

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To:

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
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's Motion to Vacate IEPA's Trade Secret Determination and to Dismiss the Petition 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
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2. On November 6, 2003, Midwest Gen 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, Midwest Gen submitted a copy of these documents to IEPA. The Generation Chart and Project Chart 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 Generation Chart and Project Chart will be referred to herein as the “CBI Materials”).

3. On November 3, 2003, 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 January 5, 2004, IEPA asked Midwest Gen to provide a statement of justification for its confidentiality claims with respect to the CBI Materials. The letter stated that the reason for this request was the FOIA request IEPA had received from Sierra Club. See Exhibit A (copy of IEPA letter requesting statement of justification). IEPA’s letter provided no other rationale for its request for a statement of justification. On January, 23, 2004, Midwest Gen submitted a statement of justification to IEPA.

5. Midwest Gen received a letter from IEPA, dated March 10, 2004, denying trade secret protection to the CBI Materials (the “Trade Secret Determination”).

6. Midwest Gen appealed IEPA’s Trade Secret Determination to the Illinois Pollution Control Board (the “Board”) in a petition filed on April 19, 2004, on the basis that (1) the Trade Secret Determination was arbitrary, capricious and contrary to law, and (2) 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. This appeal was designated as PCB 04-185.

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 its FOIA request, which, as describe above, was the sole ground for IEPA's 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 has 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 Petitioner's 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 information Monsanto had identified as confidential trade secret information. Monsanto, PCB

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.

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.

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 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 wasting judicial resources litigating the correctness of a trade secret determination regarding information that no third party is interested in obtaining.

11. In its January 5, 2004, letter, IEPA stated that its reason for requesting a statement of justification with respect to the CBI Materials was that "on November 3, 2002, the Illinois EPA received a Freedom of Information Act (FOIA) request from the Sierra Club seeking records relating to all coal-fired power plants in Illinois." Exhibit A. Because Sierra Club has now withdrawn its FOIA request, IEPA's stated purpose for making the Trade Secret Determination no longer exists. The CBI Materials were submitted to IEPA over seven years ago and the only party to express an interest in the materials has withdrawn its request. Midwest Gen maintains its 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, Midwest Gen is compelled to maintain this appeal in order to preserve its 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 because it would result in a considerable waste of resources by the Board, 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 CBI Materials in the future, IEPA may, of course, make what it believes to be the appropriate

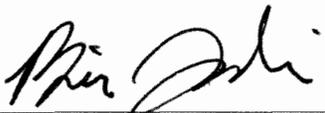
determination at that time and the Petitioner's interests would be protected by the process afforded to them under Illinois law.

CONCLUSION

WHEREFORE, for the reasons set forth above, specifically because of Sierra Club's withdrawal of its FOIA request, Midwest Gen respectfully requests that the Board grant its Motion to Vacate IEPA's March 10, 2004, Trade Secret Determination and that the Board subsequently dismiss the Petition for Review of that determination as moot.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
By Its Attorneys

Mary Ann Mullin
Bina Joshi
SCHIFF HARDIN LLP
233 South Wacker Drive
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Chicago, IL 60606
(312) 258-5500

Dated: December 15, 2010

EXHIBIT A



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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JAMES R. THOMPSON CENTER, 100 W. S. RANDOLPH, SUITE 11-300, CHICAGO, IL 60601, 312-814-6026

ROD R. BLAGOJEVICH, GOVERNOR

RENÉE CIPRIANO, DIRECTOR

Received
Jan 5, 2004
[Signature]

217/782-5544
217/782-9143(TDD)

January 5, 2004

Jane E. Montgomery
Schiff Harden & Waite
6600 Sears Tower
Chicago, Illinois 60606-6360

Re: Midwest Generation EME, L.L.C.

Dear Ms. Montgomery:

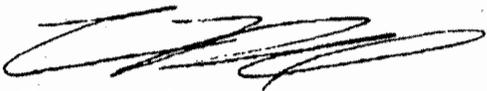
The Illinois Environmental Protection Agency ("Illinois EPA") is in receipt of Midwest Generation EME, L.L.C.'s ("Midwest") November 6, 2003, response to the USEPA Section 114 of the Clean Air Act information request, which was dated February 13, 2003. The attachments to Midwest's responses to requests number 1 - 3 and 9 were claimed 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 November 3, 2003, the Illinois EPA received a Freedom of Information Act (FOIA) request from the Sierra Club seeking records relating to all coal-fired power plants in Illinois. 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, Midwest must mark the documents in accordance with 35 Ill. Adm. Code 130.302.

Specifically, the statement of justification must contain a detailed description of the procedures used by Midwest to safeguard the article from becoming available to persons other than those selected by Midwest 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 Midwest 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 Midwest 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

EXHIBIT B

CHICAGO LEGAL CLINIC, INC.

South Chicago • Pilsen • Austin • Downtown

Most Reverend. Thomas J. Paprocki, President
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* also admitted in Indiana

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

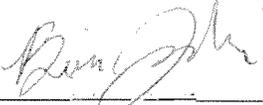
I, the undersigned, certify that I have served the attached **Midwest Generation EME, LLC's Motion to Vacate IEPA's Trade Secret Determination and to Dismiss the Petition for Review of the Determination as Moot**, by U.S. Mail, upon the following persons:

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

Stephen Sylvester
Ann Alexander
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Bradley P. Halloran, Hearing Officer
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Dated: December 15, 2010



Bina Joshi