

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 03 2006

STATE OF ILLINOIS
Pollution Control Board

Midwest Generation EME, LLC)
Petitioner,)
)
v.)
)
Illinois Environmental Protection Agency,)
Respondent)

PCB No. 04-216
(Trade Secret Appeal)

NOTICE OF FILING

To: Brad Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Ann Alexander
Assistant Attorney General and
Environmental Counsel
188 West Randolph Street
Suite 2000
Chicago, Il. 60601

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board the **Agreed Motion to Extend the Stay of PCB 04-216, Status Report and Waiver of Decision Deadline for Board Action**, copies of which are herewith served upon you.



Mary A. Mullin

Date: August 3, 2006

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

procedural motions but has not yet engaged in a substantive review of IEPA's ruling or of Midwest Generation's trade secret claims.

3. In July 2005, Midwest Generation learned that ComEd received a letter from the United States Environmental Protection Agency ("USEPA") requesting it to provide the agency with information supporting its claims that ComEd's initial Information Request Response, including the CPR, constituted confidential information exempt from disclosure under the federal FOIA (5 U.S.C. § 552 *et seq.*) and 40 C.F.R. § 2.201 *et seq.* At that time, Midwest Generation learned that on May 20, 2004, just three months after Sierra Club had submitted a FOIA request to IEPA seeking access to ComEd's Information Request Response, Sierra Club had filed an identical request with USEPA. Because Midwest Generation has independent claims to the confidentiality of the CPR, Midwest Generation submitted a substantiation of its confidentiality claims to USEPA on August 4, 2005.

4. Presently, both the Board and USEPA simultaneously are engaged in proceedings involving the same party in interest (Midwest Generation), the same FOIA requestor (Sierra Club), and substantially similar determination of confidentiality with respect to the confidential articles. The facts and claims at issue in the state and federal proceedings are closely related. As such, Midwest Generation motioned the Board for a stay of PCB 04-216 pending the resolution of the USEPA's determination.

5. On April 6, 2006, the Board issued an Order granting Midwest Generation's initial request for a stay of PCB 04-216 until August 4, 2006. Specifically, the Board ruled that a stay of PCB 04-216 is appropriate because the pending federal process is "substantially similar" to the Board's, and thus "a stay of the latter may avoid multiplicity and the potential for unnecessarily expending the resources of the Board and those before it." In its

Order, the Board notes that “[t]he information claimed by Midwest Generation at the federal and State levels to be protected from disclosure is identical.” The Board further notes that “[t]he potentially applicable legal standards for each proceedings are also similar if not the same.” Thus, USEPA’s determination would amount to “persuasive authority”; alternatively, “public release by USEPA of the documents at issue may render this appeal before the Board moot.”

6. We note that, in June 2006, pursuant to a second FOIA request from Sierra Club to USEPA requesting additional Information Request Responses, Midwest Generation submitted to USEPA a statement of justification with respect to a larger set of documents; both statements of justification discuss the basis for claiming the CPR as protected CBI. This substantiation concerned all of the information both Midwest Generation and ComEd claimed confidential in their additional Information Request Responses. This substantiation consisted of 44 pages of text, numerous affidavits and exhibits.

7. Midwest Generation has been informed that on July 27, counsel for IEPA communicated with USEPA concerning its progress on the FOIA request for the subject documents. Based on those discussions, counsel for IEPA now believes that resolution of the USEPA FOIA request is likely, albeit not certain, within the next four months. Counsel for Midwest Generation also communicated with USEPA concerning the status of its CBI determinations, USEPA reported that it is diligently working on its determination, but did not provide a specific time estimate for its determination. While Midwest Generation is hopeful that this matter can be resolved in the next four months, Midwest Generation believes it could take longer.


8. Counsel for Midwest Generation and IEPA agree that it is in the interest of justice to continue the Board’s stay of proceedings in this matter for a period of 4 months, until

December 4, 2006. Consistent with the Board's April 6, 2004 Order specifying that "any request by Midwest Generation to extend the stay must be directed to the Board and include a status report and, as appropriate, a waiver of the Board's decision deadline," Midwest Generation has attached a status report and waiver of decision deadline to this motion.

WHEREFORE, Midwest Generation and IEPA respectfully request that, pursuant to 35 Ill. Admin. Code § 101.514, the Board grant the Agreed Motion to Extend the Stay of PCB 04-216 for four months, up to and including December 4, 2006.

Dated: August 3, 2006

MIDWEST GENERATION EME, LLC

By: 
Sheldon A. Zabel
Mary A. Mullin

Schiff Hardin LLP
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Chicago, IL 60606
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Attorneys for
Midwest Generation, EME, LLC

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. 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 on August 4, 2005. On August 25, 2005, the Hearing Officer entered a Discovery Scheduling Order.

A brief status teleconference with the Hearing Officer took place on September 22, 2005. On September 23, 2005, Midwest Generation filed a motion to stay PCB 04-216 pending resolution of the substantially similar proceeding currently underway at USEPA. IEPA filed a motion in opposition to a stay of PCB 04-216, and Midwest filed a reply to IEPA's opposition.

Discovery continued pursuant to the Hearing Officer's scheduling order. Both Midwest and IEPA exchanged Interrogatories and Requests for the Production of Documents in November 2005. In March 2006, Midwest Generation filed a motion to compel certain discovery. IEPA opposed the motion. This motion is currently pending before the Board.

In March 2006, depositions in PCB 04-216 were conducted. Specifically, Midwest Generation deposed three employees of IEPA, each of whom had been identified in IEPA's Interrogatory responses as having been involved in the decision to deny Midwest Generation's trade secret claims.

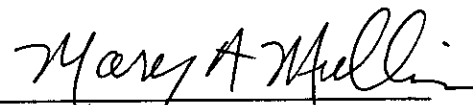
Also in March 2006, USEPA informed Midwest Generation that the Sierra Club had sent a FOIA request for Midwest Generation and ComEd's additional responses and submittals to USEPA. USEPA provided Midwest Generation with an opportunity to submit a substantiation for its claims of confidentiality as to this additional material and to supplement its original substantiation. On June 2 2006, Midwest Generation submitted its substantiation consisting of 44 pages of text, and numerous affidavits and exhibits to USEPA.

On April 6, 2006, the board issued an Order granting a stay of this case until August 4, 2006. Following the issuance of a stay, discovery in PCB 04-216 was suspended. The parties have continued to conduct scheduled status teleconferences with the Hearing Officer. A status teleconference took place on June 15, 2006. On June 28, 2006, Midwest filed an updated waiver of deadline for Board action, which extends such deadline until March 12, 2007.

Dated: August 3, 2006

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Sheldon/A. Zabel
Mary Ann Mullin

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6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5687

Attorneys for
Midwest Generation EME, LLC

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STATE OF ILLINOIS
Pollution Control Board

v.

Illinois Environmental Protection Agency,
Respondent

PROPOSED BOARD ORDER

For the reasons stated in its April 4, 2006 Order, the Board hereby grants the Agreed Motion to Extend the Stay in PCB 04-216. The stay is hereby extended until December 4, 2006.

SO ORDERED,

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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(Trade Secret Appeal) Pollution Control Board

MIDWEST GENERATION EME, LLC'S
WAIVER OF DEADLINE FOR BOARD ACTION

Comes now Midwest Generation EME, LLC, ("Midwest Generation") by and through its attorneys, and states that on June 28, 2006, pursuant to 35 Ill. Admin. Code §101.308(c)(2), Midwest Generation waived the statutory decision deadline for Board action in the above-captioned matter from September 22, 2006 to March 12, 2007. Midwest Generation adopts its waiver of decision deadline for Board action and incorporates the same by reference as if it were fully expressed herein.

Respectfully submitted,

Midwest Generation EME, LLC

By: Mary A Mullin
Sheldon A. Zabel
Mary A. Mullin

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6600 Sears Tower
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(312) 258-5687

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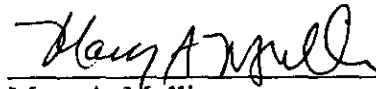
August 3, 2006

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Notice of Filing, Agreed Motion to Extend the Stay of PCB 04-216, Status Report, Proposed Order, and Waiver of Deadline for Board Action by U.S. Mail on this 3th day of August, 2006 upon the following persons:

To: Brad Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Ann Alexander
Assistant Attorney General and
Environmental Counsel
188 West Randolph Street
Suite 2000
Chicago, Il. 60601



Mary A. Mullin

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