**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF IOWA**
**CENTRAL DIVISION**

| | |
|---|---|
| **MIDWEST ENERGY EMISSIONS CORP.,**<br><br>**Plaintiff,**<br>**v.**<br><br>**BERKSHIRE HATHAWAY ENERGY COMPANY, MIDAMERICAN ENERGY COMPANY, PACIFICORP, ALLIANT ENERGY CORPORATION, ALLIANT ENERGY CORPORATE SERVICES, INC., INTERSTATE POWER AND LIGHT COMPANY, and WISCONSIN POWER AND LIGHT COMPANY,**<br><br>**Defendants.** | Case No. 4:24-cv-243-SHL-WPK<br><br>DEFENDANTS' BRIEF IN SUPPORT OF THEIR RESISTANCE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION<br><br>Oral Argument Requested<br><br>REDACTED PUBLIC VERSION |

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| Exhibit | Exhibit Name | Bates | Confidentiality designation |
|---|---|---|---|
| A | Connie Senior Declaration (with exhibits) | N/A | Public |
| B | Verdict Form (ECF 692) in Case No. 1:19-cv-01334-CJB (D. Del.) | N/A | Public |
| C | *NRG Energy. Inc. v. Midwest Energy Emissions Corp.*, No. IPR2020-00832, Paper 17 (P.T.A.B. Oct. 26, 2020) (Instituting Review of U.S. Patent No. 10,343,114) | N/A | Public |
| D | *NRG Energy. Inc. v. Midwest Energy Emissions Corp.*, No. IPR2020-00834, Paper 18 (P.T.A.B. Oct. 26, 2020) (Instituting Review of U.S. Patent No. 10,343,114) | N/A | Public |
| E | *NRG Energy. Inc. v. Midwest Energy Emissions Corp.*, No. IPR2020-00832, IPR2020-00834, Paper 23 (P.T.A.B. Oct. 26, 2020) (Terminating Review of U.S. Patent No. 10,343,114 due to Post-Institution Settlement) | N/A | Public |
| F | ME2C 2024 Annual 10-K Statement (https://ir.birchtech.com/sec-filings/all-sec-filings/content/0001477932-24-002170/meec_10k.htm) | N/A | Public |
| G | Plaintiff's Initial Disclosures | N/A | Public |
| H | ME2C July 30, 2024, Press Release (https://ir.birchtech.com/news-events/press-releases/detail/672/me2c-environmental-files-patent-infringement-lawsuits-against-14-defendants-including-major-power-utility-companies) | N/A | Public |
| I | *Mercury and Air Toxics Standards*, EPA (last visited December 16, 2024), https://www.epa.gov/stationary-sources-air-pollution/mercury-and-air-toxics-standards | N/A | Public |
| J | *Coal Explained: Use of Coal, U.S. Energy Information Administration (last updated Sept. 14, 2023) https://www.eia.gov/energyexplained/coal/use-of-coal.php#:~:text=In%202022%2C%20coal%* | N/A | Public |



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| Exhibit | Exhibit Name | Bates | Confidentiality designation |
|---|---|---|---|
| | *20accounted%20for,19.5%25%20of%20 U.S.%20electricity%20generation* | | |
| K | *What EPA is Doing to Reduce Mercury Pollution, and Exposures to Mercury*, U.S. Env't Protection Agency (last updated July 11, 2024) https://www.epa.gov/mercury/what-epa-doing-reduce-mercury-pollution-and-exposures-mercury | N/A | Public |
| L | 08/06/2022 Edwin Olson Deposition Transcript | ME2C_SDIA-00016892 | Confidential |
| M | 08/24/2022 Michael Holmes Deposition Transcript | ME2C_SDIA-00016575 | Confidential |
| N | Talen Settlement Agreement | NA | Highly Confidential |
| O | [REDACTED] Settlement Agreement | ME2C_SDIA-00013275 | Highly Confidential |
| P | [REDACTED] Settlement Agreement | ME2C_SDIA-00013230 | Highly Confidential |
| Q | 12/10/ 2024 Jim Trettel Deposition Transcript | N/A | Highly Confidential |
| R | U.S. Patent Application Publication No. 2008/0107579 | N/A | Public |
| S | Delaware Case, ECF 614 | N/A | Public |
| T | [REDACTED] Settlement Agreement | ME2C_SDIA-00013250-74 | Highly Confidential |

# I. INTRODUCTION

Facing multiple motions to dismiss and having waited years before seeking injunctive relief, Plaintiff Midwest Energy Emissions Corp. ("ME2C") now seeks a preliminary injunction. The Court should deny a preliminary injunction because the facts do not justify this extraordinary relief. ME2C's bold claims that it is likely to succeed on the merits face formidable barriers. *First*, the Patent Trial and Appeals Board ("PTAB") recently determined that a substantially similar claim in a related ME2C patent was likely invalid. *Second*, ME2C has not established even a remote likelihood of irreparable harm. ME2C's long delay in asserting infringement and its repeated licensing history confirms monetary damages would provide an adequate remedy. *Third*, the balance of hardships does not favor ME2C—it is far more burdensome to require power plants that provide electricity to customers across Iowa, Wisconsin, Wyoming, and other states to disrupt operations than for ME2C to wait until final resolution of this matter to recoup damages, if any. *Fourth*, no private interest in pursuing patent infringement based on a likely invalid patent claim can possibly outweigh the harm an injunction in this case would inflict on the public. Moreover, a gating issue is that ME2C has not established personal jurisdiction over certain parties, which precludes issuance of a preliminary injunction. And certain parties already received rights under a prior agreement granted by ME2C, which it conveniently seeks to ignore. At bottom, this Motion seeks to strong-arm Defendants into buying unpatentable commodity chemicals from ME2C—a strange business strategy premised on flawed legal arguments.

# II. STATEMENT OF FACTS

## A. The Mercury Capture Processes at Issue Were Documented by Others and Were in Use Well Before ME2C Filed Its Patents as the PTAB Found in 2020

ME2C boasts that its claimed two-step process to capture mercury emissions somehow saved a dying coal-fired power plant industry. Not so. Even the named inventors acknowledged,

in deposition and in the patent(s), that the steps of the claimed process were known and used well before the filing of U.S. Patent No. 10,596,517 ("the '517 Patent"). [REDACTED] *See* Ex. L (ME2C_SDIA-00016892) at 144:25-146:4 (Edwin Olson, a named inventor, [REDACTED]). And the '517 Patent itself acknowledges that step two (activated carbon) of the claimed process was known and used well before the filing of the Asserted Patents. *See* ECF 60-03, '517 Patent at 2:8-28; *see also* Ex. L (ME2C_SDIA-00016892) at 114:11-25 (Olson admitting [REDACTED]); Ex. M (ME2C_SDIA-00016575) at 41:5-9.

As part of its review, a panel of three administrative law judges ("ALJs") at the PTAB issued detailed findings in October 2020 concluding preliminarily that the two-step process of combusting coal with bromine and injecting activated carbon to collect mercury from the mercury-containing gas was well-known and disclosed well before ME2C filed its patents.[1] *See generally* Exs. C-D. Namely, the PTAB evaluated the validity of the related U.S. Patent No. 10,343,114 ("the '114 Patent"), which is asserted against Defendants in this litigation and with claims substantially similar in scope to claim 1 of the '517 Patent. The PTAB considered the evidence and ME2C's arguments and issued a detailed 45-page report concluding that ME2C's patent claims were likely invalid in light of the prior art. *See* Exs. C-D (IPR Institution Decisions]).[2] Claims 25 and 26 of the '114 Patent—which the PTAB found a reasonable likelihood were anticipated under

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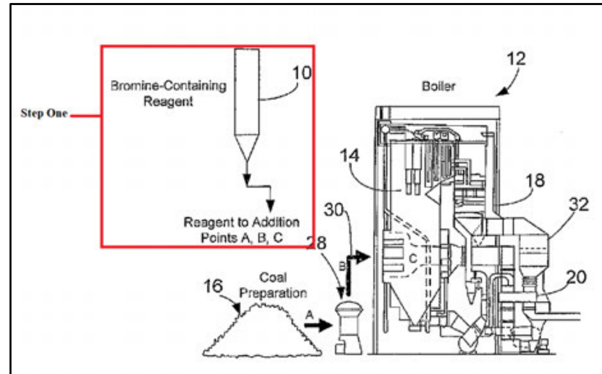
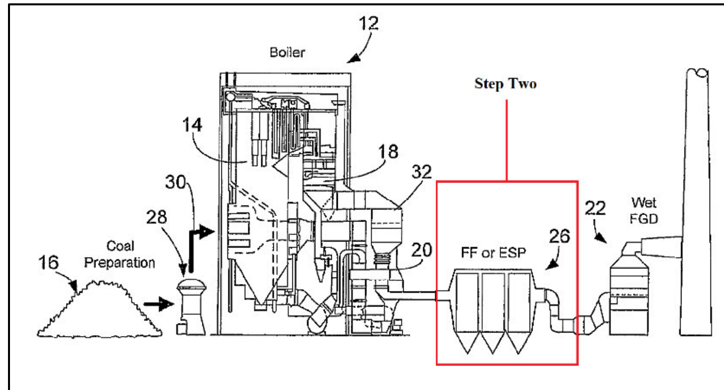
[1] A panel of ALJs at the PTAB is comprised of persons not only "of competent legal knowledge" but also "scientific ability." 35 U.S.C. § 6.
[2] The PTAB does not institute review unless it finds "a reasonable likelihood" that at least one claim of the challenged patent is invalid. 35 U.S.C. § 314(a).

35 U.S.C. § 102(e) by *Downs-Boiler*—are even narrower than claim 1 of the '517 Patent at issue in this preliminary injunction, meaning that, if they are invalid, claim 1 of the '517 Patent is almost certainly invalid. *See* Ex. A (Senior Dec.) ¶¶45, 48. This is but one exemplary prior-art reference among many others that Defendants intend to raise. The PTAB's findings as to claims 25 and 26 of the '114 Patent thus demonstrate a reasonable likelihood that claim 1 of the '517 Patent is also anticipated. Indeed, after the PTAB granted the petitions, ME2C promptly settled with the petitioners, who withdrew the petitions. The proceedings were then terminated.

Specifically, the PTAB found that the *Downs-Boiler* reference disclosed both steps of ME2C's two-step process as shown below. *Downs-Boiler* discloses adding a "bromine-containing reagent" (10) directly to the coal, upstream of the combustion chamber (labeled "boiler" (12))—Step One. It then discloses addition of activated carbon (26)—Step Two:




Ex. D at 20 (red added).




*Id.* (red added).



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### B. A Prior ME2C Settlement Precludes Any Claim Against PacifiCorp, BHE, and MidAmerican

In January 2021, ME2C settled with some parties in the Delaware Case[3] and entered into a "License Agreement" with Talen Montana, LLC ("Talen"). *See* Ex. N ("Talen Agreement").[4] Though PacifiCorp was never named as a defendant in the Delaware Case or threatened with infringement,[5] PacifiCorp had a minority ownership interest in the Colstrip power plant, which was accused of infringement and in which Talen owned the majority interest. *See* ECF 59 at ¶ 40 n.4 (citing to BHE's Form 10-K for 2023 that identified PacifiCorp's minority interest in Colstrip); *see, e.g.*, *S.E.C. v. Jasper*, 678 F.3d 1116, 1123 (9th Cir. 2012) (finding annual reports to the SEC to be admissible under Fed. R. Evid. 803(6)); *In re Homestore.com, Inc. Sec. Litig.*, 2011 WL 291176, at *5 (C.D. Cal. Jan. 25, 2011) (same).

Section 3.1 of the Talen Agreement grants a covenant not to sue to all direct and indirect co-owners of the Colstrip power plant and all their affiliates. The covenant extends to "Talen Released Parties," which are defined as:

> all entities that own . . . directly or indirectly . . . the Colstrip plant[], and all of their respective current and former predecessors, successors, assigns, affiliates, officers, counsel, employees, agents, managers, members, directors, shareholders, owners, users, customers, distributors, resellers (including value-added resellers), manufacturers (including original equipment or device manufacturers), assemblers, replicators, and integrators (collectively, "Talen Released Parties") . . . .

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[3] *Midwest Energy Emissions Corp. v. Arthu J. Gallagher & Co.*, No. 1:19-cv-01334-CJB (D. Del. filed July 17, 2019) [hereinafter the "Delaware Case"].

[4] Talen was one of the defendants in the Delaware Case along with Brandon Shores LLC, Talen Generation LLC, and H.A. Wagner LLC. Each of these defendants were parties to the Talen Agreement. *See* Ex. N.

[5] PacifiCorp, BHE, and MidAmerican had no involvement in drafting, negotiating, or approving the Talen Agreement (or the settlement that resulted in the Talen Agreement). PacifiCorp and BHE had no involvement in the Delaware Case. MidAmerican also had no involvement in the Delaware Case, other than as a third party responding to a subpoena. It is apparent from the express language of the agreement, that Talen sought to free all co-owners (broadly defined) of all of its power plants (including Colstrip) from any future concern of infringement of ME2C's patents. *See* Ex. N. ME2C's briefing (and First Amended Complaint) conveniently ignores the impact of the Talen Agreement.

*See* Ex. N, Talen Agreement § 3.1. The covenant applies to "Licensed Patents,"[6] which is broadly defined to include "all patents and patent applications listed in Exhibit A." *See id.* § 1.5. Exhibit A to the Talen Agreement expressly includes the '517 Patent. *See id.* at Exhibit A (including U.S. Patent No. "10596**517**"). ME2C thus bound itself "not to sue or threaten to sue (or cooperate with instruct, encourage, aid, or consent to a third party suing or threatening to sue) any Talen Released Parties on account of any such claim [of patent infringement]." *See id.* § 3.1.

## III. LEGAL STANDARDS

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In fact, a preliminary injunction is a remedy "not to be routinely granted." *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551 (Fed. Cir. 1995) (citation omitted); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) ("It 'is not a remedy which issues as of course,' or 'to restrain an act the injurious consequences of which are merely trifling.'" (citation omitted)). "[W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).

## IV. ARGUMENT

### A. This Court Does Not Have Personal Jurisdiction over PacifiCorp and Alliant Energy to Award ME2C's Requested Relief

This Court cannot grant a preliminary injunction against PacifiCorp and Alliant Energy Corporation ("AEC") because it lacks personal jurisdiction over them. The Eighth Circuit, the

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[6] *See* Ex. N, Talen Agreement § 2.2.

Federal Circuit, and Iowa federal courts all agree that, for any court to issue any form of relief (including a preliminary injunction) the court must first have personal jurisdiction over the parties. *Land-O-Nod Co. v. Bassett Furniture Indus., Inc.*, 708 F.2d 1338, 1339 (8th Cir. 1983) ("We hold that it was not proper for the district court to grant the preliminary injunction because the court had no personal jurisdiction over the defendants."); *Med-Tec Iowa, Inc. v. Computerized Imaging Reference Sys., Inc.*, 223 F. Supp. 2d 1034, 1035 (S.D. Iowa 2002) ("In order to grant injunctive relief, this Court must first have personal jurisdiction over the parties."); *Celgard, LLC v. LG Chem, Ltd.*, 624 F. App'x 748, 751-52 (Fed. Cir. 2015) ("[I]t was legal error for the district court to issue this injunction without making any findings with respect to its jurisdiction over [the defendant]."). This Court does not have personal jurisdiction over PacifiCorp (*see* ECF 79) or Alliant Energy (*see* ECF 88), precluding preliminary injunctive relief against those Defendants.

**B. ME2C is Unlikely to Succeed on the Merits**

ME2C cannot meet the heavy burden of showing a likelihood of success for several reasons. *First*, ME2C cannot demonstrate the '517 Patent would survive an invalidity challenge. That a panel of ALJs at the PTAB, experts in both patent law and technology (35 U.S.C. § 6), has already found "a reasonable likelihood that" substantially similar claims of a related ME2C patent were invalid is antithetical to ME2C's claim that it is likely to succeed on the merits. *Second*, ME2C granted a covenant-not-to-sue that precludes any claim of infringement against Defendants PacifiCorp, BHE, and MidAmerican. ME2C's covenant stated in no uncertain terms that it agreed "not to sue or threaten to sue" certain parties that include Defendants PacifiCorp, BHE, and MidAmerican, specifically as it relates to "any claim of any Licensed Patent," which expressly includes the '517 Patent. *See supra* Section II.B. *Finally*, ME2C's evidence of infringement relies on documents from 2011 to 2018—a period when the '517 Patent did not even exist. A patent cannot be infringed when it did not even exist.



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**1. <u>Claim 1 of the ’517 Patent is Likely Invalid and Cannot Be Infringed</u>**

At the preliminary injunction stage, ME2C (not Defendants) bears the burden to show its patent will survive an invalidity attack. *See Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1376 (Fed. Cir. 2009). Despite knowing some of the warts on its patent, ME2C boasts about a purported validity “victory” in another case where the other team did not show up to play. The trial in the Delaware Case did not involve *any challenge to validity* of the claim asserted here, because those defendants chose to only present a non-infringement defense at trial. ME2C’s suggestion to the contrary misrepresents the record from the Delaware Case. When validity was actually evaluated in the past, by the PTAB, a patent claim substantially similar to claim 1 of the ’517 Patent was found to be likely invalid. And an invalid patent cannot be infringed. *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 644 (2015) (“To be sure, if at the end of the day, an act that would have been an infringement . . . pertains to a patent that is shown to be invalid, there is no patent to be infringed.”).

***a. The PTAB Already Found ME2C’s Patent Claim is Likely Invalid***

In October 2020, the PTAB evaluated the validity of ME2C’s ’114 Patent, which is asserted against Defendants in this litigation, and which is substantially similar to the ’517 Patent. The PTAB considered the evidence and ME2C’s arguments and issued a detailed 45-page report concluding that ME2C’s patent claims were likely invalid in light of the prior art. *See* Exs. C-D.[7] ME2C ignores the PTAB’s invalidity determination. Indeed, Claim 26 of the ’114 Patent (which incorporates every limitation from claim 25) contains *every* element found in claim 1 of the ’517

[7] The ’517 Patent issued on March 24, 2020, without the benefit of the PTAB’s later invalidity findings in Exhibits C and D. *See* ECF 60-03. While the PTAB’s decision is non-binding, “it should be given weight in determining whether [ME2C] has shown a likelihood of success” on validity. *Vascular Sols. LLC v. Medtronic, Inc.*, 2022 WL 832102, at *1 n.4 (D. Minn. Mar. 21, 2022).

Patent, as shown by the chart below comparing the two claims (color coded to assist the Court in identifying similar/identical elements):

| ’517 Patent claim 1 | ’114 Patent claim 25 |
|---|---|
| 1. A method for reducing mercury in a mercury-containing gas, the method comprising: | 25. A method of separating mercury from a mercury-containing gas, the method comprising: |
| combusting coal in a combustion chamber, the coal comprising an additive comprising $Br_2$ HBr, a bromide compound, or a combination thereof, to form the mercury-containing gas; | combusting coal in a combustion chamber, to provide the mercury-containing gas, wherein the coal comprises added $Br_2$, HBr, a bromide compound, or a combination thereof, added to the coal upstream of the combustion chamber, or the combustion chamber comprises added $Br_2$, HBr, a bromide compound, or a combination thereof, or a combination thereof, |
| and collecting mercury in the mercury-containing gas with a sorbent added to the mercury-containing gas, the sorbent comprising activated carbon. | injecting a sorbent material comprising activated carbon into the mercury-containing gas downstream of the combustion chamber;<br>contacting mercury in the mercury-containing gas with the sorbent, to form a mercury/sorbent composition;<br>and separating the mercury/sorbent composition from the mercury-containing gas, to form a cleaned gas. |
| | 26. The method of claim 25, wherein the coal comprises the added $Br_2$, HBr, the bromide compound, or a combination thereof, added to the coal upstream of the combustion chamber. |

This comparison shows that claim 1 of the ’517 Patent is even *broader* than claim 25 of the ’114 Patent, rendering it even more likely to be invalidated by the prior art. Defendants need only present a “substantial question of invalidity,” *Altana Pharma AG v. Teva Pharms. USA, Inc.*, 566 F.3d 999, 1006 (Fed. Cir. 2009), and here, specialized judges have already found substantial questions in detailed findings. *See* 35 U.S.C. § 6.

i. The PTAB Found the *Downs-Boiler* Reference Disclosed ME2C’s Claimed Invention

The PTAB found several prior art references disclose the two-step process of adding bromine to the coal and subsequently adding activated carbon to the mercury-containing gas. For



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example, the PTAB noted that the *Downs-Boiler* reference[8] "explains that bromine-containing compounds, 'added to the coal, or to the boiler combustion furnace, are used to enhance the oxidation of mercury, thereby enhancing the overall removal of mercury in downstream pollution control devices.'" Ex. D at 19-20. The PTAB further found that, "Downs-Boiler also discloses 'powdered activated carbon (PAC)' as a sorbent, and describes 'downstream pollution control systems such as wet 22 and SDA 24 FGD systems, and PAC injection systems.'" *Id.* at 20. Based on these key findings, the PTAB reached the logical conclusion that, "Petitioner's arguments and evidence are sufficient to show a reasonable likelihood Petitioner would prevail in proving unpatentability of claims 23, 25–27, and 30" of the '114 Patent. *Id.* at 22. Seeing the writing on the wall, ME2C settled with the Petitioners before the PTAB issued its final written decision. The settlement required that Petitioners request the PTAB terminate the *inter partes* review ("IPR").[9] As explained below, had the PTAB completed its review, it would have likely concluded that *Downs-Boiler* anticipated ME2C's patent claim. Regardless, ME2C's patent claim is highly vulnerable to a validity attack and "[v]ulnerability is the issue at the preliminary injunction stage, while validity is the issue at trial." *Altana Pharma*, 566 F.3d at 1006 (citation omitted).

*Downs-Boiler* discloses the same two-step process that is claimed by ME2C's patents. The bromine-containing reagent added to the coal is disclosed on the first page of *Downs-Boiler*, and it is the same Bromine-Containing Reagent in the '517 Patent that ME2C now asserts in this case. *See* Ex. R, *Downs-Boiler* at Abstract (disclosing addition of a Bromine Containing Reagent at point 10 to the coal at point A); *compare id.* at [0021] ("[T]he bromine-containing reagent 10 could

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[8] *See* Ex. R, U.S. Patent Application Publication No. 2008/0107579 [hereinafter *Downs-Boiler*].

[9] Soon after PTAB instituted review of ME2C's '114 Patent, ME2C entered into settlements with the petitioners for less than the cost of litigation. *See* Ex. N (Talen Agreement), Ex. O ([REDACTED]), Ex. P ([REDACTED]). Once the petitioners and ME2C jointly informed the PTAB of their settlement, PTAB terminated the IPR proceeding. *See* Ex. E (Decision Terminating IPR).

comprise, but is not limited to, alkali metal and alkaline earth metal bromides, ***hydrogen bromide (HBr)*** or bromine (Br).”); *with* ECF 60-03, ’517 Patent cl. 1 (“[A]n additive comprising Br2, ***HBr***, a bromide compound, or a combination thereof.”). Finally, the activated carbon limitation is also disclosed in *Downs-Boiler*. *Compare* Ex. R, *Downs-Boiler* at [0025] (“Such carbonaceous sorbents include . . . powdered ***activated carbon*** (PAC).”); *with* the ECF 60-03, ’517 Patent cl. 1 (“[T]he sorbent comprising ***activated carbon***.”). Each limitation of claim 1 of the ’517 Patent is disclosed in *Downs-Boiler* rendering this claim invalid as anticipated or, at the very least, obvious. If Defendants “raise[] a ‘substantial question’ concerning validity, enforceability, or infringement (*i.e.,* asserts a defense that [ME2C] cannot show ‘lacks substantial merit’) the preliminary injunction should not issue.” *Genentech, Inc. v. Novo Nordisk A/S*, 108 F.3d 1361, 1364 (Fed. Cir. 1997) (citation omitted).

ii. The PTAB Found the *Sjostrom* Reference Rendered ME2C’s Claimed Invention Obvious

In another decision issued in October 2020, the PTAB found that another prior art combination—the *Sjostrom* reference—rendered claims 25 and 26 of the ’114 Patent obvious under 35 U.S.C. § 103 because it disclosed the same two-step process that ME2C claims to have invented. *See* Ex. C. In that decision, the PTAB noted *Sjostrom* disclosed combusting coal with bromine (as shown in the red boxes below) and injecting activated carbon sorbent downstream of the combustion chamber (as shown in the black box):



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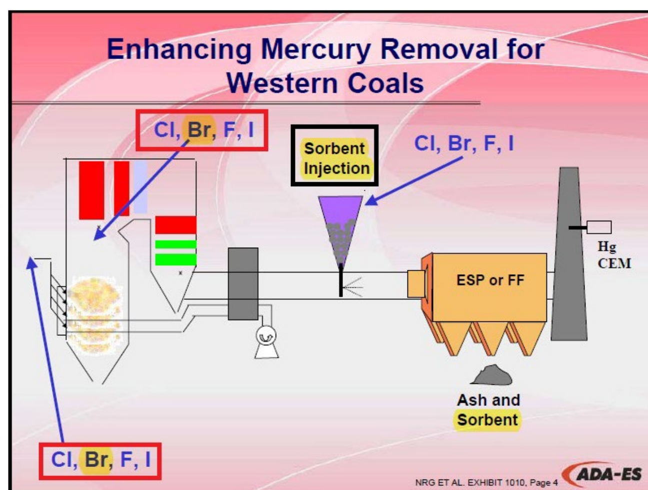


*See id.* at 32. Based on this finding, the PTAB concluded "that Petitioner's arguments and evidence are sufficient to show a reasonable likelihood Petitioner would prevail in proving unpatentability of claims 1, 2, 4–9, 12–28, and 30" of the '114 Patent. *Id.* at 41.

In the PTAB proceeding, ALJs having scientific ability concluded that ME2C's patents on the mercury emission reduction process were reasonably likely to be invalidated. ME2C's preliminary injunction motion both ignores that record and offers no evidence to contradict it and support validity. Thus, ME2C has not shown a likelihood that it can withstand a validity challenge and, for this reason alone, the Court should deny the motion. *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (Fed. Cir. 1994) (declining to make findings on other factors where the movant has not carried its burden with respect to likelihood of success).

***b. The '517 Patent is Invalid over an On-Sale Bar***

In addition to the PTAB finding ME2C's patents invalid over the *Sjostrom* reference, the PTAB also addressed the effective filing date for ME2C's patents and found that it was May 2018. The effective filing date of a patent is important because it serves as the touchstone for determining whether a reference is early enough in time to be considered invalidating prior art. *See* 35 U.S.C. § 102(a) (defining "prior art"); *id.* § 100(i)(1) (defining "effective filing date"). For a patentee to

demonstrate that its patents can obtain an effective filing date that traces back to earlier applications, "each application in the chain leading back to the earlier application must comply with the written description requirement of 35 U.S.C. § 112." *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1571 (Fed. Cir. 1997). The PTAB conducted this analysis for claims 25 and 26 of the '114 Patent (discussed above) and asked whether ME2C's earlier (parent) patents provided written-description support "for a method that includes both (1) adding the promoter to coal or to the combustion chamber and (2) injecting the sorbent material into the mercury-containing gas downstream of the combustion chamber." Ex. C at 26. The PTAB concluded that ME2C "has not presented persuasive arguments or evidence that the '114 patent is entitled to a priority date earlier than the May 14, 2018 filing date of the '760 application." *Id.* at 31. There is at least a reasonable likelihood that claim 1 of the '517 Patent—of similar scope to claims 25 and 26 of the '114 Patent addressed by the PTAB—also has an effective filing date no earlier than May 2018.

Because ME2C cannot obtain an earlier effective filing date, the '517 Patent becomes invalid for another reason, the "on sale" bar. § 102(a)(1). The policy behind an on-sale bar is "preventing inventors from filing for patents a year or more after the invention has been commercially marketed." *Medicines Co. v. Hospira, Inc.*, 827 F.3d 1363, 1376-77 (Fed. Cir. 2016) (en banc). ME2C sold the two-part claimed process at least by [REDACTED] as admitted by Trettel:

[REDACTED]



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Ex. Q (Trettel Dep.). at 208:7-20. Trettel further testified that [REDACTED]

[REDACTED] *Id.* at 206:6-208:6.

***c. ME2C Misrepresents Its Success in the Delaware Case***

ME2C touts the record from the Delaware Case as if it prevailed on a finding of validity. It did not. While ME2C relies on an order denying summary judgment of *invalidity* in the Delaware Case, that is irrelevant here. First, the pre-trial ruling did not declare ME2C's patents to be valid: it simply denied summary judgment of *invalidity* and allowed that disputed factual question to go to trial. The record for that pre-trial ruling also encompassed patents and issues beyond the '517 Patent that is the basis for ME2C's preliminary injunction motion. Because of those differences, the Delaware denial of summary judgment addressed only a limited set of prior art: "prior art references Sjostrom, Eckberg and Olson-646," Ex. S, Delaware Case, ECF 614 at 4 n.2, and did not consider *Downs-Boiler* (discussed in Section IV.B.1.a.i). The PTAB, however, found "a reasonable likelihood" that ME2C's patent claims would be invalid over those very same references, *including Downs-Boiler*. Dr. Senior's declaration explains how that same reference anticipates claim 1 of the '517 Patent.[10] The applicable inquiry for a preliminary injunction is similar to that applied in the PTAB decision ("reasonable likelihood" v. "likelihood of success") and is not the same standard applied by the Delaware court at the summary-judgment stage.

The non-settling defendants at the Delaware trial (none of which are parties to this action) chose not to present evidence on invalidity and the issue was not submitted to the jury. *See* Ex. B

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[10] This reference is discussed in more detail at *supra* Section IV.B.1.a.

(Delaware Verdict Form). It is, thus, unsurprising that, at trial, ME2C sought a JMOL of no invalidity and that the defendant did not oppose. *See* ECF 58-16, Delaware Case Trial Tr. (02/29/24) at 1119:22-1120:6. ME2C mischaracterizes this as a "JMOL of patent validity." ECF 58-1 at 10. It is not. ME2C did not file or make any such motion in the Delaware Case. Nothing in the Delaware Case record established ME2C's patent claims as "valid."

ME2C next misrepresents its settlements with prior defendants as "further confirm[ing] that ME2C's patents are valid." ECF 58-1 at 10. Those settlements expressly *negate* ME2C's claims of validity. *See* Ex. N (Talen Agreement) § 9.1 ("No Admission. Neither the negotiation, execution, nor performance of this Agreement, nor anything contained herein, constitutes an admission by Talen or its Affiliates of . . . validity of the Licensed Patents."). If anything, these settlements are well-below the cost of litigation, reflecting that the settling parties wished to avoid additional litigation expenses as opposed to bowing to the alleged supremacy of ME2C's patents. The settlements also suggest ME2C's worry that its patents would be found invalid when prior defendants actually mounted an invalidity defense.

**2. <u>ME2C is Unlikely to Succeed on the Merits on Infringement</u>**

ME2C seeks to import a victory in a prior litigation in Delaware, when no Defendant in *this litigation* was a party, and patent invalidity was not an issue at trial, to prove that it is likely to succeed on the merits here. The sole issue at trial in the Delaware Case was infringement by the defendants at *that* trial—not Defendants in this case. Those significant distinctions (among others) between the Delaware Case and this one show why the result in that case has no relevance here. ME2C's "evidence" of infringement relies on inadmissible hearsay from the Delaware Case (the trial transcript), but fails to reconcile critical differences between this case and that one. The declaration of Jim Trettel in which he offers opinions on whether activities at the accused plants meet the limitations of the '517 Patent is worthless as evidence because Trettel is admittedly not a

technical expert in patent matters. *Compare* Ex. Q (Trettel Dep.) at 158:5-12; *see also id.* at 17:23-18:9 (admitting he ), 26:1-28:25 (admitting ), 64:8-65:15 (conceding ), 71:21-75:6 (admitting ), 94:24-25 (admitting ), 108:21-109:13 (admitting ), 122:1-11 (admitting he ), 144:6-146:11 (conceding ), 153:3-6 (admitting ), 155:24-158:12 (agreeing t "), 171:3-9 *with* ECF 58-3 (Trettel Decl.) ¶ 18 (discussing how each plant allegedly meets the limitations of the '517 Patent).

Critically, Trettel's declaration does not establish any activity at the accused plants *after* March 24, 2020—the date when the '517 Patent issued.[11] *See* ECF 60-03. Instead, the evidence cited in Trettel's declaration describes permitting activities that took place in 2011-2018, years before the issuance of the patent. *See* ECF 58-3 ¶ 18. It is axiomatic that a patent is not enforceable before it issues, thus citing to acts years *before* the issuance of the patent is not probative of *current*

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[11] The only document dated after March 24, 2020, actually suggests the opposite of what ME2C believes. *See* ECF 58-11 ("The temporary testing will utilize the AtlaSORB product ***and will not include the calcium bromide and nonbrominated PAC*** mercury control reagents during the testing." (emphasis added)). Thus, material ME2C offered undercuts its own case and cannot show likelihood of success.



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infringement and does not warrant the extraordinary remedy of a preliminary injunction. *See* 35 U.S.C. § 154(a)(2) (providing the term of a patent "begin[s] on the date on which the patent issues"). Moreover, the evidence cited with respect to PacifiCorp's Dave Johnston,[12] Wyodak, and Jim Bridger plants merely refers to a permit application being received. Additionally, Trettel acknowledges that: [REDACTED].[13] It does not show that the steps claimed in '517 Patent claim 1 were actually performed any time *after* March 24, 2020, when the patent issued.

### 3. ME2C Granted PacifiCorp, BHE, and MidAmerican a Covenant-Not-to-Sue with Respect to the '517 Patent

Even if ME2C could overcome validity and infringement, ME2C also has to contend with a covenant-not-to-sue granted to PacifiCorp, BHE, and MidAmerican that expressly applies to the '517 Patent and bars ME2C's requested relief. Specifically, the Talen Agreement granted to "Talen and . . . the co-owners of the Colstrip Plant" and their "affiliates" a "covenant[] not to sue or threaten to sue . . . for any purpose as infringing in whole or in part any claim of [the '517 Patent]." *See supra* Section II.B; *see also* Ex. N §§ 2.2, 3.1 (defining "Talen Released Parties" as including

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[12] Trettel's declaration cites to "Ex. 5" in connection with PacifiCorp's Dave Johnston plant and quotes certain text from a permit application. ECF 116-1. But this document instead shows that an "alternative" to "calcium bromide" was being considered at the Dave Johnston plant, *see* ECF 116-1 at 150-51 after the calcium bromide permit waiver was "superseded" in November 2014, *see id.* at 144, more than five years before the '517 Patent issued. The use of an alternative technology further undermines ME2C's perceived likelihood of success.

[13] Ex Q. (Trettel Dep.) at 88:15-90:1 (admitting [REDACTED]), 161:9-20 (same), 180:15-17 (admitting [REDACTED], 185:14-17 ([REDACTED], 188:17-189:3 (stating [REDACTED]"), 189:11-22 (stating [REDACTED]); *see also id.* at 89:2-90:1, 161:18-20, 182:3-183:5, 185:1-25, 186:4-8, 187:11-188:3, 190:2-21, 191:8-192:12, 195:20-196:11, 197:23-198:9.



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"*co-owners of the Colstrip Plant* and its or their successors and assigns of any of the foregoing, and *any and all entities that own or control directly or indirectly the . . . Colstrip plant[], and all of their respective current and former* predecessors, successors, assigns, *affiliates*, officers, counsel, employees, agents, managers, members, directors, shareholders, owners, users, customers, distributors, resellers" (emphasis added)).

Defendant PacifiCorp is a co-owner of the Colstrip Plant. *See* ECF 59 ¶ 40 n.4 (citing to BHE's Form 10-K for 2023 that identified PacifiCorp's minority interest in Colstrip). Defendant BHE is an indirect corporate parent of PacifiCorp (*see* ECF 39) and thus an indirect owner of the Colstrip Plant through PacifiCorp. Defendant MidAmerican is an indirect subsidiary of BHE (*see* ECF 41) and a corporate affiliate of BHE and PacifiCorp. And ME2C has taken the position in this case that MidAmerican and PacifiCorp are affiliates. *See* ECF 59 ¶¶ 40, 200-05, 217-23. Hence, PacifiCorp, BHE, and MidAmerican are all included within the express definition of "Talen Released Parties" and are protected by the covenant in section 2.2 of the Talen Agreement in which ME2C agreed not to sue any of these entities for any alleged infringement of the '517 Patent.[14] *See* Ex. N §§ 2.2, 3.1. Against the backdrop of ME2C's covenant, which provides a complete defense to the claim ME2C now asserts, ME2C is unlikely to succeed on the merits.

**C. ME2C Has Not Established a Likelihood of Irreparable Harm**

ME2C bears the burden of showing it is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. "The failure to show irreparable harm is, *by itself*, a sufficient ground upon which to deny a preliminary injunction." *Gelco Corp. v. Coniston Partners*,

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[14] Although PacifiCorp in no way concedes that it infringes the '517 Patent, any activity that this Court would otherwise deem infringement does not impose liability on PacifiCorp because ME2C granted a license and a covenant-not-to-sue certain entities, including PacifiCorp, and which extends to PacifiCorp affiliates. *See supra* Section II.B.

811 F.2d 414, 418 (8th Cir. 1987) (emphasis added). The Eighth Circuit has held that, "[t]o succeed in demonstrating a threat of irreparable harm, 'a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012) (citation omitted). Thus, "[s]peculative harm does not support a preliminary injunction." *Id.* at 779. Moreover, courts have routinely rejected claims of irreparable harm where, as here, the patentee (1) delayed in seeking an injunction, *cf., e.g.*, *Vertigo Media, Inc. v. Earbuds Inc.*, 2021 WL 4806410, at *5 (D. Del. Oct. 14, 2021); and (2) had freely licensed the patents to others, *id.* at *4 ("An injury cannot be 'irreparable' if money would be an adequate remedy . . . .").

**1. ME2C's Decision Not to Seek an Injunction Against Other Accused Infringers Shows a Lack of Irreparable Harm**

Despite commencing several suits on the same '517 Patent on the same day, ME2C has never sought an injunction in any of the other pending cases against any defendant. In fact, ME2C did not seek either a preliminary injunction in the Delaware Case or even a permanent injunction after a obtaining a favorable verdict against certain defendants in that case. *See generally* Delaware Case Docket. ME2C's strategy shows that it never suffered any irreparable harm. Nor did ME2C seek a temporary restraining order in this case or any injunctive relief until months into the case—and after Defendants moved to dismiss. And ME2C has not sought an injunction against the defendants in the Missouri or Arizona Cases.

**2. ME2C's Delays Establish a Lack of Irreparable Harm**

ME2C's deliberate delays in commencing this action and in moving for a preliminary injunction reveal a lack of urgency that defeats ME2C's claim of irreparable harm. In other cases that "involve the same five patents and the same accused conduct" (MDL Case No. 3132, ECF 1-1, at 1), ME2C has not moved for injunctive relief and, instead, has repeatedly agreed to extensions

of time to answer.[15] Arizona Case, ECF 35 (third stipulation for extension of time to answer complaint filed Oct. 10, 2024); Missouri Case, ECF 28 (second consent motion for extension of time to file answer filed Sept. 3, 2024).

Even prior to litigation, ME2C exhibited a level of lethargy inconsistent with any irreparable harm. ME2C filed its provisional patent application in 2004, and then waited more than fourteen years, until June 4, 2018, to file the application that ultimately issued as the ’517 Patent. ECF 60-3 (’517 Patent). Once the ’517 Patent issued on March 24, 2020, ME2C then waited *more than four years* to file suit against Defendants on July 18, 2024—barely a year before the ’517 Patent expires in August 2025. ECF 1 (Compl.). And ME2C then waited nearly *three more months* (until October 11, 2024) to file its Motion for Preliminary Injunction (ECF 58)—only filing after Defendants moved for dismissal of the Complaint (ECF 44-48, 50) and to sever the cases for misjoinder in violation of 35 U.S.C. § 299(b) (ECF 53).[16] Thus, ME2C delayed asking for a preliminary injunction for *over four and a half years* from the date the ’517 Patent issued.[17] ME2C’s brief neither acknowledges nor provides any explanation for this extreme delay.

ME2C cannot claim its delay was necessitated by further investigation of Defendants’ allegedly infringing conduct. ME2C’s motion relies exclusively on publicly available evidence *dating back to 2011*. *See* ECF 58-3 (Trettel Decl.) ¶ 18 (citing Exs. 1-11).[18] And ME2C previously

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[15] *Midwest Energy Emissions Corp. v. Ameren Corp.*, No. 4:24-cv-00980 (E.D. Mo. filed July 17, 2024) [hereinafter Missouri Case]; *Midwest Energy Emissions Corp. v. Tucson Elec. Power Co.*, No. 3:24-cv-08145 (D. Ariz. filed July 17, 2024) [hereinafter Arizona Case].

[16] ME2C subsequently filed the FAC (thereby mooting the then-pending motions to dismiss and motion to sever). ECF 60. The FAC named an additional party, Alliant Energy Corporate Services, Inc., against whom no preliminary injunction has been sought. *See* ECF 58. All Defendants have since filed motions to dismiss the FAC and have joined in a renewed motion to sever. ECF 79, 84, 87-92.

[17] In fact, the ’517 Patent is set to *expire* in August of 2025—less than a year from now. ECF 58-1 at 15.

[18] *See, e.g.*, Ex. 1 (ECF 58-5) (2018 permit); Ex. 6 (ECF 10) (Letter dated 2014); Ex. 7 (ECF 11) (Letter dated 2020); Ex. 8 (ECF 12) (Letter dated 2018); Ex. 9 (ECF 13) (2020 permit); Ex. 10 (ECF 14) at 1 (Letter dated 2013).

conceded it was aware of the accused conduct long before it filed suit because it allegedly "attempted to negotiate a commercial agreement with respect to Defendants' practicing ME2C's patented processes." ECF 59 (FAC) ¶ 214.

ME2C's years-long delay in seeking a preliminary injunction warrants denial of ME2C's motion. The facts here are parallel to, and in fact much worse for ME2C than, those of other cases in which courts have found no irreparable harm. For example, in *Guntert v. Gomaco Corp.*, the court found that the patentee's delay of nineteen months from the time of patent issuance to the time it filed suit, and delay of another four months until it requested a preliminary injunction, "substantially undercuts [its] argument that urgent relief is necessary to prevent irreparable harm to its business." 2020 WL 6948364, at *12 (N.D. Iowa Oct. 14, 2020) (denying motion for preliminary injunction).[19] ME2C's delays similarly negate any possible finding of irreparable harm.

#### 3. Monetary Damages are Adequate to Compensate ME2C for any Injury

ME2C's claim of irreparable harm is further undermined by its routine agreement to grant non-exclusive licenses to the patents-in-suit, including the '517 Patent. *See, e.g.*, Exs. N-P ([REDACTED]

[REDACTED]

[REDACTED]); Ex. Q (Trettel Dep.) at 20:19-21:12, 129:3-31:13 ([REDACTED]

[19] Other courts have similarly found that delays spanning far less time than ME2C's delay here militate against a preliminary injunction. *See, e.g.*, *High Tech*, 49 F.3d at 1557 ("Absent a good explanation, . . . 17 months is a substantial period of delay that militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief."); *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) (holding waiting nine months to commence suit and four months to seek preliminary injunction did not reflect "irreparable harm"); *T.J. Smith & Nephew Ltd. v. Consol. Med. Equip., Inc.*, 821 F.2d 646, 648 (Fed. Cir. 1987) (holding delay of fifteen months to seek an injunction warranted a denial of preliminary injunction motion); *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (holding five-month delay warranted a denial of preliminary injunction motion); *Vertigo Media*, 2021 WL 4806410, at *5 (concluding no irreparable harm where patentee delayed eight months between cease and desist letter and filing its complaint and another three months before moving for preliminary injunction).

Ex. F (ME2C 2024 Annual Statement) at 18 (Entering into non-exclusive licenses between July 2020 and January 2021 "with each of the four major utility defendants in [the Delaware] action," which "provide each of them and their affiliates with a non-exclusive license"); *see also* ECF 59 (FAC) ¶ 220 (admitting that "power plant operators . . . had agreed to mutually acceptable license and supply terms for use of ME2C's technology"). ME2C admits it has already offered non-exclusive licenses to most Defendants in this case. ECF 59 (FAC) ¶ 214 ("Representatives from ME2C have contacted representatives from Defendants and attempted to negotiate a commercial agreement with respect to Defendants' practicing ME2C's patented processes."); ECF 58-3 (Trettel Decl.) ¶ 7 ("ME2C reached out to MidAmerican and Alliant . . . regarding the need for a license.").

ME2C has confirmed its "overall strategy" of seeking non-exclusive licensees: "Our goal and overall strategy is to convert infringers to our supply chain of sorbent products for mercury removal, *or otherwise license our patents to them on a non-exclusive basis* in connection with their respective coal-fired power plant." Ex. F (ME2C 2024 Annual Statement) at 8 (emphasis added).[20] These public statements and its demonstrated willingness to license the patents directly contradict ME2C's litigation position that it has suffered "the violation of the right to exclude, lost market share, lost brand recognition, and lost good will." ECF 58-1 (ME2C Br.) at 10. ME2C *voluntarily* (and repeatedly) relinquished any such rights by regularly licensing its patents to others. *See* Ex. Q (Trettel Dep.) at 98:1-9, 125:1-8, 127:5-128:5 (stating

[20] In fact, ME2C's press release regarding *this litigation* indicates that "[o]ur primary interest is to find a way to create a positive business partnership with these companies" (i.e., Defendants) and that ME2C expected "a successful business outcome with these additional named parties." Ex. H (ME2C July 30, 2024, Press Release (https://ir.birchtech.com/news-events/press-releases/detail/672/me2c-environmental-files-patent-infringement-lawsuits-against-14-defendants-including-major-power-utility-companies)).

"), 128:6-129:11 (

, 130:22-131:2, 133:20-134:3, 134:8-10 (

"), 163:22-165:2. In doing so, ME2C implicitly concedes that monetary compensation is adequate to account for any use of the claimed process.

Courts have routinely held that offering non-exclusive licenses—thereby giving up any rights to exclusivity—demonstrates the adequacy of monetary damages and, thus, the lack of irreparable harm. *See High Tech*, 49 F.3d at 1557 ("[T]he evidence shows that [patentee] offered a license to [defendant], so it is clear that [patentee] is willing to forgo its patent rights for compensation. That evidence suggests that any injury suffered by [patentee] would be compensable in damages assessed as part of the final judgment in the case."); *Ill. Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 683 (Fed. Cir. 1990) (finding monetary damages sufficient where patentee had licensed its patents); *T.J. Smith*, 821 F.2d at 648 (holding patentee's grant of two licenses, along with delay in seeking injunction, rebutted any presumption of irreparable harm); *Vertigo Media*, 2021 WL 4806410, at *4 ("An injury cannot be 'irreparable' if money would be an adequate remedy, and that is exactly what is suggested by Plaintiffs' offering to license their patents to Defendant and other competitors.").

The adequacy of monetary damages as a remedy for these claims is further evidenced by the fact that ME2C is only seeking a reasonable royalty in this case. Ex. G (Pl.'s Initial Disclosures (Oct. 9, 2024)), at 4 ("ME2C seeks monetary damages for Defendants' infringement of the asserted patents in an amount not less than a reasonable royalty."). This amount is quantifiable (especially given ME2C's licensing history). *See* Ex. Q (Trettel Dep.) at 123:14-21 (

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While ME2C advances attorney arguments and self-serving statements in the declaration

of its Vice President of Operations, Jim Trettel (ECF 58-1 (ME2C Br.) at 15), it offers no *evidence* supporting his assertions.[21] In similar circumstances, courts have found such arguments insufficient. For example:

> [L]ost market share must be proven (or at least substantiated with some evidence) to support a preliminary injunction. Otherwise, a preliminary injunction would be granted in every case where a patentee practices the invention in a competitive market. Similarly, a patentee must submit evidence of harm to its reputation or good will, investment loss, or price erosion beyond mere conclusory statements. All of [patentee's] statements about the status of the market, its competition with [defendant], its reputation and good will, and the potential losses it may suffer cite only to [patentee's CEO's] declaration. . . . [Patentee] has not provided the Court with projected market data, sales figures, customer surveys, circumstantial evidence, or any other support for [patentee's] assertions.

*Guntert*, 2020 WL 6948364, at *9 (citations omitted). As in *Guntert*, ME2C's vague and conclusory "assertions of lost market share, harm to its reputation and good will, and price erosion . . . are too speculative and unsupported to warrant the drastic and urgent relief of a preliminary injunction." *Id.* at *10.

Finally, ME2C argues that the "patent is due to expire in August 2025" and ME2C will thereafter "be forever deprived the opportunity of building supply relationships with these power plants." ECF 58-1 (ME2C Br.) at 15.[22] That ME2C chose to delay in filing its suit until just before its patents expire is a problem of ME2C's own making and does not weigh in favor of an injunction. Indeed, that strategic call weighs against granting ME2C's injunction request. In addition, ME2C's argument hinges upon the unsupported assumption that Defendants would opt

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[21] Trettel—who holds a B.S. degree in Mechanical Engineering and has "operations, systems, and engineering responsibilities for ME2C"—is not offered as an expert on financial matters. ECF 58-3 (Trettel Decl.) ¶ 2, Ex. Q [Trettel Dep.] at 126:2-7 ([REDACTED]), 165:13-18 ([REDACTED]).

[22] ME2C concedes "it is likely that the patent will expire before a jury trial can occur." (ECF 58-1 at 15). Thus, in the event the Court finds it appropriate to enter an injunction, it must be immediately lifted upon the expiration of the patent in August 2025.

to use ME2C's claimed method rather than non-infringing alternative methods.[23] As a practical matter, ME2C cannot be taken seriously when it argues that it will garner some goodwill *from Defendants* by suing on invalid patents to force them to buy unpatented products from ME2C. Regardless, ME2C has offered no evidence of lost market share, lost brand recognition, or lost good will beyond the conclusory and self-serving statements of a non-expert party witness. This is insufficient to justify the extraordinary remedy sought here.

#### 4. ME2C Failed to Show It Will Be Unable to Collect a Judgment Against Defendants PacifiCorp, BHE, and MidAmerican[24]

ME2C argues that one of the seven Defendants, PacifiCorp, is allegedly "undercapitalized," relying solely on an unsupported allegation in its (original) complaint that "BHE has warned that it may exercise its control over PacifiCorp to the detriment of potential creditors." ECF 58-1 (ME2C Br.) at 16. ME2C presented no evidence whatsoever that PacifiCorp (or any other Defendant) will be unable to satisfy any judgment. In fact, PacifiCorp is not undercapitalized and, throughout its history, has maintained sufficient capital to pay its creditors. *See* ECF 79-2 ¶ 16.

#### 5. ME2C Does Not Actually Want to Enjoin Defendants

ME2C revealed its true motivation in its motion: this is a misguided effort to strongarm new customers, not to avoid irreparable harm. ME2C states: "[i]f Defendants want to continue using ME2C's technology, they need only purchase the necessary input products from ME2C,

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[23] ME2C does not dispute that Defendants could pursue alternative options, noting in its briefing that "Defendants will be free to implement an alternative mercury capture method, if feasible." ECF 58-1 at 20; *see also* Ex. Q (Trettel Dep.) at 22:7-9, 140:7-13, 154:11-16 (a , 144:19-25 ( ), 158:13-159:4 ( ).

[24] ME2C does not raise this argument with respect to any other Defendants. ECF 58-1 at 16-17.



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under commercially reasonable terms, consistent with ME2C's patent rights." ECF 58-1 (ME2C Br.) at 1. ME2C's proffered "lay" witness similarly asserts that "ME2C is now seeking an injunction to stop any further infringement from these companies, but ME2C remains open to working with them and supplying product to them on reasonable terms." ECF 58-3 (Trettel Decl.) ¶ 7; *see also* Ex. Q (Trettel Dep.) at 19:13-20:5 ([REDACTED] [REDACTED]). Thus, contrary to the injunction requested in ME2C's motion—which seeks disabling power plant equipment that could be used to perform the allegedly infringing process—it appears that ME2C does not actually even want to stop Defendants from continuing to perform the process. Rather, ME2C essentially wants a judicial order that would effectively coerce Defendants to buy (unpatented) products from ME2C at whatever it deems to be "commercially reasonable terms." This is a wholly inappropriate use of the preliminary injunction remedy.

**D. The Balance of Harms Favors Defendants**

The next factor—"balance of harms"—also strongly favors Defendants and weighs against a preliminary injunction. "[T]he balance of harms analysis examines the harm of granting or denying the injunction upon both parties to the dispute, as well as to other interested parties." *Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.*, 460 F. Supp. 2d 1012, 1021 (S.D. Iowa 2006) (citing *Dataphase*, 640 F.2d at 114.). "An injunction should not be granted if its impact on the enjoined party would be more severe than the injury the moving party would suffer if it is not granted." *Litton Sys., Inc. v. Sundstrand Corp.*, 750 F.2d 952, 959 (Fed. Cir. 1984). And "[a]n illusory harm to the movant will not outweigh any actual harm to the non-movant." *Guntert*, 2020 WL 6948364, at *13. Here, an injunction changes little for ME2C—and in the worst case is both speculative and limited, but an injunction would certainly and severely harm Defendants.

**1. <u>Any Harm to ME2C is Both Speculative and Limited</u>**

The supposed harm to ME2C if a preliminary injunction is not ordered is purely monetary:

delayed recovery of the royalty it seeks to recover in this litigation. Ex. G (ME2C Initial Disclosures seeking solely a reasonable royalty). And, given the weakness in ME2C's case, the prospect of *any* recovery is speculative. ME2C claims harm from not having agreements in place to sell Defendants its *unpatented* commodity chemicals. But injunctive relief could not force Defendants to buy unpatented products from a specific supplier, and the injunction ME2C seeks does not even request as much. ECF 58 at 2 (requesting injunction ordering Defendants to disable plant equipment); *USA Network v. Jones Intercable, Inc.*, 704 F. Supp. 488, 491 (S.D.N.Y. 1989) (denying preliminary injunction because "[s]pecific performance is particularly undesirable and impractical where it would force essentially hostile parties into an ongoing, active business relationship").

**2. The Harm to Defendants and Interested Parties Would Be Certain, Immense, and Immediate**

In contrast to ME2C's uncertain and limited monetary harm, any disruptions to the production and dispatch of electricity from these plants caused by the injunction will have immediate impacts to the costs and, potentially, the reliability of power to millions of customers across the states these plants serve just as winter is starting. The injunction also seeks to disrupt mercury emissions controls from coal combustion and broadly requires that Defendants "disable" portions of their equipment. While there are other ways to control mercury emissions, derating, idling, or shutting down coal-fired power plants would, at a minimum, temporarily disrupt operations, and could put the power plants at risk of violating environmental regulations that limit harmful emissions. ME2C's requested relief will also risk mercury emissions exceedances raising adverse environmental and health concerns for affected communities. *See, e.g.*, Ex. I, (*Mercury and Air Toxics Standards*). These harms vastly outweigh the supposed monetary harm ME2C claims it is incurring from not selling commodity products. *See* Ex. Q (Trettel Dep.) at 102:11-19

([REDACTED]); *see also id.* at 82:19-85:3. Further, any disruption caused by an injunction here would be an utter waste, as the ’517 Patent expires in August 2025.

ME2C would likely respond that these potential harms could be avoided if Defendants would enter into long-term contracts with ME2C to buy its commodity products at inflated prices and obtain a license in the process. ECF 58-1 at 1, 15. But that only highlights the fundamental problem with ME2C’s request for injunctive relief. While ME2C’s motion formally requests an Order “disabl[ing]” aspects of the power plants and preventing use of bromine-containing additives with activated carbon, ECF 58 at 2, it is clear that what ME2C really wants is to sell its products to Defendants at exorbitant rates. It wants to use the prospect of an injunction—and all the harms that would entail—to extract money from Defendants on patents that Defendants contend are not valid, not infringed, and about to expire. This is a case about money, pure and simple, and thus extraordinary injunctive relief is not appropriate here. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (finding that “plaintiff must demonstrate” that “monetary damages, are inadequate to compensate for . . . injury”).

**E. A Preliminary Injunction is Not in the Public Interest**

Any disruptions to the production and dispatch of electricity from these plants caused by a preliminary injunction—which may have immediate impacts to the costs and, potentially, the reliability of power to millions of customers across the states these plants serve—or mercury emissions exceedances caused by a preliminary injunction, are not in the public’s interest. Courts consider “both the public interests injured and the public interests served in granting or denying a preliminary injunction.” *Bellino Fireworks, Inc. v. City of Ankeny*, 2017 WL 11446135, at *20 (S.D. Iowa June 29, 2017) (citing *Sierra Club v. U.S. Army Corps of Eng’rs*, 645 F.3d 978, 997 (8th Cir. 2011)). When, as here, an accused infringer raises a substantial question regarding validity of the involved patents, then enforcement of the patents does not serve the public’s interest.


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*See Abbott Lab'ys v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1348 (Fed. Cir. 2006) ("[A]s a substantial question of patent validity has been raised by [the defendant], the public interest benefits from a denial of the injunction.").

The generation and provision of energy is in the public's interest. Coal-fired power plants, like those involved here, play a large role in generating electricity in the United States. *See* Ex. J ("In 2022, coal accounted for about 19.5% of U.S. electricity generation."). Additionally, reducing mercury emissions from coal-fired power plants is similarly in the public interest as the release of mercury into the air is harmful to public health. *See* Ex. K ("[P]ower plants have taken steps such as installing controls or updating operations to meet [the EPA's Mercury and Air Toxics Standards], which protect public health."). Generating electricity and reducing mercury emissions are both "critical public interest[s] that would be injured by the grant of preliminary relief." *Hybritech Inc. v. Abbott Lab'ys*, 849 F.2d 1446, 1458 (Fed. Cir. 1988). Therefore, even if ME2C could demonstrate a likelihood of success that the '517 Patent is valid *and* that Defendants infringed it—and they cannot—an injunction should be denied because uninterrupted generation of electricity serves the best interests of the public.

ME2C also failed to demonstrate it can meet the increased demand it would face if an injunction were granted. While Trettel declared that "ME2C is fully capable of supplying these power plants with bromine additives and activated carbon products," ECF 58-3 ¶ 22, ME2C has not presented any evidence (other than Trettel's conclusory, self-serving declaration) that it can meet the demand of the eleven power plants involved here. In fact, ME2C recently acknowledged in its SEC Annual Report that it is dependent on other suppliers to provide it with raw materials and that, if the raw materials suppliers cannot meet ME2C's demand, ME2C would likewise be unable to meet demand for its products. *See* Ex. F (ME2C 2024 Annual Statement) at 9 ("If [raw


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materials] suppliers cannot meet our demand for such raw materials on a timely basis or at acceptable prices or if we are unable to offset any such increases that might occur with price adjustments to our customers, such could have a negative effect on our operations."). Indeed, while ME2C describes their competitors as having "large" staffs, ME2C states it has "a limited number of employees." *Id.* at 12; *see also id.* (noting it only has "9 full-time and 2 part-time employees"); *id.* at 18 (noting it leases a single warehouse for both "manufacturing and distribution"). Moreover, ME2C has not identified any employees licensed to do business in Wyoming, Iowa, Wisconsin, or any of the other states where power plants are located. Indeed, Trettel [REDACTED] [REDACTED]. *See* Ex. Q (Trettel Dep.) at 86:21-87:5, 183:9-184:3. Nor has ME2C demonstrated that it has the permitting necessary to long-haul corrosive chemicals (such as halogens) across state lines.

ME2C has not provided any evidence of how many power plants it is currently supplying with chemicals, let alone any evidence that it can quickly increase production to be able to meet the demand of supplying an additional ***eleven*** power plants. Again, this is ME2C's burden, not Defendants'. The Court should conclude this factor weighs in favor of denying a preliminary injunction. *See Guntert*, 2020 WL 6948364, at *14 ("Given . . . the unlikelihood that [the plaintiff] will be able to drastically increase its operations in such a short time frame, the Court finds the public interest factor slightly weighs in favor of denying an injunction."). For these reasons, granting a preliminary injunction in this case is not in the public's best interest.

**F. ME2C's Proposed Bond is Insufficient**

Rule 65(c) requires the Court to order ME2C to provide security in an amount sufficient "to pay the costs and damages sustained by any party found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c); *see Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 373 (8th Cir. 1991) (noting that security should be imposed "in an amount that fairly protects the

[defendants] should it be ultimately found that the [defendants] ha[ve] been wrongfully enjoined”). The Court has discretion to set the bond in this case. *Stockslager v. Carroll Elec. Coop. Corp.*, 528 F.2d 949, 951 (8th Cir. 1976). Defendants need only “establish[] a rational basis for the amount of the proposed bond.” *In re President Casinos, Inc.*, 360 B.R. 262, 266 (B.A.P. 8th Cir. 2007).

ME2C states it will post a $100,000 bond if the Court determines security is necessary to cover the costs and damages sustained by Defendants if they are wrongfully enjoined. ECF 58-1 at 19. Defendants note that ME2C has previously stated the cost to Defendants (and the defendants in prior litigation) for using the allegedly patented technology is $1 per ton of coal burned. In other words, adding together its claims against each Defendant, what ME2C seeks in this case amounts to tens if not hundreds of millions in damages. Under ME2C’s case theory, a $100,000 bond would not be sufficient for even one power plant, let alone the eleven power plants it is accusing. Were the Court to enter injunctive relief—and it should not, for all the reasons stated in this brief—the bond to protect Defendants should be commensurate with the claim ME2C asserts.

## V. CONCLUSION

For the foregoing reasons, ME2C’s Motion for Preliminary Injunction should be denied.

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/s/ *Thomas M. Patton*

**Fredrikson & Byron, P.A.**
R. Scott Johnson (#AT0004007)
Thomas M Patton (#AT0014768)
Cara S. Donels (#AT0014198)
111 East Grand Avenue, Suite 301
Des Moines, IA 50309-1977
Telephone: (515) 242-8900
Facsimile: (515) 242-8950
rsjohnson@fredlaw.com
tpatton@fredlaw.com
cdonels@fredlaw.com

***Attorneys for Defendant, MidAmerican Energy Company***

Respectfully submitted,

/s/ *Casey J. McCracken*

Casey J. McCracken
**Gibson, Dunn & Crutcher LLP**
3161 Michelson Drive
Irvine, CA 92620
cmccracken@gibsondunn.com

Benjamin Hershkowitz
Richard W. Mark
**Gibson, Dunn & Crutcher LLP**
200 Park Avenue
New York, NY 10166
bhershkowitz@gibsondunn.com
rmark@gibsondunn.com

Glenn L. Johnson
**McKee, Voorhees & Sease, P.L.C.**
801 Grand Avenue, Suite 3200
Des Moines, IA 50309
glenn.johnson@ipmvs.com

***Attorneys for Berkshire Hathaway Energy Company***

Respectfully submitted,

/s/ *Syed Fareed*

Syed Fareed
**McDermott Will & Emery LLP**
300 Colorado Street, 22nd Floor
Austin, TX 78701
sfareed@mwe.com

David M. Genender
David J. Tobin
**McDermott Will & Emery LLP**
2501 North Harwood Street Suite 1900
Dallas, TX 75201-164
dgenender@mwe.com
dtobin@mwe.com

Gregory R. Brown
**Duncan, Green, Brown & Langeness, P.C.**
400 Locust Street, Suite 380
Des Moines, IA 50309
gbrown@duncangreenlaw.com
***Attorneys for Defendant PacifiCorp***

Respectfully submitted,

/s/ *Michelle M. Kemp*

Michelle M. Kemp
Gabrielle E. Bina
**Perkins Coie LLP**
33 E. Main Street, Suite 201
Madison, WI 53703
mkemp@perkinscoie.com
gbina@perkinscoie.com

Brianna L. Kadjo
**Perkins Coie LLP**
1900 Sixteenth Street, Suite 1400
Denver, CO 80202-5255
bkadjo@perkinscoie.com

Andrew Kalamarides
**Perkins Coie LLP**
405 Colorado Street, Suite 1700
Austin, TX 78701
akalamarides@perkinscoie.com



**REDACTED PUBLIC VERSION**

_______________________________________________
Tara Z. Hall
Matthew Warner-Blankenship
**Dentons Davis Brown PC**
215 10th Street, Suite 1300
Des Moines, IA 50309
tara.hall@dentons.com
matt.warner-blankenship@dentons.com

***Attorneys for Alliant Energy Corporation, Interstate Power and Light Company and Wisconsin Power and Light Company***

## CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2024, I electronically filed the **DEFENDANTS' BRIEF IN SUPPORT OF THEIR RESISTANCE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system, who in turn sent notice to the counsel of record, including the following:

Bradley W. Caldwell
bcaldwell@caldwellcc.com
Justin T. Nemunaitis
jnemunaitis@caldwellcc.com
Richard A. Cochrane
rcochrane@caldwellcc.com
Austin Curry
acurry@caldwellcc.com
**Caldwell Cassady & Curry P.C.**
2121 N Pearl Street, Suite 1200
Dallas, TX 75201

Jeffrey D. Harty
jharty@nyemaster.com
**Nyemaster Goode, P.C.**
700 Walnut Street, Suite 1300
Des Moines, IA 50309

*Attorneys for Plaintiff*

Michelle M. Kemp
mkemp@perkinscoie.com
Gabrielle E. Bina
gbina@perkinscoie.com
**Perkins Coie LLP**
33 E. Main Street, Suite 201
Madison, WI 53703

Brianna L. Kadjo
bkadjo@perkinscoie.com
**Perkins Coie LLP**
1900 Sixteenth Street, Suite 1400
Denver, CO 80202-5255

Andrew Kalamarides

akalamarides@perkinscoie.com
**Perkins Coie LLP**
405 Colorado Street, Suite 1700
Austin, TX 78701

Tara Z. Hall
tara.hall@dentons.com
Matthew Warner-Blankenship
matt.warner-blankenship@dentons.com
**Dentons Davis Brown PC**
215 10th Street, Suite 1300
Des Moines, IA 50309

*Attorneys for Defendants Alliant Energy Corporation, Alliant Energy Corporate Services Inc., Interstate Power and Light Company and Wisconsin Power and Light Company*

Syed Fareed
sfareed@mwe.com
**McDermott Will & Emery LLP**
300 Colorado Street, 22nd Floor
Austin, TX 78701

David M. Genender
dgenender@mwe.com
David J. Tobin
dtobin@mwe.com
**McDermott Will & Emery LLP**
2501 North Harwood Street Suite 1900
Dallas, TX 75201-164

Gregory R. Brown
gbrown@duncangreenlaw.com
**Duncan, Green, Brown & Langeness, P.C.**
400 Locust Street, Suite 380
Des Moines, IA 50309

*Attorneys for Defendant PacifiCorp*

Benjamin Hershkowitz
bhershkowitz@gibsondunn.com
Richard W. Mark
rmark@gibsondunn.com



**REDACTED PUBLIC VERSION**

**Gibson, Dunn & Crutcher LLP**
200 Park Avenue
New York, NY 10166

Casey J. McCracken
cmccracken@gibsondunn.com
**Gibson, Dunn & Crutcher LLP**
3161 Michelson Drive
Irvine, CA 92620

Glenn L. Johnson
glenn.johnson@ipmvs.com
**McKee, Voorhees & Sease, P.L.C.**
801 Grand Avenue, Suite 3200
Des Moines, IA 50309

*Attorneys for Defendant Berkshire Hathaway Energy Company*

/s/ *Erica Palmer*
Erica Palmer