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SEP 27 2005

STATE OF ILLINOIS  
Pollution Control Board

**ILLINOIS POLLUTION CONTROL BOARD**

MIDWEST GENERATION EME, LLC  
Petitioner,

v.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,  
Respondent.

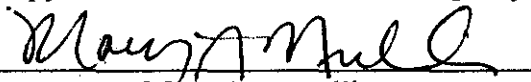
PCB 04-216  
(Trade Secret Appeal)

**NOTICE OF FILING**

To: Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, IL 60601

Lisa Madigan  
Matthew Dunn  
Ann Alexander  
Paula Becker Wheeler  
Office of the Attorney General  
188 West Randolph Street, Suite 2000  
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an original (1) and nine (9) copies of Midwest Generation EME, LLC's Motion to Stay PCB 04-216, Memorandum in Support of Midwest Generation's Motion to Stay IPCB 04-216, and Midwest Generation's Status Report, a copy of which is herewith served upon you.

  
Mary Ann Mullin

Dated: September 27, 2005

Schiff Hardin LLP  
6600 Sears Tower  
Chicago, IL 60606  
(312) 258-5687

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served the attached Midwest Generation EME, LLC's Motion to Stay PCB 04-216, Memorandum in Support of Midwest Generation's Motion to Stay IPCB 04-216, and Midwest Generation's Status Report by U.S. Mail, upon the following persons:

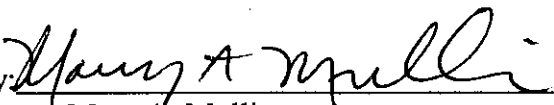
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Lisa Madigan  
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Office of the Attorney General  
188 West Randolph Street, Suite 2000  
Chicago, Illinois 60601

Dated: September 27, 2005

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By   
Mary A. Mullin

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6600 Sears Tower  
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(312) 258-5687

One of the Attorneys for  
Midwest Generation EME, LLC



implementing FOIA codified at 40 C.F.R. § 2.201 et. seq. Certain of the information in the ComEd Response, excerpts from a Continuing Property Record ("CPR") detailing financial information related to expenditures at the six stations, is also owned and considered confidential by Midwest Generation. At the suggestion of USEPA, each company provided a courtesy copy of its Response to the Illinois Environmental Protection Agency ("IEPA").

3. Subsequently, IEPA received FOIA requests from Sierra Club requesting copies of the Midwest Generation Response and the ComEd Response. By letter dated February 26, 2004, IEPA asked ComEd to provide a Statement of Justification for its confidentiality claims. On March 11, 2004, ComEd submitted a Statement of Justification pertaining to the two types of information it considered confidential: compilations of Generating Availability Data System ("GADs") data and the CPR. Midwest Generation was informed of the pending FOIA request for the ComEd Response and on March 11, 2004, also submitted a Statement of Justification for the portion of the ComEd Response pertaining to the CPR

4. IEPA denied both Midwest Generation's and ComEd's trade secret claims as to the information on the CPR. IEPA also denied ComEd's trade secret claims pertaining to the GADs data. On June 2, 2004, ComEd petitioned the Board to review and reverse IEPA's ruling as to ComEd's claims; the Board accepted the petition and it is docketed at 04-215. On June 3, 2004, Midwest Generation petitioned the Board to review and reverse the IEPA determination as to Midwest Generation's claim that the CPR constitutes trade secrets; the Board accepted the petition and it is docketed as 04-216. Discovery is currently beginning in both matters and, pursuant to the Discovery

Schedule entered into by the Hearing Officer, Initial Document Requests and Interrogatories are due to be served on or before October 27, 2005. In accordance with 35 Ill. Adm. Code 101.514, a Status Report of this matter accompanies this Motion to Stay.

5. On June 29, 2005, Midwest Generation and ComEd became aware that an identical Sierra Club FOIA request for the ComEd Response was pending with USEPA. Although the FOIA request was filed on May 20, 2004, it was not until June 29, 2005, that USEPA informed ComEd of the FOIA request and provided ComEd with an opportunity to submit information supporting its claims of confidentiality. ComEd informed Midwest Generation of this development, and by letter dated August 4, 2005, Midwest Generation provided USEPA with a substantiation of its confidentiality claims. On August 5, 2005, ComEd also submitted a justification to USEPA. USEPA is currently reviewing the trade secret status of the ComEd Response. Accordingly, at this time both the Board and USEPA are addressing the same fundamental question: Is the CPR exempt from disclosure?

6. On September 23, 2005, ComEd moved the Board for a Stay of IPCB 04-215 pending resolution of the federal CBI determination process. In its Memorandum in Support of its Motion to Stay, ComEd argued that granting a Stay would (1) avoid the costly and inefficient allocation of resources that is necessarily resulting from duplicative proceeding, (2) avoid practical difficulties that might arise from contrary FOIA determination by state and federal agencies, and (3) allow the Board to be informed by a closely related federal determination. Midwest Generation has incorporated ComEd's arguments into its Memoranda in Support of Midwest Generation's Motion to Stay. In

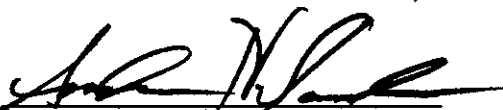
addition, Midwest Generation argues that the proceeding should be stayed because the Board owes EPA deference when both administrative bodies are interpreting federal regulations under the Clean Air Act. Midwest Generation also points out that without a stay, administrative resources may be wasted. For example, if the result of the federal CBI process is that the CPR is released to Sierra Club, the Board proceedings will be unnecessary.

For the reasons set forth in the accompanying Memorandum in Support of Midwest Generation's Motion to Stay and the Memorandum in Support of ComEd's Motion to Stay, Midwest Generation respectfully requests that the proceedings before the Board be stayed until completion of the federal CBI process.

Dated: September 27, 2005

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Sheldon A. Zabel  
Mary Ann Mullin  
Andrew N. Sawula

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2.201 et. seq. Certain of the information in the ComEd Response, excerpts from a Continuing Property Record ("CPR") detailing financial information related to expenditures at the six stations, is also owned and considered confidential by Midwest Generation.

At the suggestion of USEPA, each company provided a courtesy copy of its Response to the Illinois Environmental Protection Agency ("IEPA"). Subsequently, IEPA received FOIA requests from the Sierra Club requesting copies of the Midwest Generation Response and the ComEd Response. By letter dated February 26, 2004, IEPA asked ComEd to provide a Statement of Justification for its confidentiality claims.<sup>1</sup> On March 11, 2004, ComEd submitted a Statement of Justification pertaining to the two types of information it considered confidential: compilations of Generating Availability Data System ("GADs") data and the CPR. Midwest Generation was informed of the pending FOIA request for the ComEd Response, and on March 11, 2004, also submitted a Statement of Justification for the portion of the ComEd Response pertaining to the CPR.

IEPA denied both Midwest Generation's and ComEd's trade secret claims as to the information on the CPR. IEPA also denied ComEd's trade secret claims pertaining to the GADs data. On June 2, 2004, ComEd petitioned the Board to review and reverse IEPA's ruling as to ComEd's claims; the Board accepted the petition and it is docketed

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<sup>1</sup> By letter dated January 5, 2004, IEPA asked Midwest Generation to provide a Statement of Justification for its trade secret claims concerning the Midwest Generation Response. Midwest Generation submitted a Statement of Justification for the confidential information contained in the Midwest Generation Response. IEPA subsequently denied trade secret status to a portion of the claimed confidential information and Midwest Generation petitioned Board to review the negative ruling. The Board accepted this petition and it is docketed at 04-185. In a separate filing, Midwest Generation has moved to Stay that matter.



at 04-215. On June 3, 2004, Midwest Generation petitioned the Board to review and reverse the IEPA determination as to Midwest Generation's claim that the CPR constitutes trade secrets; the Board accepted the petition and it is docketed as 04-216. Discovery is currently beginning in both matters, and pursuant to the Discovery Schedule entered into by the Hearing Officer, Initial Document Requests and Interrogatories are due to be served on or before October 27, 2005.

On June 29, 2005, Midwest Generation and ComEd became aware that an identical Sierra Club FOIA request for the ComEd Response was pending with USEPA. Although the FOIA request was filed on May 20, 2004, it was not until June 29, 2005, that USEPA informed ComEd of the FOIA request and provided ComEd with an opportunity to submit information supporting its claims of confidentiality. ComEd informed Midwest Generation of this development, and by letter dated August 4, 2005, Midwest Generation provided USEPA with a substantiation of its confidentiality claims. On August 5, 2005, ComEd also submitted a justification to USEPA. USEPA is currently reviewing the trade secret status of the ComEd Response.

## **II. ARGUMENT**

Pursuant to 35 Ill. Adm. Code 101.514, ComEd has moved the Board for a Stay of IPCB 04-215 pending resolution of the federal CBI determination process. Similarly, Midwest Generation now moves to Stay IPCB 04-216 pending resolution of the federal CBI determination process. Midwest Generation incorporates by reference the "Memorandum in Support of Commonwealth Edison's Motion to Stay" ("ComEd's Memorandum"), which was filed in PCB No. 04-215 on September 23, 2005, for the reasons stated therein. See Attachment A. As explained in ComEd's Memorandum, at

this time, both the Board and USEPA are addressing the same fundamental question. Granting a Stay would avoid the costly and inefficient allocation of resources that results from duplicative proceedings. Further, a Stay of the Board proceedings will allow the Board to be informed by a closely related federal determination.

In addition to the reasons cited in the ComEd Memorandum, Midwest Generation notes that without a Stay, both USEPA and the Board will be making simultaneous determinations as to whether the CPR is exempted from trade secret protection because it constitutes "emission data" under the federal Clean Air Act, 42 U.S.C. § 114. As the IEPA has noted in a filing in this matter, the Illinois Environmental Protection Act excludes "emission data" from protection as a trade secret and incorporates the federal definition of "emission data". See Respondent's Memorandum in Opposition to Midwest Generation's Motion for Partial Reconsideration at 7 citing 415 ILCS 5/7. While Midwest Generation vehemently opposes the characterization of the CPR, an accounting record, as "emissions data," IEPA's denial of trade secret protection was based, in part, on its determination that the CPR constituted "emission data" under the regulations implementing Section 114 of the Clean Air Act. Id. Accordingly, the Board and USEPA will be simultaneously applying the federal regulatory term "emission data" to the CPR. USEPA has the primary duty to interpret the Clean Air Act and its own regulations and the Board, at the least, owes deference to those interpretations. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). In fact, the Board may be bound by USEPA's interpretations but, even if not bound, principles of comity encourage the Board to consider that determination; doing so is particularly appropriate in this instance because the IEPA

determination rests on its interpretation of an USEPA regulation. See, e.g., Mather Investment Properties LLC v. Ill. State Trapshooters, IPCB 04-29 (2005) (Principles of comity caution against contrary determinations, at least where a stay of one proceeding remains possible.).

A Stay would promote the efficient allocation of resources. If, for example, at the conclusion of the federal process, the CPR is released to Sierra Club, the Board proceedings would be largely moot.

Therefore, Midwest Generation respectfully requests that its Motion to Stay IPCB 04-216 pending completion of the federal process for determination of Midwest Generation's confidentiality claims be granted, pursuant to 35 Ill. Adm. Code 101.514.

Dated: September 27, 2005

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

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Midwest Generation EME, LLC

SEP 23 2005

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS  
Pollution Control Board

Commonwealth Edison Company  
Petitioner,

v.

Illinois Environmental Protection Agency,  
Respondent

PCB No. 04-215  
(Trade Secret Appeal)

**MEMORANDUM IN SUPPORT OF  
COMMONWEALTH EDISON COMPANY'S MOTION TO STAY PCB 04-215**

Commonwealth Edison Company ("ComEd"), by and through its attorneys,  
Sidley Austin Brown & Wood LLP, respectfully submits this Memorandum in Support of its  
Motion to Stay PCB 04-215.

**I. FACTS**

In 2003, ComEd received a Clean Air Act § 114 Request for Information ("Information Request") from the United States Environmental Protection Agency ("USEPA"). The Information Request sought information regarding six coal-fired generating stations owned by ComEd until 1999 and currently owned by Midwest Generation EME, LLC.<sup>1</sup> In the response ComEd submitted to USEPA on January 30, 2004, ComEd included certain financial and business data, marked conspicuously as "confidential business information" ("CBI"), that included excerpts from a Continuing Property Record ("CPR") and four years of Generating Availability Data System ("GADs") data (collectively, the "Confidential Articles"). The CPR excerpts are compilations ComEd prepared of detailed financial information relating to

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<sup>1</sup> The six electric generating stations named in the Information Request were: Crawford, Joliet, Will County, Waukegan, Fisk, and Powerton.

**THIS FILING SUBMITTED ON RECYCLED PAPER**

expenditures and investments at the six stations. The CPR identified additions and transfers worth \$100,000 or more that had taken place at each of the facilities over approximately 25 years. The GADs data compilations revealed information concerning planned outage hours, forced outage hours, maintenance outage hours, and total unit derated hours for each generating unit at each station. At USEPA's suggestion, ComEd sent an identical copy of its Information Request responses to the Illinois Environmental Protection Agency ("IEPA").

#### **A. IEPA Denial of Trade Secret Status**

By letter dated February 26, 2004, IEPA asked ComEd to provide a statement of justification for its confidentiality claims following the agency's receipt of a Freedom of Information Act ("FOIA") Request from the Sierra Club for ComEd's Information Request responses. Specifically, IEPA stated that, pursuant to the requirements of the Illinois Environmental Protection Act (hereinafter referred to as the "Illinois Act"), 415 ILCS § 7, and the Illinois Pollution Control Board's ("IPCB's" or the "Board's") implementing regulations, codified at 35 Ill. Admin. Code §130.201 et seq., ComEd must submit a "trade secret" justification.<sup>2</sup>

On March 11, 2004, ComEd submitted a statement of justification pursuant to 35 Ill. Admin. Code Part 130, as requested by IEPA. In its statement, ComEd set forth the legal requirements for trade secret status and argued that those requirements are satisfied. Specifically, ComEd detailed its corporate policies governing the handling of sensitive information and set forth the measures used to protect the confidential CPR and GADs data. ComEd's justification discussed the competitive value of the information and informed IEPA

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<sup>2</sup> IEPA requested a trade secret justification despite ComEd's labeling of the Confidential Articles as "confidential business information." As such, ComEd provided its justification pursuant to 35 Ill. Admin. Code Part 130.

that releasing its information would place ComEd at an economic disadvantage, since informed observers and competitors could ascertain overall business strategies, alter bidding practices, and infer operational plans from a review of these materials.

On April 28, 2004, IEPA denied ComEd's trade secret claims and stated that the Confidential Articles were, in the agency's determination, not exempt from disclosure under the Illinois Act. In its denial, the agency simply stated, tracking the regulations without explanation, that ComEd failed to adequately demonstrate that the information had not been disseminated or published, that the information has competitive value, and that the information was not "emissions data."

#### **B. Petition to IPCB for Review of IEPA Initial Determination**

On June 2, 2004, ComEd timely petitioned the IPCB to review IEPA's ruling and reverse the negative trade secret determination, or alternatively, to remand the case for a determination of the articles' exemption from disclosure under the confidential business information provisions of the Illinois FOIA (5 ILCS § 140/7(1)(g)) and 2 Ill. Admin. Code Part 1828. In an order issued on June 17, 2004, the IPCB accepted for hearing the petition for review and agreed to examine whether the Confidential Articles are in fact trade secrets and, therefore, exempt from disclosure under the Illinois Act. The Board further granted ComEd's request that the hearing be conducted *in camera* and ordered IEPA to continue protecting the claimed information as confidential during the Board's review. The Board has ruled on certain procedural motions but has not yet engaged in a substantive review of IEPA's ruling and of ComEd's trade secret claims.

### **C. USEPA Proceeding**

On May 20, 2004, just three months after Sierra Club had submitted a FOIA request to IEPA seeking access to ComEd's Information Request responses, Sierra Club filed a similar request with USEPA. Both FOIA requests sought access to the same data. ComEd was not made aware of Sierra Club's federal FOIA request, however, until June 30, 2005, the date on which ComEd received a USEPA request for substantiation of its confidentiality claims. Specifically, by letter dated June 29, 2005, USEPA requested that ComEd provide the agency with supporting information related to its claims of confidentiality, pursuant to 40 C.F.R. § 2.201 *et seq.*, so that USEPA can make a determination as to whether it must provide copies of ComEd's responses to the FOIA requestor. By letter dated August 5, 2005, ComEd submitted a substantiation of its confidentiality claims under FOIA to USEPA. In particular, ComEd detailed both its policies for keeping the CPR and GADs data confidential, and its legal and practical explanations of how the information qualifies for protection. USEPA has not yet issued its determination of ComEd's CBI claims.

### **II. ARGUMENT**

Pursuant to 35 Ill. Admin. Code § 101.514, ComEd moves this Board for a Stay of PCB 04-215 pending resolution of the federal CBI determination process. At this time, both the IPCB and USEPA currently are engaged in proceedings involving the same party in interest, the same FOIA requestor, and substantially similar determinations of confidentiality with respect to a single submission of data. Granting a stay would (1) avoid the costly and inefficient allocation of resources that is necessarily resulting from duplicative proceedings; (2) avoid

practical difficulties that might arise from contrary FOIA determinations by state and federal agencies; and (3) allow the Board to be informed by a closely related federal determination.

The Board may allow a stay where a substantially similar matter is pending in a different forum, so as to avoid the practical difficulties and inefficiencies that result from duplicative proceedings. See 35 Ill. Admin. Code § 101.514; Midwest Generation EME, LLC v. Illinois EPA, PCB No. 04-185 (2005)(stay granted at IPCB's own motion to "avoid potentially wasting administrative resources"). See also Village of Mapleton v. Cathy's Tap, 313 Ill. App. 3d 264, 268 (3d Dist. 2000)(stay granted to remove "the chance of conflicting judgment" in contemporaneous, similar federal proceeding). A duplicative proceeding is defined as a matter "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Admin. Code § 101.202. Illinois courts have recognized that this multiplicity results in an inefficient expenditure of resources for not only the forums, but the parties, who must prepare for both proceedings. Mapleton, 313 Ill. App. 3d at 268 (multiplicity of litigation is a valid consideration in granting motions to stay).

A substantially similar proceeding involving ComEd's confidentiality claims is currently under way at the federal level. Since August 5, 2005, the date on which ComEd submitted its substantiation letter, USEPA has been engaged in an analysis of the confidentiality of ComEd's CPR excerpts and GADs data. This evaluation was prompted by Sierra Club's FOIA request, identical to the one sent to IEPA, for ComEd's Information Request responses. The Confidential Articles at issue in both the IPCB and the USEPA proceedings are identical. In fact, the documents reviewed by IEPA, and on appeal, by the Board, are photocopies of the responses ComEd submitted to USEPA pursuant to the § 114 Information Request.



Not only do the state and federal proceedings share factual commonality, the applicable legal standards governing both confidentiality determinations are substantially similar. See Monstanto v. Illinois EPA et al., PCB 85-19 (1985)(citing federal judicial interpretations of the federal FOIA in support of ruling under 35 Ill. Admin. Code Part 120); Outboard Marine Corp. v. Illinois EPA et al., PCB 84-26 (1984)(“The Board notes that [its] broad construction of standing [under 35 Ill. Code Part 120] comports with the federal courts’ interpretation of standing under the [federal] “Freedom of Information Act” (5 USC 552, as amended)”). See also Cooper v. Illinois Dep’t of the Lottery et al., 640 N.E.2d 1299, 1303 (Ill. App. Ct. 1st Dist. 1994)(citing federal FOIA caselaw in trade secret analysis under Illinois FOIA). Both the Board’s trade secret regulations, codified at 35 Ill. Admin. Code Part 130, and similar trade secret provisions in the Illinois Freedom of Information Act, 5 ILCS § 140/7(1)(g), are frequently interpreted by the Board and by Illinois courts with reference to federal analyses of analogous federal FOIA standards. *Id.* In Monsanto and Outboard Marine Corp., for example, the IPCB considered federal cases interpreting the federal FOIA as guides during its own analyses of the trade secret provisions promulgated under § 7 of the Illinois Act. Similarly, Illinois courts have routinely held that “case law construing the federal statute should be used in Illinois to interpret [the Illinois FOIA].”<sup>3</sup> E.g., Cooper, 640 N.E.2d at 1303; Roulette v. Dep’t of Central Mgmt. Services, 490 N.E.2d 60, 64 (Ill. App. Ct. 1st Dist. 1986). Achieving “consistent construction” between determinations of confidentiality at the state and federal levels in this case would be facilitated by a stay, which would allow the IPCB to be informed by the federal confidentiality determination during its own analysis. Stated differently, failure to grant a stay

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<sup>3</sup> Indeed, the Illinois FOIA exempts from disclosure “[i]nformation specifically prohibited from disclosure by federal or State law or rules or regulations adopted under federal or State law.” 5 ILCS § 140/7(1)(a). See also 2 Ill. Admin. Code § 1828.202(a)(1)(A).

will result in two adjudicatory bodies undertaking similar reviews of the facts, the record, and the applicable law, without the benefit of the other's precedent.

An additional pragmatic consideration counsels in favor of staying PCB 04-215.

A stay of the Board proceedings avoids the serious, practical difficulties that could arise from contrary determinations by the two forums. Contrary determinations could result in the release of ComEd's confidential information at the federal level but not at the state level, or vice versa. Such an outcome not only places ComEd at risk of competitive disadvantage, it provides incentive for FOIA requestors to circumvent one agency's confidentiality determinations by simply directing their requests to another agency. Principles of comity caution against contrary determinations, at least where a stay of one proceeding remains possible. See e.g., Mather Investment Properties, L.L.C. v. Ill. State Trapshooters, PCB No. 04-29 (2005). Although ComEd does not contend that the Board would be bound by USEPA's or a federal court's determination, principles of comity encourage the Board to consider that determination.

Further, the Board need not relinquish jurisdiction by granting a stay. See e.g., Pearl v. Bicoastal Corp. et al., PCB No. 96-265 (1997)(Board retained jurisdiction over claims but consented to parties' request for stay to await developments in state remediation program and to await federal court determination of whether that court would exercise supplemental jurisdiction over state law claims also at issue in the Board proceeding, even though federal complaint was later-filed). Rather, a stay affords the Board an opportunity to consider the federal determination during its analysis and would permit the Board to issue a fully informed decision. Just as confidentiality determinations among various state agencies, including IEPA

and IDNR, are coordinated pursuant to state regulations, see e.g., 35 Ill. Admin. Code § 132.216, similar coordination of state and federal determinations makes sense.<sup>4</sup>

\* \* \*

WHEREFORE, ComEd respectfully requests that, pursuant to 35 Ill. Admin. Code § 101.514, the IPCB grant ComEd's Motion to Stay PCB 04-215 pending resolution of the federal CBI determination process.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 

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Attorneys for Commonwealth  
Edison Company

September 23, 2005

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<sup>4</sup> 35 Ill. Admin. Code § 130.402 further provides that

Any information accorded confidential treatment may be disclosed or transmitted to other officers, ... , or authorized representatives of this State or of the United States concerned with or for the purposes of carrying out the [Environmental Protection] Act or the federal environmental statutes and regulations; provided, however, that such information shall be identified as confidential by the Board, as the case may be [415 ILCS 5/7(e)]. (emphasis added).

ILLINOIS POLLUTION CONTROL BOARD

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Petitioner,

v.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,  
Respondent.

STATE OF ILLINOIS  
Pollution Control Board  
PCB 04-216  
(Trade Secret Appeal)

STATUS REPORT

Now comes Midwest Generation EME, LLC ("Midwest Generation") and files a Status Report in conformance with the requirements of 35 Ill. Adm. Code 101.514.

On June 3, 2004, Midwest Generation filed with the Illinois Pollution Control Board ("Board") a petition for review of the Illinois Environmental Protection Agency's ("IEPA's") April 28, 2004 denial of trade secret status to certain information owned by ComEd and Midwest Generation and provided to IEPA by ComEd. ComEd compiled the information at the request of USEPA in the context of a Section 114, Information Request pursuant to the federal Clean Air Act (hereafter referred to as the "Response"). At the suggestion of USEPA, ComEd sent a copy of its response to IEPA. The information submitted to USEPA and copied to IEPA consisted, in part, of an accounting record referred to as a Continuing Property Record ("CPR"). In its Response, ComEd clearly marked the CPR as "Confidential Business Information."

In response to a Freedom of Information Act (FOIA) request by the Sierra Club, IEPA made a determination pursuant to the trade secret provisions of the Illinois Environmental Protection Act, 415 ILCS 7, that the CPR did not constitute trade secret information and, therefore, could be released to Sierra Club. Both ComEd and Midwest

Generation petitioned the Board to reverse this determination, in addition to a reversal of the IEPA determination concerning the CPR, ComEd also asked for a reversal of the IEPA negative trade secret determination concerning other information submitted with the Response and owned exclusively by ComEd. The Board accepted both petitions, ComEd's petition is docketed at PBC 04-215.

Both appeals have been assigned to Hearing Officer Bradley P. Halloran. In the matter of PCB 04-216, the Board has ruled on certain procedural motions but has not yet engaged in a substantive review of IEPA's trade secret determination or of Midwest Generation's confidentiality claims.

In its June 17, 2004 Order, the Board asked the parties to address whether consolidation of PCB 04-216 with PCB 04-215 was appropriate. On July 26, 2004, pursuant to the Board's Order, IEPA filed a motion recommending consolidation of PCB 04-215 and PCB 04-216, and ComEd and Midwest Generation each filed motions opposing consolidation. On July 7, 2005, the Board issued an Order declining to consolidate PCB 04-215 and PCB 04-216.

A second procedural matter on which the Board has ruled involves Sierra Club's Motion to Intervene in PCB 04-216, filed August 3, 2004. Sierra Club claimed an interest in the proceedings because it had filed a Freedom of Information Act ("FOIA") request seeking access to the CPR. On August 17, 2004, Midwest Generation filed a motion opposing Sierra Club's request to intervene. On August 18, 2005, the Board issued an order denying Sierra Club's Motion to Intervene but permitting Sierra Club to present oral and written statements during Board hearings and file amicus curiae briefs and public comments in the case.

On August 17, 2004, Midwest Generation filed a Motion for Partial Reconsideration of the Board's Order of June 17, 2004, holding that the hearing in this matter would be on the record before IEPA at the time of its decision. On September 21, 2004, IEPA filed an Opposition to the Motion for Partial Reconsideration. On October 6, 2004, Midwest Generation filed a Reply. The Board has not yet ruled on this Motion.

Following a status teleconference on July 29, 2005, the parties filed a proposed discovery schedule with IPCB on August 4, 2005. On August 25, 2005, the Hearing Officer entered an Order detailing a discovery schedule that commences with initial document requests and initial interrogatories served on or before October 27, 2005.

A brief status teleconference with the IPCB Hearing Officer took place on September 22, 2005. The next status teleconference is scheduled for November 10, 2005.

Dated: September 27, 2005

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

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