

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC,
Petitioner,

v.

Illinois Environmental Protection Agency,
Respondent.


PCB No. 04-185
(Trade Secret Appeal)

NOTICE OF FILING

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

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

PLEASE TAKE NOTICE that I have filed today with the Office of the Clerk of the Pollution Control Board **Midwest Generation EME, LLC's Unopposed Motion for Leave to File the Attached Reply to the Illinois Environmental Protection Agency's Response to Midwest Generation EME, LLC's Motion to Vacate IEPA's Trade Secret Determination and Dismiss the Petition for Review as Moot** and an **Appearance for Kathryn McCollough Long**, copies of which are herewith served upon you.


Kathryn McCollough Long

Dated: January 28, 2011

SCHIFF HARDIN LLP
One Westminster Pl.
Lake Forest, Illinois 60045
(847) 295-4324

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Midwest Generation EME, LLC,)	
Petitioner,)	
)	
)	PCB No. 04-185
v.)	(Trade Secret Appeal)
)	
Illinois Environmental Protection Agency,)	
Respondent.)	
)	

**UNOPPOSED MOTION FOR LEAVE TO FILE THE ATTACHED REPLY TO
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO MIDWEST
GENERATION EME, LLC'S MOTION TO VACATE IEPA'S TRADE SECRET
DETERMINATION AND DISMISS THE PETITION FOR REVIEW AS MOOT**

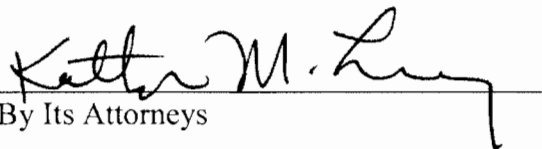
Pursuant to 35 Ill. Admin. Code § 101.500(e), Midwest Generation EME, LLC ("Midwest Gen") respectfully submits this Unopposed Motion for Leave to File the Attached Reply to the Illinois Environmental Protection Agency's ("IEPA's") Response to Midwest Gen's Motion to Vacate the Trade Secret Determination and Dismiss the Petition for Review as Moot. In support of this motion, Midwest Gen states as follows:

IEPA, in its Response, raised new arguments regarding mootness, the Board's authority to grant Midwest Gen's Motion to Vacate the Trade Secret Determination and Dismiss the Petition as Moot, and the Illinois Pollution Control Board's (the "Board's") decision in Monsanto Company v. IEPA, 85-19. Midwest Gen will be materially prejudiced unless it is allowed to file the attached Reply. Respondent has indicated that it has no objection to this request.

WHEREFORE, Midwest Gen respectfully requests that the Hearing Officer grant its Motion for Leave to File the Attached Reply.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
By Its Attorneys

Mary Ann Mullin
Kathryn McCollough Long
SCHIFF HARDIN LLP
One Westminster Pl.
Lake Forest, Illinois 60045
(847) 295-9200

Dated: January 28, 2011

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Midwest Generation EME, LLC,)	
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**MIDWEST GENERATION EME, LLC'S REPLY IN SUPPORT OF MOTION TO
VACATE IEPA'S TRADE SECRET DETERMINATION AND TO DISMISS THE
PETITION FOR REVIEW AS MOOT**

Pursuant to the Illinois Pollution Control Board's (the "Board's") December 8, 2010, Order, Petitioner Midwest Generation EME, LLC ("Petitioner") respectfully submits this Reply to Respondent Illinois Environmental Protection Agency's ("IEPA" or "Respondent's") Response in Opposition to Petitioner's Motion to Vacate IEPA's Trade Secret Determination and to Dismiss the Petition for Review as Moot, which Respondent filed with the Board on January 14, 2011. In addition to the legal and factual bases for vacating IEPA's final decision (the "Trade Secret Determination") regarding the trade secret status of certain documents produced by the Petitioner in response to an information request issued by the United States Environmental Protection Agency pursuant to §114 of the Clean Air Act (the "CBI Materials") previously set forth in the Petitioner's motion and supporting memorandum, the Petitioner states as follows:

I. Because this Matter is Moot, it Should be Dismissed and the Trade Secret Determination Vacated

This matter is moot. A matter becomes moot when "no actual controversy exists or when events occur which make it impossible for the reviewing court to grant the complaining party effectual relief." In re Marriage of Peters-Farrell, 216 Ill.2d 287, 291, 835 N.E.2d 797, 799, 296

Ill.Dec. 444, 446 (Ill. 2005); see also, Madison Park Bank v. Zagel, 91 Ill.2d 231, 236 (Ill. 1982); People v. Weaver, 50 Ill.2d 237, 241, 242 (Ill. 1972). The issues presented by the Petition for Review under both the trade secrets provisions of the Illinois Environmental Protection Act (the “Act”),¹ the Illinois Freedom of Information Act (“FOIA”) and the applicable regulations promulgated thereunder are moot because Sierra Club has withdrawn its request for the CBI Materials and no other member of the public is seeking disclosure of the CBI Materials. See 415 ILCS 5/7.1; 5 ILCS 140/1 et seq.; 35 Ill. Adm. Code § 130.101 et seq.; 2 Ill. Adm. Code § 1828.101 et seq. Respondent’s argument that the Trade Secret Determination is not moot because it was prompted by the Petitioner’s submission of a statement of justification which was only submitted in response to IEPA’s request is flimsy: If the existence of Petitioner’s statement of justification somehow provides a basis for the continued life of this matter, then Petitioner hereby withdraws that statement of justification. Indeed, if Respondent’s argument is correct, then all a party must do to prevent IEPA from making a trade secret determination in the future is to refuse to submit a statement of justification. Obviously, this cannot be true. The Sierra Club FOIA request initiated this matter and nothing else.

Moreover, even if the Board were to affirm that the Trade Secret Determination was not arbitrary and capricious under the trade secrets provisions of the Act, the CBI Materials would still be exempt from disclosure under Section 7(1)(g) of FOIA and, now that Sierra Club’s FOIA request has been withdrawn, IEPA lacks the authority to review Petitioner’s claims that the CBI Materials are exempt from disclosure. 5 ILCS 140/7(g); 2 Ill. Adm. Code §§ 1828.202(a)(1)(F) and 1828.402.

¹ IEPA’s Response stated that the Petitioner, in its Motion, improperly relied on the regulations implementing the Trade Secrets Act. As the citation in Petitioner’s Motion (35 Ill. Adm. Code § 130.201(b)) correctly indicated, the Petitioner intended to refer to the regulations implementing the trade secret provisions of the Illinois Environmental Protection Act (415 ILCS 5/7.1), not the Trade Secrets Act.

Respondent further argues that even if this case is moot, the Board should hear the case because there is a “public interest” in the disclosure of environmental compliance documents. While Petitioner would characterize the materials as accounting and production records, not environmental compliance records, it is clear that no member of the public other than Sierra Club, which has now withdrawn its request, has expressed interest in these documents by requesting them and therefore there is no public interest in the disclosure of these documents. Further, the public interest exception to the mootness doctrine must be narrowly construed and requires a clear showing of each criterion for the exception to apply. Felzak v. Hruby, 226 Ill.2d 382, 393, 876 N.E.2d 650, 658, 315 Ill.Dec. 338, 346 (Ill. 2007) (citing In re India B., 202 Ill.2d 522, 543, 270 Ill.Dec. 30, 782 N.E.2d 224 (Ill. 2002)). Respondent failed to meet its burden of demonstrating that this case meets the necessary criteria for at least two reasons. First, even if the Board were to rule on the merits of the Petition for Review and affirm the Trade Secret Determination, it is unlikely that such an outcome would ever result in the disclosure of the CBI Materials to a third party. As Respondent knows, in the seven years that the CBI Materials have been in its possession, no member of the public, other than the Sierra Club, has requested those documents and Respondent has offered no evidence that any member of the public ever will seek the CBI materials in the future. Second, even a ruling in Respondent’s favor on the trade secret issue will not result in the release of the documents. Respondent has never made a FOIA determination and thus cannot legally release the documents. Continued litigation of this matter would not serve the public interest and would only result in a considerable waste of public resources.

When a controversy has become moot during the pendency of an appeal, the reviewing body should not review the matter “merely to decide moot or abstract questions, establish a

precedent, or to determine the right to, or liability for, costs, or in effect, to render a judgment to guide potential future litigation.” See, Weaver, 50 Ill.2d at 241. It would be improper for the Board to issue a decision on the merits of this case because such decision would be an advisory opinion. This matter should therefore be dismissed.

In dismissing the matter, however, the Board must not leave standing a determination that the CBI Materials are not exempt from disclosure under the trade secrets provisions of the Act, particularly in light of the fact that Respondent failed to consider whether the CBI materials were exempt from disclosure under FOIA and the regulations promulgated thereunder. 415 ILCS 5/7.1; 5 ILCS 140/1 et seq.; 35 Ill. Adm. Code § 130.101 et seq.; 2 Ill. Adm. Code § 1828.101 et seq. This result would not only deny the Petitioners their right to due process in the event, however unlikely, that another member of the public requests the CBI Materials in the future, but would also be inconsistent with Illinois public policy, as embodied in the Board’s Trade Secret Regulations, which only authorize IEPA to request a justification of a claim that a document is exempt from disclosure when it has a legitimate reason to do so. See 35 Ill. Adm. Code § 130.201(b) (detailing the limited circumstances under which IEPA may request a statement of justification that information is exempt from disclosure under the Board’s trade secret rules); see also 2 Ill. Adm. Code § 1828.402 (detailing the limited circumstances under which IEPA may undertake a review of a claim that a document is exempt from disclosure under FOIA). Therefore, in addition to dismissing this matter as moot, the Board should vacate the Trade Secret Determination. See, e.g., Madison Park Bank, 91 Ill.2d at 236 (Ill. 1982) (dismissing a matter as moot and vacating a lower court determination that taxpayers may offset Federal losses against current Illinois gains without reaching the merits of that case); Weaver, 50 Ill.2d at 241-242 (dismissing a matter as moot and vacating a lower court decision that the Administrative

Review Act does not preclude certain individuals from seeking Mandamus or declaratory relief without reaching the merits of that proposition).

In the event that a member of the public should request the CBI Materials in the future, as Petitioner stated in its motion, Respondent may make what it believes to be the appropriate determination at that time and Petitioner's interests would be protected by the process afforded to it under Illinois law. Unlike Respondent, Petitioner does not take for granted the notion that such event would require the parties to "repeat the litigation path that has brought us to this point" (Response pp. 4 and 10). Petitioner may find no cause to appeal that hypothetical future determination, provided that Respondent properly makes that determination after duly considering not only the Board's Trade Secret Standards but also the standards applicable to the IEPA under FOIA. See 35 Ill. Adm. Code § 130.101 et seq. and 2 Ill. Adm. Code § 1828.101 et seq.

Thus, the Board should save this fight for another day (or not at all) by vacating the Trade Secret Determination and dismissing the Petition for Review as moot.

II. The Board has Authority to Dismiss this Action and Vacate the Trade Secret Determination

Respondent spends considerable portions of its Response arguing that Reichhold limits IEPA's authority to reconsider or withdraw its Trade Secret Determination, but Petitioner is not seeking an order to require IEPA to do anything. Petitioner seeks an order from the Board dismissing the action and vacating the Trade Secret Determination. Further, there is no merit to Respondent's argument that the Board is required to conduct a hearing in this matter and lacks the authority to grant the Petitioner's Motion. In essence, Respondent argues that the Board is powerless in this case other than to rule on a motion for Summary Judgment or to "modify" IEPA's Determination after a full hearing on the merits. This constraining view of the Board's

authority is inconsistent with the Illinois Environmental Protection Act, 415 ILCS 5/5(d) (“The Board shall have authority to conduct proceedings . . .”) and with the Board’s rules. The Board’s rules provide broad authority for it to dismiss petitions for review. 35 Ill. Adm. Code § 105.108(e). Similarly, the rules state that the “Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure.” 35 Ill. Adm. Code § 101.500. Given that this matter has become moot during the pendency of the Petition for Review, the Board should vacate the Trade Secret Determination and dismiss the Petition for Review as moot, as it has in the past. See, e.g., Monsanto Co. v. Illinois Pollution Control Board, PCB 85-19 (October 6, 1988); c.f., Madison Park Bank, 91 Ill.2d at 236; Weaver, 50 Ill.2d at 242. Such an order clearly is within the Board’s statutory authority.

III. By Operation of Law, the Determination in Monsanto was Vacated

The Board, in its October 6, 1988, Order in Monsanto, stated that, upon the withdrawal of the FOIA request which was the subject of that case and the filing of a joint motion by the parties to dismiss the action, IEPA’s trade secret determination in that case would be vacated and the matter dismissed as moot. PCB 85-19. Respondent correctly notes in its Response that the Board’s November 3, 1988, Order dismissing that matter after the parties filed a joint motion to dismiss and the requestor filed a motion to withdraw his FOIA request, does not explicitly repeat that the trade secret determination will be vacated. Monsanto, PCB 85-19. Despite the lack of an explicit restatement, the natural, and the only sensible, conclusion is that the trade secret determination was vacated by operation of law. Logically, without the vacatur, Monsanto’s information would then have been public and the company would have been deprived of its due

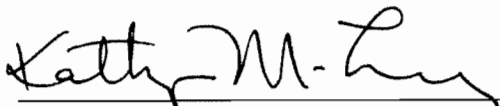
process rights should another individual come forward with a new request for the same information.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that its Motion to Vacate the Trade Secret Determination and Dismiss the Matter as Moot be granted.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
By Its Attorneys

Mary Ann Mullin
Kathryn McCollough Long
SCHIFF HARDIN LLP
One Westminster Pl.
Lake Forest, Illinois 60045
(847) 295-9200

Dated: January 28, 2011

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Midwest Generation EME, LLC,
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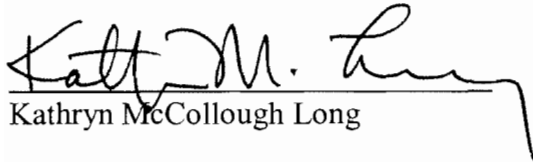
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APPEARANCE

I hereby file my appearance in this proceeding on behalf of Midwest Generation EME, LLC.


Kathryn McCollough Long

Dated: January 28, 2011

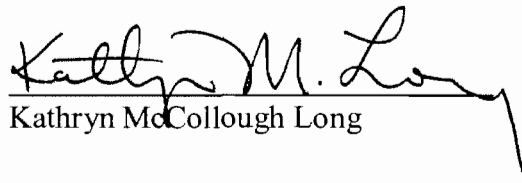
SCHIFF HARDIN LLP
One Westminster Pl.
Lake Forest, Illinois 60045
(847) 295-4324

CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I have served the attached Notice of Filing, Midwest Generation EME, LLC's Unopposed Motion for Leave to File the Attached Reply to the Illinois Environmental Protection Agency's Response to Midwest Generation EME, LLC's Motion to Vacate IEPA's Trade Secret Determination and Dismiss the Petition for Review as Moot and Appearance for Kathryn McCollough Long in PCB 04-185 by U.S. Mail on this 28rd day of January, 2011, upon the following persons:

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

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


Kathryn McCollough Long