BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter Of:	)	
	)	
JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	**PCB No. 14-3**
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on October 27, 2017, I caused to be filed with the Clerk of the Pollution Control Board of the State of Illinois, *COMPLAINANT'S BRIEF REGARDING RELEVANCE OF DISCOVERY SOUGHT BY IDOT,* a copy of which is hereby served upon you via electronic mail.

Dated: October 27, 2017

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Johns Manville

By: */s/ Lauren J. Caisman*

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ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	

COMPLAINANT'S BRIEF REGARDING RELEVANCE OF DISCOVERY SOUGHT BY IDOT

Complainant, JOHNS MANVILLE ("JM"), states as follows in response to the Hearing Officer's October 5, 2017 Order, which required JM to address the relevance of discovery sought in IDOT's May 19th Subpoena to Commonwealth Edison ("ComEd"), IDOT's June 23rd Subpoena to ComEd (collectively, the "Subpoenpas") and IDOT's Motion to Require JM to Produce Scott Myers for a Second Deposition ("Motion to Produce").

INTRODUCTION

The information IDOT seeks in the Subpoenas and Motion to Produce is neither relevant nor calculated to lead to relevant evidence. This is a case about *IDOT's liability* for *its* violations of the Illinois Environmental Protection Act (the "Act"). No one else's liability is at issue. Thus, whether ComEd or anyone else paid or reimbursed JM money for work done at the Sites (the information IDOT seeks in the Subpoenas and Motion to Produce) has no bearing on the remaining issue before the Board – the extent of IDOT's monetary liability. IDOT has previously conceded that "[i]t is difficult to see how any such [cost-sharing] agreement [between JM and ComEd] would have any bearing on the issues related to this case." (*See* IDOT

Response to Application for Non-Disclosure, filed September 15, 2017, p. 9.) This is true, particularly where the collateral source rule also would bar the use of the type of information IDOT seeks through its Subpoenas and Motion to Produce. IDOT's attempt to muddy this already complex case by attempting to inject third parties and irrelevant, collateral issues into the second hearing has caused and continues to cause undue delay, expense and harassment. As a result, IDOT's Subpoenas should be quashed, IDOT's Motion to Produce should be denied, and JM's and ComEd's Applications for Non-Disclosure/Protective Orders should be granted.

SCOPE OF SUBPOENAS AND MOTION TO PRODUCE

The Subpoenas issued to ComEd originally sought three categories of documents: (1) documents regarding payments made by ComEd related to the Sites; (2) documents regarding payments to be made by ComEd made related to the Sites; and (3) documents regarding "liability ComEd has been ordered to pay or has agreed to undertake" with respect to Sites 3 or 6. On July 7, 2017, the scope of the requests was narrowed by agreement to cover the following: "(1) documents pertaining to any payments made by ComEd to Johns Manville, relative to its obligations under the 2007 Administrative Settlement Agreement and Order on Consent ("Settlement Agreement"), which payments, if any, involve either or both Site 3 or Site 6 of the Southwestern Site Area; and (2) any agreements between ComEd and Johns Manville with respect to addressing ComEd's obligations under the Settlement Agreement, which agreements, if any, involve either or both Site 3 or Site 6 of the Southwestern Site Area." (*See* Email, attached as **Exhibit A**.)

On July 18, 2017, IDOT filed its Motion to Produce. While the Motion to Produce does not identify with any specificity the topics or questions on which IDOT wants to re-depose Mr. Myers and on which Mr. Myers did not already provide an answer, JM assumes for the purpose

of this response that IDOT wants to further depose Mr. Myers regarding: (1) any payments made or to be made by ComEd to JM regarding Site 3 or Site 6; and (2) any cost sharing or reimbursement agreement between ComEd and JM regarding Site 3 or Site 6. In a status call with the Hearing Officer, it was agreed that JM need not file a response to the Motion to Produce until the privilege and confidentiality issues currently under consideration (by virtue of JM and ComEd's Applications for Non-Disclosure) were determined. (*See* July 24, 2017 Hearing Officer Order.) Thus, JM's argument here is limited to the question of relevance posed by the Hearing Officer's October 5, 2017 Order. JM reserves its right to file an additional response to address other failings of the Motion to Produce at the appropriate time, if necessary. Nevertheless, as set forth herein, none of the discovery sought by IDOT is relevant or reasonably calculated to lead to relevant or admissible information.

ARGUMENT

The Illinois Administrative Code provides that "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 under statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130." 35 Ill. Admin. Code 101.616(a). It is without question that the Hearing Officer possesses the power to deny IDOT's discovery requests. 35 Ill. Admin. Code 101.616(b).

In Illinois, "the right to discovery is limited to disclosure of matters that will be relevant to the case at hand in order to protect against abuses and unfairness, and a court should deny a discovery request where there is insufficient evidence that the requested discovery is relevant or will lead to such evidence." *In re Estate of Blickenstaff*, 2012 IL App (4th) 120480, ¶ 48 (finding that trial court abused its discretion by overruling relevancy objections to discovery

requests and by requiring the production of irrelevant information); *see also M. Loeb Corp. v. Brychek*, 98 Ill. App. 3d 1122, 1125-26 (1st Dist. 1981) ("A trial court does not abuse its discretion by denying discovery of a subject not relevant to the issues of the action."); *Harris Tr. & Sav. Bank v. Chicago Coll. of Osteopathic Med.*, 116 Ill. App. 3d 906, 912 (1st Dist. 1983) (finding that trial court did not abuse its discretion in refusing to allow discovery of irrelevant information and agreeing with trial court's denial of last minute continuance "for nebulous reasons to engage in remote discovery . . .").

The Board likewise routinely denies requests for irrelevant information. *See e.g.*, *Timber Creek Homes, Inc. v. Vill. of Round Lake*, PCB 14-99, 2014 WL 1350986, *3 (Apr. 3, 2014) (Board finding that Hearing Officer correctly limited the scope of discovery and that discovery concerning prior siting decisions was irrelevant); *ComEd v. IEPA*, PCB 04-215, 2007 WL 1266937, *3 (Apr. 26, 2007) ("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."); *People v. Packaging Personified, Inc.*, PCB 04-16, 2006 WL 2467879, *2 (June 28, 2006) (denying motion to compel on the basis that the information requested was neither relevant nor calculated to lead to relevant information).

In Illinois, "relevant evidence" means evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ILL. EVID. R. 401. In general, the pleadings serve as the starting point for determining whether information requested is relevant. *See Owen v. Mann*, 105 Ill. 2d 525, 530 (Ill. 1985) (holding that "discovery should only be utilized to 'illuminate the actual issues in the case'").

A. <u>The Information IDOT Seeks Is Irrelevant.</u>

Here, the Complaint and the Board's December 15, 2016 Interim Opinion and Order ("Interim Order") frame the "actual issues in the case." This action concerns only one party's conduct — IDOT's conduct. To that end, the Board unanimously found that "IDOT caused open dumping of ACM waste along the south side of Greenwood Avenue within Site 6 and adjacent areas along the north edge of Site 3," IDOT "allows open dumping to continue as long as ACM waste remains at these locations," and that "IDOT allowed open dumping of ACM waste on the portion of Site 3 within Parcel 0393." (Interim Order, p. 22.) Based on these findings, IDOT was held to have violated Sections 21(a), (d), and (e) of the Act. Notably absent from the Interim Order is any finding that JM, ComEd, or anyone else violated the Act.

As a result of IDOT's numerous, continuing violations and considering that every Section 33(c) factor weighed against IDOT, the Board determined that JM is entitled to recover its cleanup costs from IDOT. (Interim Order, pp. 18-19, 21.) The Board then directed that further hearing be held on three straightforward issues so that the Board could "enter its order awarding cleanup costs":

1. The cleanup work performed by JM in the portions of Site 3 and Site 6 where the Board found IDOT responsible for ACM waste present in the soil.
2. The amount and reasonableness of JM's costs for this work
3. The share of JM's costs attributable to IDOT.

(*Id*., p. 22.)

The information IDOT now seeks—information regarding any payments by ComEd to JM for work at the Sites and any cost sharing agreement between the parties—is immaterial to these narrow questions, which concern only "JM's work" and "JM's costs." The Board did not ask the parties to address work done or costs incurred by ComEd. Nor did the Board ask the

parties to address whether any portion of JM's costs were reimbursed by or attributable to ComEd or any other third party. Thus, whether ComEd has made any payments related to the work on the Sites is neither relevant nor likely to lead to the discovery of relevant evidence. There can be no dispute (as the invoices provided through discovery demonstrate) that JM is seeking only to recover from IDOT certain costs *JM* has expended at the Sites. The hearing will establish which of those costs were incurred due to IDOT's violations of the Act.

IDOT might argue that the Board must consider ComEd's or JM's liability in determining the "the amount and reasonableness of JM's costs for this work" or "the share of JM's costs attributable to IDOT" and that any payments by ComEd to JM serves as evidence of such liability. (*See* Response to Application for Non-Disclosure, filed September 15, 2017, p. 10.) This is incorrect for many reasons. First, the only party to have engaged in "open dumping" or found liable for violations of the Act at the Sites is IDOT. Conversely, neither ComEd nor JM have been held liable for placing ACM on the Sites in violation any law, let alone the Act or the Board's regulations, as IDOT has been. As such, the relevant issue at this stage in the case is the amount of money JM expended due to IDOT's violations of the Act. That discovery was completed long ago.

Second, the Board has already held that apportionment does not apply in this case and thus the liability of ComEd or JM is not at issue. (*See* Interim Order, p. 22 ("The requirement of Section 58.9(a) of the Act to determine IDOT's proportionate share of JM's costs does not directly apply because the sites are subject to a USEPA order. *See* 415 ILCS 5/58.1(a)(iv) (2014), 58.9(a); *see also* 35 Ill. Adm. Code Part 741.").) Thus, IDOT should be solely and wholly liable for investigation and remediation costs associated with its violations of the Act. *See e.g., People v. Gilmer,* PCB 99-27, 2000 WL 1246533, *6 (Aug. 24, 2000) ("The closure

activities at the Multi-County Landfill are excluded from proportionate share liability, and . . . the Act therefore does not limit respondents' liabilities."); *People v. Cmty. Landfill Co. et al.*, PCB 97-193, 2012 WL 1227674, *1 (Apr. 5, 2012) (assessing joint and several liability to two defendants and rejecting that liability should be assessed on a pro rata basis or by dividing by number of violations found).

Third, to allow apportionment when only one party has been found to have violated the Act would run contrary to a primary purpose of the Act, which is "to assure that adverse effects upon the environment are fully considered and borne by those who cause them." *Nat'l Marine, Inc. v. IEPA*, 159 Ill. 2d 381, 386 (Ill 1994). As the Board has previously held, "[r]eading the Act to allow a private party to recover cleanup costs furthers the intent of the Act by encouraging prompt cleanup and ensuring that the responsible party pays for its share." (Interim Order, p. 21.) Here, to effectuate the purposes of the Act, IDOT must be required to take responsibility for its conduct and to pay for the consequences of its unlawful acts. This does not mean that IDOT is liable for all of the costs JM has spent with respect to Sites 3 and 6 and JM is not seeking to recover all such costs. Rather, it means that when costs were incurred by JM as a result of IDOT's violations of the Act, IDOT alone is responsible for those costs. In other words, IDOT must pay, and JM is seeking to recover, all reasonable costs JM has expended as a result of IDOT's violations of the Act.

Finally, any payments by ComEd to JM cannot serve as evidence of liability under the Act or even under CERCLA. The USEPA expressly recognized that any actions taken by JM or ComEd to clean up the Sites did not "constitute an admission of any liability." (Hearing Exhibit 62-3, ¶ 4.) As a result, any payments made by ComEd to JM would not be tied to a finding of liability, but rather would be the result of a negotiation between the two parties. In short, any

payments made by ComEd to JM regarding the Sites have no bearing on IDOT's liability and IDOT should not be allowed to shift any of its burden onto ComEd or JM, especially when neither has been found culpable in any forum. The discovery requests should be denied.

B. <u>The Information IDOT Seeks Is Not Calculated To Lead To Relevant Evidence.</u>

Even assuming *arguendo* that ComEd made payments to JM and that those payments were germane to the few remaining issues for hearing, the information IDOT seeks still would not lead to relevant or otherwise admissible evidence. Illinois has adopted the collateral source rule, which provides that "benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor." *Wills v. Foster,* 229 Ill. 2d 393, 399 (Ill. 2008). "Under the rule, payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable . . . The collateral payments made to or benefits conferred on the plaintiff *do not reduce the defendant's liability*, even though they reduce a plaintiffs' losses . . . The collateral source rule bars a defendant from reducing the plaintiffs compensatory award by the amount the plaintiff received from the collateral source." *Segovia v. Romero,* 2014 IL App (1st) 122392, ¶¶ 19-20, 22-23 (emphasis added); *Brumley v. Fed. Barge Lines, Inc*., 78 Ill. App. 3d 799, 807 (5th Dist. 1979) (ruling that, consistent with its *prior protective order* precluding inquiry into collateral sources, the collateral source rule prevented inquiry into collateral sources).

The collateral source rule is a rule of evidence and a substantive one of damages. "As a rule of evidence, the rule operates to prevent the jury from learning anything about collateral source income . . . As a substantive rule of damages, the collateral source rule protects collateral payments made to or benefits conferred on the plaintiff *by denying the defendant any*

corresponding offset or credit." *Segovia*, 2014 IL App (1st) 122392, at ¶ 22 (emphasis in original). Illinois courts routinely find evidence of collateral source payments to be inadmissible. *See Lang v. Lake Shore Exhibits, Inc.*, 305 Ill. App. 3d 283, 290 (1st Dist. 1999) (vacating judgment and finding that trial court erred in allowing admission of collateral source payments and that admission denied plaintiff a fair trial); *Nastasi v. United Mine Workers of Am. Union Hosp.*, 209 Ill. App. 3d 830, 842 (5th Dist. 1991) (letter indicating that plaintiff was obtaining disability benefits should not have been admitted because it violated the collateral source rule as the reference to benefits "served no legitimate purpose"). Since the information IDOT seeks is ultimately not admissible in this matter, it is also not relevant, likely to lead to relevant/admissible information, or discoverable. *See Manns v. Briell*, 349 Ill. App. 3d 358, 361 (4th Dist. 2004) (finding that plaintiff was not entitled to discovery of information that was clearly inadmissible at trial); *Storino, Ramello & Durkin v. Rackow*, 2015 IL App (1st) 142961, ¶ 41 (trial court did not abuse its discretion in denying discovery when party failed "to show some relevance in the material sought").

The rationale behind the collateral source rule is similar to the rationale behind the Act; both aim to hold wrongdoers fully accountable for their actions. Under the collateral source rule, the wrongdoer "should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and third persons." *Segovia*, 2014 IL App (1st) 122392, at ¶ 21; *see also Lopez v. Morley*, 352 Ill. App. 3d 1174, 1179 (2d Dist. 2004). But this is precisely what IDOT attempts to achieve. IDOT has argued that that any "division" of costs between JM and ComEd or any "reimbursement" by ComEd of costs JM otherwise incurred is "highly relevant" here because IDOT plainly wants to to take advantage of any contract that might exist between JM and ComEd to reduce its own

liability. (*See* IDOT Response to ComEd Motion to Quash, filed June 22, 2017, p. 3.) But, under both the Act and the collateral source rule, IDOT (the only entity held liable for causing certain contamination at the Sites) should not be able to avoid its liability by relying on any negotiated side agreement(s) that might exist between JM and third party ComEd. *See e.g.*, *Nickon v. City of Princeton*, 376 Ill. App. 3d 1095, 1100 (3d Dist. 2007) (relying "heavily on the blueprint provided by our supreme court in a line of case discussing the collateral source rule," which states that "the collateral source rule does not allow a wrongdoer to take advantage of 'contracts *or other relations*' that may exist between the injured party and third persons" and explaining that the rule is not limited to only contractual payments) (emphasis in original); *see also* 415 ILCS 5/2(b). Permitting IDOT to discover and use evidence of payments JM might have received from any other source, including ComEd, to offset its liability would run afoul of both the Act and the collateral source rule. Consequently, the discovery should be denied.

C. <u>JM's And ComEd's Motions For Protective Orders Should Be Granted.</u>

If the Board or Hearing Officer were to determine that IDOT's Subpoenas and Motion to Produce might lead to relevant evidence, they should still use their powers to prevent IDOT's wasteful fishing expedition. The Board and the Hearing Officer have the power to grant a protective order "when necessary to prevent undue delay, undue expense, or harassment, or to protect materials from disclosure." 35 Ill. Admin. Code 101.610; 35 Ill Admin. Code 101.614. "The purpose of pretrial discovery is to ascertain the truth about the legal controversy to expedite its disposition in the circuit court." *Brostron v. Warmann*, 190 Ill. App. 3d 87, 91–92 (3d Dist. 1989). "Even after determining the pretrial discovery request is relevant, however, the circuit court must still balance the needs of truth with the burdens of production through the entry of any protective order appropriate to the action." *Id.*

Here, given that the collateral source rule would preclude IDOT from using any sums that might have been paid by ComEd to JM to obtain an offset or credit, it would be an enormous waste of resources and harassing to JM and ComEd to allow IDOT to continue with this fruitless inquiry. *See Timber Creek Homes, Inc. v. Vill. of Round Lake Park*, PCB 14-99, 2014 WL 1598140, *4 (Apr. 17, 2014) (quashing subpoena seeking information that was not clearly relevant). This second phase of the case was intended to be limited in scope, not a year-long quest for immaterial information. Consequently, if the Hearing Officer or Board were to somehow find IDOT's inquiry to be relevant or likely to lead to relevant evidence, they should, in the alternative, enter a protective order preventing IDOT from seeking this information, which is plainly inadmissible at hearing.

CONCLUSION

WHEREFORE, for the foregoing reasons, JM respectfully requests that the Board/Hearing Officer quash IDOT's Subpoenas, deny IDOT's Motion to Produce and enter a protective order precluding IDOT from inquiring, in discovery or at hearing, into any irrelevant, collateral source arrangements or payments.

Dated: October 27, 2017

Respectfully submitted,

BRYAN CAVE LLP

Attorneys for Complainant Johns Manville

By: */s/ Lauren J. Caisman*

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on October 27, 2017, I caused to be served a true and correct copy of *COMPLAINANT'S BRIEF REGARDING RELEVANCE OF DISCOVERY SOUGHT BY IDOT* upon all parties listed on the Service List by sending the documents via e-mail to all persons listed on the Service List, addressed to each person's e-mail address.

/s/ Lauren J. Caisman
Lauren J. Caisman

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EXHIBIT A

Caisman, Lauren

From: McGinley, Evan <emcginley@atg.state.il.us>
Sent: Friday, July 07, 2017 4:22 PM
To: 'Sigel, Gabrielle'; O'Laughlin, Ellen; Brice, Susan; Caisman, Lauren
Cc: Bandza, Alexander J.
Subject: RE: This Morning's Conference Call Regarding IDOT Subpoenas to Com Ed

Gay:

Thank you for your email. IDOT is willing to agree to the terms set forth below, provided that ComEd agrees to provide IDOT with a privilege log listing each document withheld by ComEd that would otherwise fall within the scope of this agreement. IDOT also requests that such a privilege log contain the following information:

- the date of the document
- the author and any recipients of the document
- a listing of all privileges claimed for the withheld document

If ComEd is amenable to these additional terms, then we have an agreement.

Please advise how your client wishes to proceed.

Regards,

Evan J. McGinley
Assistant Attorney General
Environmental Bureau
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Chicago, IL 60602
312.814.3153 (phone)
312.814.2347 (fax)
emcginley@atg.state.il.us

From: Sigel, Gabrielle [mailto:GSigel@jenner.com]
Sent: Friday, July 07, 2017 11:21 AM
To: McGinley, Evan; O'Laughlin, Ellen; 'Brice, Susan'; Caisman, Lauren (lauren.caisman@bryancave.com)
Cc: Bandza, Alexander J.
Subject: RE: This Morning's Conference Call Regarding IDOT Subpoenas to Com Ed

Counsel: ComEd will agree to proceed in response to IDOT's May 2017 subpoena *duces tecum*, served upon ComEd and its counsel ("the ComEd Subpoena"), based on the following proposed agreement:

A. IDOT agrees to limit its request for documents from ComEd to the following: 1) documents pertaining to any payments made by ComEd to Johns Manville, relative to its obligations under the 2007 Administrative Settlement Agreement and Order on Consent ("Settlement Agreement"), which payments, if any, involve either or both Site 3 or Site 6 of the Southwestern Site Area; and

2) any agreements between ComEd and Johns Manville with respect to addressing ComEd's obligations under the Settlement Agreement, which agreements, if any, involve either or both Site 3 or Site 6 of the Southwestern Site Area (collectively, the Category A documents).

B. In this litigation, IDOT will not serve or otherwise make any other requests for documents to ComEd, any of its employees, or any of its corporate representatives, other than Category A documents pursuant to the ComEd Subpoena.

C. ComEd will not withdraw its objection that the ComEd Subpoena is unduly burdensome and duplicative and that the Category A documents were or should have been sought from JM or another entity, but ComEd will not, on those bases, withhold from production Category A documents, if any.

D. ComEd is asserting its rights to withhold from production Category A documents, if any, based on claims of privilege and confidentiality. ComEd will assert its rights with respect to privilege and confidentiality in a separate filing to be presented for in camera review by the Hearing Officer at a future, mutually agreed-to date.

E. By making or agreeing to this proposal, ComEd is not making any representations or admissions that Category A documents exist or are within ComEd's possession, custody or control, or that any Category A documents, if required by the Hearing Officer to be produced despite ComEd's privilege/confidentiality objections, are relevant or admissible for any purposes in the hearing in this case or otherwise.

F. After the Hearing Officer rules on ComEd's privilege/confidentiality objections, IDOT will re-consider, in good faith, whether it will subpoena any deposition or other live testimony from ComEd's corporate representatives, employees or agents. ComEd reserves all rights to object, on any grounds, to any subpoena for deposition or other live testimony from ComEd's corporate representatives, employees, or agents.

ComEd is making this proposal for an agreement with IDOT on ComEd's behalf, and ComEd is not speaking on behalf of, or precluding objections by, JM or any other entity. Thank you for letting me know if the proposal stated above is acceptable.

Gay Sigel

From: McGinley, Evan [mailto:emcginley@atg.state.il.us]
Sent: Monday, July 03, 2017 2:39 PM
To: Sigel, Gabrielle <GSigel@jenner.com>
Cc: Bandza, Alexander J. <ABandza@jenner.com>; 'Brice, Susan' <Susan.Brice@bryancave.com>; Caisman, Lauren (lauren.caisman@bryancave.com) <lauren.caisman@bryancave.com>; O'Laughlin, Ellen <EOLaughlin@atg.state.il.us>
Subject: RE: This Morning's Conference Call Regarding IDOT Subpoenas to Com Ed

Gay:

Thank you for your response. Hope you have an enjoyable holiday, as well.

Regards,

Evan J. McGinley
Assistant Attorney General
Environmental Bureau
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From: Sigel, Gabrielle [mailto:GSigel@jenner.com]
Sent: Monday, July 03, 2017 2:14 PM
To: McGinley, Evan
Cc: Bandza, Alexander J.; 'Brice, Susan'; Caisman, Lauren (lauren.caisman@bryancave.com); O'Laughlin, Ellen
Subject: RE: This Morning's Conference Call Regarding IDOT Subpoenas to Com Ed

Evan: Thank you for what I agree was a productive call and for agreeing to put in writing IDOT's offer to limit the scope of document requests served upon ComEd. To clarify, I need to speak with my client regarding both IDOT's offer to limit the scope of its document requests under any subpoenas issued to ComEd and the issue of ComEd's assertions of privilege and/or /confidentiality. I will get back to you as soon as I can with my client's position in response to both issues. As I stated in our call, by agreeing to consider IDOT's offer regarding scope of requested documents, ComEd is not making any statement or admission regarding the existence of any documents or information which may come within IDOT's offered scope.

I hope you enjoy your July 4th.

Gay Sigel

From: McGinley, Evan [mailto:emcginley@atg.state.il.us]
Sent: Monday, July 03, 2017 12:12 PM
To: Sigel, Gabrielle <GSigel@jenner.com>
Cc: Bandza, Alexander J. <ABandza@jenner.com>; 'Brice, Susan' <Susan.Brice@bryancave.com>; Caisman, Lauren (lauren.caisman@bryancave.com) <lauren.caisman@bryancave.com>; O'Laughlin, Ellen <EOLaughlin@atg.state.il.us>
Subject: This Morning's Conference Call Regarding IDOT Subpoenas to Com Ed

Gay:

Thank you for your time this morning. We found this morning's call to be reasonably productive as to the issues which Com Ed has raised about IDOT's subpoena for documents ("document subpoena") and the deposition of a corporate representative ("deposition subpoena"). Please let this email serve to memorialize our discussions today regarding the two subpoenas.

During this morning's call, IDOT agreed to limit the scope of its document subpoena to seek only the following categories of documents: 1) documents pertaining to any payments made by Com Ed to Johns Manville, relative to their mutual obligations under the 2007 Administrative Order on Consent ("AOC"); and 2) any agreements between Com Ed and Johns Manville (as further specified below) with respect to addressing their mutual obligations under the AOC.

As we discussed, IDOT is only seeking such agreements to the extent that they encompass or deal with Sites 3 and 6. However, IDOT is not seeking any such agreements, if those agreements only deal exclusively with Sites 4 and 5. (As we also discussed this morning, IDOT is willing to agree to all of the aforementioned limits with respect to any documents requested in any subpoena for deposition that IDOT may reissue/issue to Com Ed.)

Based on our conversation this morning, we understand that the limits that IDOT has now agreed to on the scope of documents sought from Com Ed are acceptable to Com Ed with respect to scope. However, it is also our understanding that Com Ed still has concerns about the possibility that some form(s) of privilege may still attach to some of the documents within this now narrowed scope. It is our further understanding that with these agreed upon limits to the scope of documents sought through IDOT's document subpoena, you will now have discussions with your client regarding whether Com Ed will be asserting any claim of privilege with respect to documents that are still responsive to the revised scope of this subpoena. You indicated that you will try to advise us of any privilege claims by the end of this week. (We assume you will use your best efforts to do this, but understand that because of the holiday this week that may not be possible.)

We also discussed whether IDOT would agree to similar limitations on the topics which might be investigated during the deposition of any Com Ed representatives or employees. As I noted during our call, IDOT is presently unable to agree to such limitations, due to not having a full understanding of what level of involvement Com Ed may have had in the course of Johns Manville performing the work required under the AOC. Perhaps once IDOT has a better understanding of Com Ed's involvement (if any), IDOT will be able to limit the scope of topics for any future depositions of Com Ed employees.

I trust that this email accurately summarizes the understandings that we reached this morning. Please let me know immediately if you believe otherwise.

Regards,

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