

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.)
)

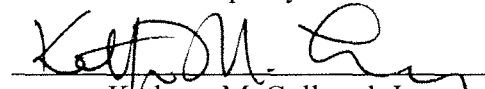
PCB No. 04-216
(Trade Secret Appeal)

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 and Commonwealth Edison Company's Response to Respondent's Motion to Clarify, Reconsider and/or Modify the Board's April 7, 2011 Order**, copies of which are herewith served upon you.


Kathryn McCollough Long

Dated: May 27, 2011
SCHIFF HARDIN LLP
One Westminster Pl.
Lake Forest, Illinois 60045
(847) 295-4324

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**MIDWEST GENERATION EME, LLC'S AND COMMONWEALTH EDISON
COMPANY'S RESPONSE TO RESPONDENT'S MOTION TO CLARIFY,
RECONSIDER AND/OR MODIFY THE BOARD'S APRIL 7, 2011 ORDER**

Petitioners Midwest Generation EME, LLC ("Midwest Gen") and Commonwealth Edison Company ("ComEd") (collectively, "Petitioners") hereby respond to Respondent Illinois Environmental Protection Agency's ("IEPA" or "Respondent's") Motion to Clarify, Reconsider and/or Modify the Board's April 7, 2011 Order ("Respondent's Motion"), which Respondent filed with the Illinois Pollution Control Board (the "Board") on May 13, 2011.

1. On April 7, 2011, the Board entered an order granting Petitioners' Motion to Vacate IEPA's Trade Secret Determination and to Dismiss the Petition for Review as Moot (the "Order"). The trade secret determinations which are the subject of this matter (the "Trade Secret Determinations") concern documents Petitioners submitted to IEPA and claimed to be trade

secrets (the “CBI Materials”). In 2004, a third party sought these documents through a Freedom of Information Act (“FOIA”) request. After seeking and obtaining justifications from the Petitioners regarding their claims that the CBI Materials constituted trade secrets, IEPA determined that the documents were not trade secrets. Petitioners appealed the Trade Secret Determinations to the Board. In its Order, the Board found that the matter was moot because the third party FOIA request for the CBI Materials had been withdrawn, there was no other request for public disclosure of the CBI Materials and IEPA had not articulated any other reason to release the CBI Materials into the public domain. (Order at p. 9.) The Board further found that the public interest exception to the mootness doctrine was inapplicable because IEPA failed to demonstrate that the question of whether the CBI Materials constituted trade secrets was likely to recur. (Order at p. 9.) Finally, the Board vacated the Trade Secret Determinations in order to avoid the risk of a future public disclosure of the CBI Materials. (Order at p. 10.)

2. In its Motion, IEPA appears to seek clarification from the Board as to whether IEPA’s 2004 requests to substantiate the Petitioners’ claims that the CBI Materials constituted trade secrets (the “Requests for Substantiation”) and the Petitioners’ responses to those requests (“Petitioners’ Responses”) are still pending before the IEPA. Of course they are not. The entire matter has been dismissed as moot. The necessary consequence of the Board’s Order is that the Requests for Substantiation and Petitioners’ Responses are no longer pending before the IEPA. When the Board vacated the Trade Secret Determinations, it did not remand the matter to IEPA for further action. Rather, it dismissed the entire proceeding as moot because the underlying reason for the IEPA’s Substantiation Requests and Petitioners’ Responses—the FOIA request—has been withdrawn. Thus, IEPA need not take any further action with regard to the Requests for Substantiation or Petitioners’ Responses. Indeed, if this were not the case, it would lead to

the absurd result suggested in Respondent's Motion, i.e. that IEPA would merely make the same determinations that it made in 2004, which would result in the parties coming before the Board again. If that had been the Board's intent, it would not have found that IEPA failed to show that the question of whether the CBI Materials constituted trade secrets was likely to recur. (Order at 9.) While Petitioners do not believe any clarification of the Order is necessary, Petitioners do not object to the Board providing an explicit statement clarifying the status of the Requests for Substantiation and Petitioners' Responses. However, Petitioners do not see the necessity of modifying the Order and respectfully request that Respondent's Motion be denied to the extent it seeks modification of the Order.

3. Petitioners are perplexed by Respondent's statement that in the event of a new request for the public disclosure of the CBI Materials, IEPA would be "foreclosed" from issuing a new request that the Petitioners substantiate their claims that the CBI Materials constitute trade secrets under the doctrine enunciated in Reichhold Chemicals, Inc. v. Illinois Pollution Control Board, 204 Ill.App.3d 674, 677 (3rd Dist. 1990). (Respondent's Motion at 5.) Reichhold dealt with IEPA's denial of a permit, a final determination which was subject to appeal. Id. In contrast, the Requests for Substantiation were not final determinations by IEPA. Therefore, Reichhold would have no bearing on IEPA's authority to make a new request for substantiation if some new reason to publically disclose the CBI Materials arises in the future. In any event, it appears to Petitioners that, in raising this point, Respondent is improperly seeking an advisory opinion from the Board as to how it should handle a hypothetical future request for the disclosure of the CBI Materials. Insofar as that is the case, the Respondent's Motion should be denied.

4. Although styled as a "Motion to Clarify, Reconsider and/or Modify the Order," Respondent's Motion neither meets the standard for a motion for reconsideration nor requests

that the Board reconsider its decision. Section 101.902 of the Title 35 of the Illinois Administrative Code states, “[i]n ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board’s decision was in error.” Respondent’s Motion does not allege the existence of any new evidence or a change in the law. Respondent’s Motion does not even aver that the Board’s decision was in error. Therefore, to the extent that Respondent’s Motion could be read to request that the Board reconsider the Order, that motion for reconsideration should be denied.

CONCLUSION

Although Petitioners do not think it is necessary, Petitioners do not object to the Board’s making an explicit statement clarifying that the Order applies to the entire matter, including the Requests for Substantiation and Petitioners’ Responses. However, for the foregoing reasons, to the extent that Respondent’s Motion seeks reconsideration or modification of the Order or an advisory opinion, the Respondent’s Motion should be denied.

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: May 27, 2011

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 
By Its Attorneys


Byron F. Taylor
Margaret Sobota
SIDLEY AUSTIN LLP
1 S. Dearborn
Chicago, Illinois 60603
(312) 853-7000

CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I have served the attached Notice of Filing and Midwest Generation EME, LLC's and Commonwealth Edison Company's Response to Respondent's Motion to Clarify, Reconsider and/or Modify the Board's April 7, 2011 Order in PCB 04-215/04-216 (consolidated) by U.S. Mail on this 27th day of May, 2011, upon the following persons:

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

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Office of the Attorney General
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