager when I first came to the bureau of air,

8 no.

9 Q And you said there's been between one and

10 10 staff attorneys at the bureau of air since

11 you've been here, is that accurate?

12 A I'd say it ranges between there, yeah.

13 (Whereupon a document

14 was duly marked for

15 purposes of

16 identification as

17 Exhibit Number 3 as of

18 this date.)

19 MS. MULLIN: Q I'm handing you a document

20 that's been marked Exhibit 3. I'll represent

21 that this is a copy of the FOIA regulations at

22 2 Illinois Administrative Code 1828. Are you

23 familiar with these regulations?

24 A Yes.

6 (Pages 21 to 24)

3/16/06
Julie Armitage

Midwest Generation v. IEPA

Page 1

1 ILLINOIS POLLUTION CONTROL BOARD
2
3 COMMONWEALTH EDISON COMPANY,
4 Complainant/Petitioner,
5 vs. No. PCB 04-215
6 ILLINOIS ENVIRONMENTAL
7 PROTECTION AGENCY,
8 Respondent.
9
10 MIDWEST GENERATION EME, LLC,
11 Complainant/Petitioner,
12 vs. No. PCB 04-216
13 ILLINOIS ENVIRONMENTAL
14 PROTECTION AGENCY,
15 Respondent.
16
17 CONTINUED DISCOVERY DEPOSITION of JULIE
18 ARMITAGE, 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 8:40 o'clock
22 A.M., on March 16, 2006, at 1021 North Grand
23 Avenue East, Springfield, Sangamon County,
24 Illinois, pursuant to subpoena.

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1 APPEARANCES:
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7 On behalf of Complainant/Petitioner
8 Midwest Generation EME, LLC.
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10 SIDLEY AUSTIN, LLP
11 BY: Byron F. Taylor, Esq.
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14 Chicago, Illinois 60603
15 On behalf of Complainant/Petitioner
16 Commonwealth Edison Company.
17
18 MS. ANN ALEXANDER
19 MS. PAULA BECKER WHEELER
20 Assistant Attorneys General
21 188 Randolph Street
22 Twentieth floor
23 Chicago, Illinois 60601
24 On behalf of Respondent.

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11	E X H I B I T S	
12	NUMBER	MARKED FOR IDENTIFICATION
13	Exhibit Number 6	11
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S T I P U L A T I O N

1 It is stipulated and agreed, by and
2 between the parties hereto, through their
3 attorneys, that the continued discovery deposition
4 of JULIE ARMITAGE may be taken before Rhonda K.
5 O'Neal, a Notary Public, Certified Shorthand
6 Reporter, and Registered Professional Reporter,
7 upon oral interrogatories, on the 16th of March
8 A.D., 2006, at the instance of the
9 Complainants/Petitioners at the hour of 8:40
10 o'clock A.M., 1021 North Grand Avenue East,
11 Springfield, Sangamon County, Illinois;
12 That the oral interrogatories and the
13 answers of the witness may be taken down in
14 shorthand by the Reporter and afterwards
15 transcribed;

16 That all requirements of the rules and
17 regulations promulgated under the Pollution
18 Control Board of the State of Illinois and the
19 Rules of the Supreme Court as to *dedimus*, are
20 expressly waived;

21 That any objections as to competency,
22 materiality or relevancy are hereby reserved, but
23 any objection as to the form of question is waived
24 unless specifically noted;

That the deposition, or any parts thereof
may be used for any purpose for which discovery
depositions are competent, by any of the parties
hereto, without foundation proof;

That any party hereto may be furnished
copies of the deposition at his or her own
expense.

3/16/06
Julie Armitage

Midwest Generation v. IEPA

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1 feed an NSR determination, and we could not
 2 conclude that it would not be that information--or
 3 that it would not be the case.
 4 MS. MULLIN: Q So it's your position that any
 5 information involved in an NSR determination would
 6 be emissions data?
 7 A I'm going to go again with a potentially
 8 so. I hesitate to say yes because I'm not--
 9 Q Is it generally so?
 10 A I would say generally so, yeah.
 11 Q Okay. I want--in the record there were
 12 several documents that in the interrogatory
 13 requests, in the interrogatory answers were said
 14 to support your emissions determination.
 15 (Whereupon a document
 16 was duly marked for
 17 purposes of
 18 identification as
 19 Exhibit Number 12 as of
 20 this date.)
 21 MS. MULLIN: Q Are you familiar with these
 22 documents?
 23 A Yes.
 24 Q Did you add them to the record?

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1 A That goes back to the point that I made
 2 earlier that I am aware that these are part of the
 3 record. Who, which person actually added them to
 4 the record I don't know. Did I, did Chris
 5 Pressnall, did we simply tell Ann to put--I don't
 6 know.
 7 Q Did you review these documents before
 8 IEPA issued its determination in this trade secret
 9 matter?
 10 A I did not sit down and read them, no.
 11 MS. ALEXANDER: I've got that your time's up
 12 even under Paula's more generous limitations.
 13 MR. TAYLOR: I'm willing to allot her 10
 14 minutes of my time so that she can just complete
 15 her line of questioning.
 16 MS. ALEXANDER: Well, I'm not sure that it
 17 really works that way. I mean, each party gets
 18 three hours. I mean, you can complete the same
 19 questions. I mean, I think we're done.
 20 MS. MULLIN: For now we'll end the
 21 deposition--
 22 MR. ZABEL: It can work any way you want to
 23 agree that it works, Counsel. Are you refusing to
 24 agree to allow him to give 10 minutes to the other

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1 party?
 2 MS. ALEXANDER: All right. If you want to do
 3 it as 10 minutes, I'll agree to that.
 4 MR. TAYLOR: Ten minutes it is.
 5 MS. MULLIN: Q Had you reviewed these
 6 documents before IEPA issued its trade secret
 7 determination in this matter?
 8 A I'm familiar with the documents. I have
 9 read at least portions of these documents. These
 10 are, these are more of the sorts of documents that
 11 were, that--
 12 Q I'm asking if at the time of the
 13 determination you had read these documents?
 14 A No. At the time of the determination I
 15 did not reread these documents.
 16 Q Had you read them before the
 17 determination was issued?
 18 A Yes.
 19 Q You're sure of that?
 20 A Yeah.
 21 Q Okay. Did you discuss the contents of
 22 these documents with Chris Pressnall?
 23 A I don't--. The concepts of these
 24 documents were to some extent discussed between

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1 Chris Romaine, Chris Pressnall, and me. The
 2 subject matter of these documents is more, is more
 3 the bailiwick of Chris Romaine.
 4 Q Did you pull out these documents and look
 5 at them at the time of the determination?
 6 A No. I don't know that any of the three
 7 of us did that.
 8 Q Did you identify a list of these
 9 documents before the determination was made?
 10 A Not a written list, no.
 11 Q So after the determination was made and
 12 you were putting together the record, you
 13 identified documents that you thought would
 14 support your decision?
 15 A No. What we did was identify documents
 16 that, with which Chris Romaine in particular is so
 17 familiar that these documents are of the type that
 18 factor into the type of decision that was hand
 19 every time.
 20 Q Did you ever have a specific discussion
 21 of this first document, United States versus Duke
 22 Energy, before the IEPA determination was made?
 23 A Probably. Because that's normally what
 24 we would do. That's the sort of discussion Chris

EXHIBIT G

ILLINOIS POLLUTION CONTROL BOARD
April 26, 2007

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

CORRECTED HEARING OFFICER ORDER

On February 16, 2006, petitioner, Midwest Generation EME, LLC, (Midwest), filed a motion to compel responses to certain of its initial interrogatories and initial requests for the production of documents. (Motion, Ex 1). On March 2, 2006, respondent, Illinois Environmental Protection Agency (Agency) filed a memorandum in opposition to Midwest's motion. On March 16, 2006, Midwest filed a motion for leave to file an attached reply to the Agency's memorandum in opposition. The motion is denied as discussed below. On March 28, 2006, the Agency filed a memorandum in opposition to Midwest's motion for leave to file a reply to the Agency's memorandum in opposition to the motion.

On April 6, 2006, the Board granted Midwest's motion to stay the above-captioned matter to and including August 4, 2006. On August 17, 2006, the Board again granted Midwest's motion to stay, to and including December 4, 2006. On February 15, 2007, the Board denied Midwest's third request to stay this case.

On March 23, 2007, Midwest filed an amended motion to compel the Agency's discovery responses. On March 28, 2007, the Agency filed a memorandum in opposition to Midwest's amended motion to compel. On April 4, 2007, Midwest informed the hearing officer that it will not file a motion for leave to reply.

For the reasons set forth below, Midwest's motion to compel and amended motion to compel are denied.

Procedural Status of the Case

Midwest has appealed the Agency's April 23 2004, trade secret determination of the respondent pursuant to 415 ILCS 5/40(a)(1) (2004) and 35 Ill. Adm. Code 130.214(a). In its' determination, the Agency denied trade secret protection from public disclosure for certain information regarding coal-fired generating stations. On June 17, 2004, the Board accepted the petition for review.

The Agency denied trade secret protection for the stated reasons that Midwest failed to adequately demonstrate that the information has noncompetitive value, and/or that the information does not constitute emissions data under Section 7 (b) of the Illinois Environmental Protection Act.

On June 17, 2004, the Board accepted the petition for review. Under the Board's procedural rules Midwest's information has received trade secret protection and will continue to do so until a final order is issued in this case. *See* 35 Ill. Adm. Code 130.210 (c).

Midwest's Motion To Compel

Midwest's motion to compel filed February 16, 2006, seeks an order allowing discovery in the following interrogatories. Interrogatory No. 13: Identify any determination you have made relating to the trade secret status of a business's financial information submitted to the IEPA. Interrogatory No. 14: Identify any determination you have made that information constitutes "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. sec. 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 determination and correspondence related to the same.

Midwest states that the information is needed for the Board's review of the Agency's trade secret determination where Midwest alleges that the Agency's denial is contrary to the Agency's past trade secret determinations and what information constitutes "emissions data." Midwest alleges further that the Agency has never before determined that accounting data is "emissions data", and that this information is relevant to a potential fair notice argument. Midwest's argues that the information sought is relevant or calculated to lead to relevant information. Midwest also alleges that the information sought is neither overbroad nor unduly burdensome, nor is the information sought vague.

Agency's Response In Opposition

In sum, the Agency's response in opposition, filed March 2, 2006, has two main arguments. The first is that the information sought by Midwest is irrelevant where hearings in trade secret matters at issue are to be held exclusively on the record, and that no non-record evidence would be admissible. The second is that Midwest's requested discovery is burdensome and overly broad. The Agency states that compliance with the requests would be impossible as a practical matter because "the IEPA Bureau of Air does not maintain any recordkeeping system specifically concerning trade secret matters. Trade secret determinations are stored in the file of the particular emission source concerning which they were made, and no separate record is kept of them." This assertion is supported by affidavit.

Midwest's Motion for Leave to File Reply to the Agency's Memorandum in Opposition and the Agency's Response in Opposition to Midwest's Motion for Leave to File a Reply

On March 16, 2006, Midwest filed a motion for leave to reply to the Agency's response in opposition. In sum, Midwest argues that the Agency has misrepresented Midwest's position and misquotes authority. On March 28, 2006, the Agency filed a memorandum in opposition to Midwest's motion for leave to file a reply. Section 101.500 (e) of the Board's procedural rules provides that the moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. 35 Ill. Adm. Code 101.500(e). The hearing officer finds that Midwest's reply offers no assistance and that by denying the reply, Midwest will suffer no material prejudice. Midwest's motion for leave to file a reply is denied.

Midwest's Amended Motion to Compel and Respondent's Response

On March 23, 2007, Midwest filed an amended motion to compel. In the motion, Midwest represents that subsequent to its initial motion to compel, deposition testimony of several Agency employees was taken that directly contravenes the Agency's objection that Midwest's discovery requests are overbroad and unduly burdensome. In sum, Midwest argues that the depositions reveal that some of the Agency's prior trade secret determinations in other matters can be retrieved with little effort.

On March 28, 2007, the Agency filed its response. The Agency argues that Midwest's amended motion to compel is untimely, overly burdensome and in any event, irrelevant. To buttress the overly burdensome argument, the Agency notes that its employee-deponents testified that at best, they may have "anecdotal" or "vague" recollections of other trade secret matters they have worked on. One of the deponents testified that some of the trade secret determinations involve "informal determinations" that are not documented.

Discussion and Ruling

Section 101.616(a) of the Board's procedural rules provides: All relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130 [protecting trade secrets and other non-discoverable information specified by the Act]. 35 Ill. Adm. Code 101.616(a).

In accordance with Section 130.214(a) of the Board's procedural rules (35 Ill. Adm. Code 130.214(a)), trade secret cases proceed under the procedures for permit appeals at 35 Ill. Adm. Code 105 Subparts A and B. Hearings are based exclusively on the record before the Agency at the time it issued its trade secret determination. *See* 35 Ill. Adm. Code 105.214(a). The Agency's determination frames the issue on the appeal. *See ESG Watts, Inc. v. PCB*, 286 Ill. App. 3d, 325, 676 N.E.2d 299 (3rd Dist. 1997). Therefore, though the Board hearing affords petitioner the opportunity to challenge the Agency's reasons for denial, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987)

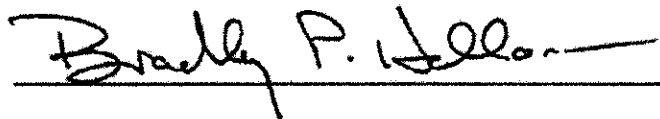
(disallowing introduction of new evidence not presented to the Agency in the permit proceeding); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom.* 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3d Dist. 2002).

Here, the Board's purpose is not to determine whether the Agency treated other companies differently. Indeed, it is long-settled that the Board has no jurisdiction to hear allegations of any Agency misfeasance, malfeasance, or nonfeasance in its enforcement of the Act and Board rules. People v. Packaging Personified, Inc., PCB 04-16 (Oct. 5, 2006), citing TTX Company v. Whitley, 295 Ill. App. 3d 548, 692 N.E.2d 790 (1st Dist. 1998); Landfill, Inc., v. PCB, 74 Ill. 2d 541, 367 N.E.2d 258 (1978).

Here, the administrative record in the above-captioned matter was filed July 13, 2004. It is noted that the requested discovery at issue, including information relating to the Agency's prior trade secret determinations regarding financial and operational data submitted by other businesses and electric utilities, are not included. The hearing officer finds that based on the Board's procedural provisions and the plethora of case law, the discovery in dispute is neither relevant, nor reasonably calculated to lead to relevant information. Midwest has not persuasively identified any additional discovery evidence. The hearing officer also finds that discovery of other trade secret determinations, some going back 17 years, of other unrelated businesses would be overly burdensome, overly broad, and would apparently yield incomplete or erroneous submissions based on "anecdotal" or "vague" recollection of the Agency personnel.

Midwest's motion to compel and amended motion to compel are denied.

IT IS SO ORDERED.



Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on April 26, 2007, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 26, 2007:

Dorothy M. Gunn
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath it.

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601
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Electronic Filing, Received, Clerk's Office, May 31, 2007

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Midwest Generation EME, LLC's Motion for Interlocutory Appeal of Order Denying Motions to Compel Discovery, by U.S. Mail, upon the following persons:

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
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Dated: May 31, 2007

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: /s/ Mary Ann Mullin
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