

ILLINOIS POLLUTION CONTROL BOARD

January 20, 2005

MIDWEST GENERATION EME, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 04-185
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by A.S. Moore):

This case is an appeal by Midwest Generation EME, LLC (Midwest) of an Illinois Environmental Protection Agency (Agency) trade secret determination. After the Board accepted Midwest's appeal for hearing, the Board issued an order in this proceeding that Midwest has appealed to the Third District Appellate Court. The Board today on its own motion stays the trade secret appeal pending before it. Below, the Board describes the procedural context of, and the reasons for staying, this Board proceeding.

On April 19, 2004, Midwest filed a petition asking the Board to review a March 10, 2004 trade secret determination of the Agency. In that determination, the Agency partially denied Midwest's request for trade secret protection of information the company submitted to the Agency. The information relates to Midwest's six coal-fired power stations, all of which are in Illinois. On May 6, 2004, the Board accepted Midwest's appeal for hearing.

On July 1, 2004, Midwest filed a motion for the Board to partially reconsider its May 6, 2004 order. Specifically, Midwest asked the Board to review the Agency's trade secret denial *de novo* rather than limiting the Board's review to the record before the Agency at the time of the denial. In a November 4, 2004 order, the Board, among other things, denied Midwest's motion to partially reconsider, but held that Midwest may present new evidence at the Board hearing in specified circumstances. Additionally, while retaining jurisdiction, the Board ordered a limited remand to the Agency. Specifically, the Board directed the Agency to issue, by November 30, 2004, a supplemental decision stating the Agency's reasons for denying trade secret protection. The Board required Midwest to file a pleading responsive to the Agency's supplemental decision by December 31, 2004.

On November 30, 2004, the Office of the Attorney General for the State of Illinois, acting as counsel for the Agency, filed a "Clarification of Trade Secret Determination." On December 9, 2004, Midwest filed a "Motion to Strike the Attorney General's Clarification of IEPA's Trade Secret Determination." On December 21, 2004, Midwest filed with the Board a "Joint Motion for an Extension of Time to File Certain Pleadings." In that motion, Midwest asks for more time to file a pleading responsive to the Agency's supplemental decision, and the

Agency asks for more time to file a response to Midwest's motion to strike. On December 30, 2004, the Board's hearing officer granted Midwest until February 22, 2005, and the Agency until January 10, 2005, to file these respective pleadings. The Agency has since timely-filed its response to Midwest's motion to strike. On January 19, 2005, Midwest filed a motion for leave to file a reply to the Agency's response, attaching the reply.

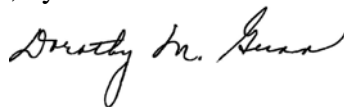
On or about December 13, 2004, Midwest petitioned the Third District Appellate Court to review portions of the Board's November 4, 2004 order. In its petition, Midwest states that it seeks court review of the following: (1) the Board's denial of Midwest's motion to partially reconsider the Board's May 6, 2004 order; (2) the Board's requirement that the Agency file a supplemental trade secret decision; and (3) the Board's requirement that Midwest file a pleading to respond to the Agency's supplemental decision. Midwest states in its petition that it seeks review "for the purpose of having the Court determine the reasonableness and lawfulness" of these portions of the Board's November 4, 2004 order. The petition to the Third District Appellate Court further states that Midwest requests that these portions of the Board's order "be reversed."

Accordingly, in the Third District Appellate Court, Midwest is challenging the very essence of the conduct of the Board's proceeding in PCB 04-185. Midwest challenges what may constitute permissible evidence at the Board hearing, and thus the nature of the record on which the Board's final decision will be based. Further, Midwest challenges the Board's limited remand to the Agency for specification of denial grounds. It is the Agency's statement of denial grounds that frames the issues in a trade secret appeal.

Under these circumstances, and to avoid potentially wasting administrative resources, the Board stays this trade secret appeal proceeding, docketed as PCB 04-185, until the Third District Appellate Court disposes of Midwest's appeal or the Board orders otherwise.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 20, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board