

ILLINOIS POLLUTION CONTROL BOARD

**Commonwealth Edison Company and
Midwest Generation EME, LLC**

Petitioners,

V.

**Illinois Environmental Protection Agency,
Respondent.**

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)
)
) **PCB 04-215 and**
) **PCB 04-216**
) **(Consolidated**
) **Trade Secret Appeals)**
)
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)

NOTICE OF FILING

To:

Pollution Control Board, Attn: Clerk
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James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601

Stephen Sylvester
Ann Alexander
Office of the Attorney General
69 West Washington Street
Suite 1800
Chicago, Illinois 60602

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board **Midwest Generation EME, LLC and Commonwealth Edison Company's Motion to Vacate IEPA's April 23, 2004, Trade Secret Determination and to Dismiss the Petitions for Review of the Determination as Moot**, a copy of which is herewith served upon you.

Dated: December 15, 2010

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Schiff Hardin LLP
Mary Ann Mullin
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Commonwealth Edison Company,
Petitioner,

v.

Illinois Environmental Protection Agency,
Respondent.

PCB No. 04-215
(Trade Secret Appeal)

Midwest Generation EME, LLC,
Petitioner,

v.

Illinois Environmental Protection Agency,
Respondent.

PCB No. 04-216
(Trade Secret Appeal)

**MIDWEST GENERATION EME, LLC AND COMMONWEALTH EDISON
COMPANY'S MOTION TO VACATE IEPA'S APRIL 23, 2004, TRADE SECRET
DETERMINATION AND TO DISMISS THE PETITIONS FOR REVIEW OF THE
DETERMINATION AS MOOT**

Pursuant to 35 Ill. Adm. Code § 101.500, Petitioners Midwest Generation EME, LLC ("Midwest Gen") and Commonwealth Edison Company ("ComEd") jointly submit this Motion to Vacate Illinois Environmental Protection Agency's ("IEPA") April 23, 2004, Trade Secret Determination and to Dismiss the Petitions for Review of that Determination as Moot. In support of their motion, Petitioners state as follows:

BACKGROUND

1. This matter arises from an IEPA determination, dated April 23, 2004, denying trade secret protection to two documents related to certain Illinois electric generating stations currently owned by Midwest Gen and formerly owned by ComEd (the "stations"). The two documents

are: (1) excerpts from an accounting record referred to in the utility industry as a continuing property record ("CPR") (the document will be referred to herein as the "CPR Excerpts") and (2) a document reflecting excerpts from the generation data related to the stations that ComEd had confidentially submitted to the North American Electric Reliability Council ("NERC") to be included in the Generating Availability Data System ("GADS") maintained by NERC (the document will be referred to herein as the "GADS Excerpts").

2. On January 30, 2004, ComEd submitted documents to the United States Environmental Protection Agency ("USEPA") in response to an information request issued by USEPA under §114 of the Clean Air Act (the submitted documents will be referred to herein as the "§114 materials"). As a courtesy, ComEd submitted a copy of these documents to IEPA. The CPR Excerpts and GADS Excerpts were included within the §114 materials and were marked as "Confidential Business Information" pursuant to the regulations set forth by the USEPA at 40 CFR §2.203 (the CPR Excerpts and the GADS Excerpts will be referred to herein as the "CBI Materials").

3. On February 12, 2004, Sierra Club made a request to IEPA pursuant to the Freedom of Information Act ("FOIA") 5 ILCS 140/1 et seq., for the CBI Materials.

4. In a letter dated February 26, 2004, IEPA requested that ComEd submit a statement of justification for ComEd's claim that the CBI Materials constituted trade secret information. IEPA cited Sierra Club's FOIA request as the Agency's reason for requesting a statement of justification. See Exhibit A (copy of IEPA letter requesting statement of justification). Midwest Gen was also informed of IEPA's request for a statement of justification. In response to IEPA's request, Midwest Gen and ComEd each submitted a statement of justification to IEPA.

5. Both Midwest Gen and ComEd received letters from IEPA, dated April 23, 2004, denying trade secret protection to the CBI Materials (the "Trade Secret Determination").

6. ComEd and Midwest Gen appealed IEPA's Trade Secret Determination to the Illinois Pollution Control Board (the "Board") in petitions filed on June 2, 2004 and June 3, 2004, respectively, on the basis that the Trade Secret Determination was arbitrary, capricious and contrary to law and that IEPA improperly failed to consider whether the documents at issue were exempt from disclosure under the Illinois Freedom of Information Act, 5 ILCS 140/1 et seq. These appeals, designated as PCB 04-215 (ComEd appeal) and PCB 04-216 (Midwest Gen appeal), were consolidated by the Board on July 23, 2009.

7. There have been significant developments in this matter since it arose in 2004. Namely, in 2009, Sierra Club entered into a Stipulation and Protective Order Regarding Confidential Information and Documents in connection with a different matter, United States of America, et al v. Midwest Generation, LLC, Civil Action No. 09-cv-05277, in the United States District Court, Northern District of Illinois, Eastern Division. Pursuant to that stipulation, in June 2009, Sierra Club sent a letter to IEPA withdrawing the FOIA request that empowered IEPA to make the Trade Secret Determination. See Exhibit B (copy of Sierra Club Letter withdrawing FOIA request). Currently, there are no requests for public disclosure of the CBI Materials.

8. In light of Sierra Club's withdrawal of the FOIA request, Midwest Gen and ComEd have asked the IEPA to voluntarily withdraw the Trade Secret Determination. IEPA has declined to do so.

ARGUMENT

9. The Board should follow its past precedent and vacate IEPA's trade secret determination because the FOIA request that authorized the Agency to make that determination was withdrawn

during the pendency of the Petitioners' appeal.¹ See, e.g., Monsanto Company v. IEPA, 1988 WL 160683 (Ill. Pol. Control. Bd.). In Monsanto, the Board vacated an IEPA trade secret determination in a situation identical to the present matter. In that case, a private individual made a FOIA request to IEPA for information related to Monsanto's air permits, including excerpts from three air permit applications that Monsanto claimed were confidential trade secret information. Monsanto, PCB 85-19 Op. at 1 (Apr. 4, 1985); Monsanto, Pet. at 2 (March 14, 1985). IEPA determined that the information should not be treated as trade secret, and Monsanto appealed that decision to the Board. Monsanto, Pet. at 2 (March 14, 1985). During the pendency of the appeal, the FOIA request which prompted the IEPA trade secret determination was withdrawn. As a result, the Board found that it was appropriate for the Agency's trade secret determination to be vacated and for the matter to be dismissed as moot. Monsanto, Mot. (Oct. 31, 1988); Monsanto, Ord. (Nov. 3, 1988); see also Monsanto, 1988 WL 160683 at *1. The current matter is identical to the situation in Monsanto. Just as IEPA issued a trade secret determination in Monsanto only in response to a FOIA request, IEPA issued the Trade Secret Determination regarding the CBI Materials here only in response to Sierra Club's FOIA request. Just as the FOIA requestor in Monsanto withdrew his FOIA request, Sierra Club has, through its letter to IEPA, withdrawn its FOIA request. As a result, like IEPA's trade secret decision in Monsanto, IEPA's decision regarding the CBI Materials must be vacated and this matter should be dismissed as moot.

¹ The Board's authority to vacate IEPA's trade secret determination is not limited by the holding in Reichhold Chemicals, Inc. v. Illinois Pollution Control Board, 204 Ill.App.3d 674, 677-80, 561 N.E.2d 1343, 1345-46 (3d Dist. 1990). In Reichhold, the Appellate Court found that IEPA lacked the statutory authority to modify or reconsider a final decision to deny a permit. Id. Given that the Board does have express statutory authority to review final determinations made by IEPA under the Illinois Environmental Protection Act, Reichhold has no bearing on the Board's authority in this case. 415 ILCS 5/5(d). Moreover, the Petitioners note that the line of reasoning followed by the Reichhold court does not limit IEPA's authority to vacate the trade secret determination in this case on its own motion. In contrast to the facts of Reichhold, the case at hand does not involve a request to reconsider a permit denial, but rather a request to vacate a trade secret determination. That distinction is of particular importance because IEPA would not be reconsidering its application of the law, but rather vacating a determination after the FOIA request which formed the basis for that determination has been withdrawn. Thus, the Reichhold decision is inapplicable to the facts of this case. 204 Ill.App.3d 677-80, 561 N.E.2d 1345-46.

10. In addition to following prior precedent, vacating an IEPA trade secret determination in a case where the determination is no longer necessary because the FOIA request was withdrawn during the pendency of an appeal is appropriate because it serves an important public policy interest. See, e.g., Madison Park Bank v. Zagel, 91 Ill.2d 231, 236 (Ill. 1982) (vacating a lower court decision in order to serve an important public policy interest when the underlying issues were moot); People v. Weaver, 50 Ill.2d at 241, 242 (Ill. 1972). Illinois public policy, as reflected in the regulations implementing the Trade Secrets Act and FOIA, dictates that trade secret determinations should not be made without a valid reason. See 35 Ill. Adm. Code § 130.201(b) (requiring IEPA to include a reason for requesting that a party justify a claim that a document is exempt from disclosure and describing the limited the circumstances under which IEPA may undertake a review of such claims); 2 Ill. Adm. Code § 1828.402(a) (detailing the limited circumstances under which IEPA must review a party's claims that a document is exempt from disclosure under FOIA). The public interest is served by this policy because it avoids the waste of resources entailed by litigation over the correctness of a trade secret determination regarding information that no third party is interested in obtaining.

11. In its February 26, 2004, letter, IEPA stated that its reason for requesting a statement of justification with respect to the CBI Materials was that "on February 12, 2004, the Illinois EPA received a Freedom of Information Act (FOIA) request from the Sierra Club seeking the responses of Midwest Generation and ComEd to USEPA's Section 114 information request." Exhibit A. Since Sierra Club has now withdrawn its FOIA request, IEPA's justification for making the Trade Secret Determination no longer exists. The CBI materials were submitted to IEPA nearly seven years ago and the only party to express an interest in the material has withdrawn its request. ComEd and Midwest Gen maintain their position that the CBI Materials contain confidential business information that IEPA is required to protect from disclosure.

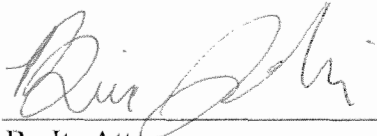
Because the Trade Secret Determination has not been withdrawn, ComEd and Midwest Gen are compelled to maintain this appeal in order to preserve their right to require IEPA to protect the information from disclosure in the event, however unlikely, that another member of the public requests these documents in the future. This is exactly the situation that the regulations described above were designed to avoid by requiring IEPA to have a legitimate reason before making a trade secret determination. Continued litigation over the correctness of the Trade Secret Determination would go against public policy as it would result in a considerable waste of resources by the Board, ComEd, Midwest Gen and IEPA. Therefore, the Board should follow the precedent it set in Monsanto and vacate the Trade Secret Determination and dismiss this matter as moot. If any member of the public should request the documents in the future, IEPA may, of course, make what it believes to be the appropriate determination at that time and the Petitioners' interests would be protected by the process afforded to them under Illinois law.

CONCLUSION

WHEREFORE, for the reasons set forth above, specifically because of Sierra Club's withdrawal of its FOIA request, Midwest Gen and ComEd respectfully request that the Board grant their Motion to Vacate IEPA's April 24, 2004, Trade Secret Determination and that the Board subsequently dismiss the consolidated Petitions for Review of that determination as moot.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
By Its Attorneys

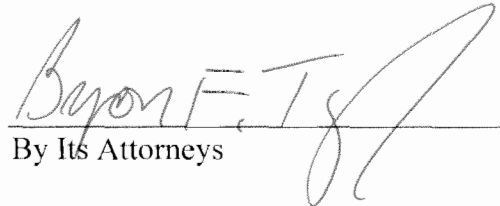
Mary Ann Mullin
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(312) 258-5500

Dated: December 15, 2010

CH2\9199366.7

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 
By Its Attorneys

Byron F. Taylor
Margaret Sobota
SIDLEY AUSTIN LLP
Bank One Plaza
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Chicago, Illinois 60603
(312) 853-7424

EXHIBIT A



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)

February 26, 2004

*Received
BET
3/1/04*

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

Re: Commonwealth Edison

Dear Mr. Taylor:

The Illinois Environmental Protection Agency ("Illinois EPA") is in receipt of Commonwealth Edison's ("ComEd") January 30, 2004, response to the USEPA Section 114 of the Clean Air Act information request, which was dated February 13, 2003. ComEd claimed all information attached to the cover letter and response as "confidential business information", however, the claim was not properly justified pursuant to the Illinois Pollution Control Board ("Board") trade secret regulations. (35 Ill. Adm. Code Part 130)

The Illinois EPA is hereby requesting a statement of justification within 10 working days of receiving this letter as the Illinois EPA has received a FOIA request pertaining to the Section 114 request response. (35 Ill. Adm. Code 130.201(a) and 130.202(a)) Specifically, on February 12, 2004, the Illinois EPA received a Freedom of Information Act (FOIA) request from the Sierra Club seeking the responses of Midwest Generation and ComEd to USEPA's Section 114 information request. Upon receipt of the statement of justification and until such time as the Illinois EPA has made a final trade secret determination, the documents will be protected from public disclosure. (35 Ill. Adm. Code 130.200(d))

In order for materials to be claimed confidential or trade secret, the requirements of 35 Ill. Adm. Code Part 130, Identification and Protection of Trade Secrets and Other Non-Disclosable Information, must be met. The Board regulations require that a statement of justification accompany the submission of any trade secret or confidential information or be submitted upon request by the Illinois EPA. In addition, ComEd must mark the documents in accordance with 35 Ill. Adm. Code 130.302.

ROCKFORD - 4302 North Main Street, Rockford, IL 61103 - (815) 987-7760 • DES PLAINES - 9511 W. Harrison St., Des Plaines, IL 60016 - (847) 294-4000
ELGIN - 595 South State, Elgin, IL 60123 - (847) 608-3131 • PEORIA - 5415 N. University St., Peoria, IL 61614 - (309) 693-5463
BUREAU OF LAND - PEORIA - 7620 N. University St., Peoria, IL 61614 - (309) 693-5462 • CHAMPAIGN - 2125 South First Street, Champaign, IL 61820 - (217) 278-5800
SPRINGFIELD - 4500 S. Sixth Street Rd., Springfield, IL 62706 - (217) 786-6892 • COLLINSVILLE - 2009 Mall Street, Collinsville, IL 62234 - (618) 346-5120
MARION - 2309 W. Main St., Suite 116, Marion, IL 62959 - (618) 993-7200

Specifically, the statement of justification must contain a detailed description of the procedures used by ComEd to safeguard the article from becoming available to persons other than those selected by ComEd to have access thereto for limited purposes; a detailed statement identifying the persons or class of persons to whom the article has been disclosed; a certification that ComEd has no knowledge that the article has ever been published or disseminated or has otherwise become a matter of general public knowledge; a detailed discussion of why ComEd believes the article to be of competitive value; and any other information that will support the claim (35 Ill. Adm. Code 130.203).

If you have any questions or concerns regarding this matter please do not hesitate to contact me.



Chris Pressnall
Assistant Counsel
Division of Legal Counsel

cc: Neena J. Hemmady, ComEd
ID file

EXHIBIT B

CHICAGO LEGAL CLINIC, INC.

South Chicago • Pilsen • Austin • Downtown

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March 2, 2010

Robert A. Kaplan
Regional Counsel
U.S. EPA, Region 5, C-14J
77 West Jackson Blvd.
Chicago, IL 60604-3590

Dear Mr. Kaplan:

Please be advised that I represent Sierra Club.

On behalf of Sierra Club, I withdraw all pending Freedom of Information Act requests by Sierra Club seeking information in U.S. EPA's possession obtained from Midwest Generation pursuant to Section 114 of the Clean Air Act, 42 U.S.C. § 7414, regarding the following electric generating facilities:

1. Fisk Station, 1111 W. Cermak Rd. Chicago, IL
2. Crawford Station, 3501 S. Pulaski Rd., Chicago, IL
3. Waukegan Station, 401 E. Greenwood Ave., Waukegan, IL
4. Will County Station, 529 E. 135th, Romeoville, IL
5. Joliet Station, 1800 Channahon Rd., Joliet, IL
6. Powerton Station, 13082 E. Manito Road, Pekin, IL.

On behalf of Sierra Club, I also withdraw all pending Freedom of Information Act requests by Sierra Club seeking information in U.S. EPA's possession obtained from Commonwealth Edison pursuant to Section 114 of the Clean Air Act regarding these six facilities.

This withdrawal of Sierra Club's Freedom of Information Act request includes all documents provided by Midwest Generation or its affiliates, Commonwealth Edison or its affiliates, or any other entity to the United States Environmental Protection Agency ("EPA") or to the Illinois Environmental Protection Agency ("Illinois EPA") in connection with information requests issued by the EPA under section 114 of the Clean Air Act, 42 U.S.C. § 7414 or otherwise, and for which Midwest Generation and/or Commonwealth Edison has asserted and not withdrawn its request that such documents

be protected under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and EPA's implementing regulations in 40 C.F.R Part 2, or under the Illinois Environmental Protection Act, 415 ILCS 5/7, the Illinois Freedom of Information Act, 5 ILC 140/1 or implementing regulations for these Illinois Statutes at 2 Ill.Adm.Code 1828 and 35 Ill.Adm.Code 130.

This action by Sierra Club is expressly pursuant to the *Stipulation and Protective Order Regarding Confidential Information and Documents* in the case United States of America, et al v. Midwest Generation, LLC, Civil Action No. 09-cv-05277, in the United States District Court, Northern District of Illinois, Eastern Division.

Please contact me if you have questions regarding this matter or if you require further information about Sierra Club's request.

Sincerely,

A handwritten signature in cursive script that reads "Keith Harley".

Keith Harley
Attorney for Sierra Club

CC see attached list

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Board **Midwest Generation EME, LLC and Commonwealth Edison Company's Motion to Vacate IEPA's April 23, 2004, Trade Secret Determination and to Dismiss the Petitions for Review of the Determination as Moot**, by U.S. Mail, upon the following persons:

Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601

Stephen Sylvester
Ann Alexander
Office of the Attorney General
69 West Washington Street
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Chicago, Illinois 60602

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601

Dated: December 15, 2010

/s/ 
Bina Joshi