

ILLINOIS POLLUTION CONTROL BOARD

August 17, 2006

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):

On August 3, 2006, petitioner, Midwest Generation EME, LLC (Midwest), filed an agreed motion to extend the stay previously granted by the Board in this trade secret appeal. Midwest and respondent, the Illinois Environmental Protection Agency (IEPA), seek an extension of the stay through December 4, 2006. For the reasons below, the Board grants the agreed motion. In this order, the Board provides background on the case before turning to a discussion of and ruling on the agreed motion.

BACKGROUND

On April 19, 2004, Midwest appealed a March 10, 2004 trade secret determination of IEPA under the Environmental Protection Act (Act) (415 ILCS 5 (2004)). The Board docketed the trade secret appeal as PCB 04-185 and accepted the case for hearing. In the IEPA determination being appealed, IEPA denied Midwest's claim for trade secret protection of information that Midwest submitted to IEPA. IEPA made the determination after receiving Sierra Club's request, under Illinois' Freedom of Information Act (FOIA) (415 ILCS 140 (2004)), for a copy of Midwest's submittal.

Midwest maintains that the information it submitted to IEPA is entitled to trade secret status, exempt from public disclosure requirements under the Act. *See* 415 ILCS 5/7, 7.1 (2004). The information relates to Midwest's six coal-fired power stations, all of which are in Illinois. Midwest originally submitted the claimed business and financial information to the United States Environmental Protection Agency (USEPA) in response to USEPA's information request under Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). Sierra Club also submitted a federal FOIA request to USEPA for the same claimed information. USEPA has been and is currently in the process of determining whether to exempt the materials claimed to be confidential business information (CBI) from release under federal FOIA.

In an April 6, 2006 order, the Board ruled on Midwest's first motion to stay this appeal based on the pending USEPA determination of confidentiality. The Board issued a short-term stay, staying this proceeding for 120 days or until August 4, 2006. The Board required that

“[a]ny request by Midwest 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 EME, LLC v. IEPA, PCB 04-185 (Apr. 6, 2006).

On August 3, 2006, Midwest filed the agreed motion to extend the stay through December 4, 2006. The Board rules on the agreed motion today. Sierra Club made no filings in response to the agreed motion for stay. The agreed motion includes a status report and a waiver of the Board’s statutory decision deadline.¹ Midwest waived to March 26, 2007, the Board’s deadline for deciding this appeal. The Board meeting before that deadline is currently scheduled for March 15, 2007. The parties have conducted discovery, but discovery was suspended following issuance of the April 2006 stay. The case has not been to hearing. SR at 2-3.

The Board today, in separate orders, is likewise issuing short-term stay extensions in two other trade secret appeals involving claimed information that is also the subject of a confidentiality request pending before USEPA: Commonwealth Edison Company v. IEPA, PCB 04-215; and Midwest Generation EME, LLC v. IEPA, PCB 04-216.

DISCUSSION

The agreed motion states that the Board and USEPA are simultaneously engaged in proceedings involving the same “party in interest” (Midwest), the same FOIA requestor (Sierra Club), and a “substantially similar determination of confidentiality with respect to the confidential articles.” Mot. at 2. The facts and claims at issue in the State and federal proceedings are “closely related,” the motion maintains. *Id.* According to the motion, these circumstances led Midwest to originally move the Board to stay this trade secret appeal, PCB 04-185, “pending the resolution of the USEPA’s determination.” *Id.*

In the agreed motion, the parties emphasize that the Board’s April 6, 2006 order granting a short-term stay found the stay appropriate because:

[T]he 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 [] 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 proceeding[] 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.” Mot. at 2-3 (quoting Midwest Generation, PCB 04-185 (Apr. 6, 2006)).

According to the agreed motion, on July 27, 2006, IEPA’s counsel communicated with USEPA concerning USEPA’s progress on the federal FOIA request: “Based on those discussions, counsel for IEPA now believes that resolution of the USEPA FOIA request is likely,

¹ The Board cites the agreed motion as “Mot. at _”, and the status report as “SR at _.”

albeit not certain, within the next four months.” Mot. at 3. Counsel for Midwest 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,” “up to and including December 4, 2006.” *Id.* at 3-4.

Section 101.514(a) of the Board’s procedural rules addresses motions for stays:

Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion. (See also Section 101.308 of this Part.) 35 Ill. Adm. Code 101.514(a).

The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” See People v. State Oil Co., PCB 97-103 (May 15, 2003), *aff’d sub nom State Oil Co. v. PCB*, 822 N.E.2d 876 (2d Dist. 2004). When exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: (1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum, *i.e.*, in the Board proceeding. See A. E. Staley Mfg. Co. v. Swift & Co., 84 Ill. 2d 245, 254, 419 N.E.2d 23, 27-28 (1980); *see also* Environmental Site Developers v. White & Brewer Trucking, Inc.; People v. White & Brewer Trucking, Inc., PCB 96-180, PCB 97-11 (July 10, 1997) (applying the Illinois Supreme Court’s A.E. Staley factors). The Board may also weigh the prejudice to the nonmovant from staying the proceeding against the policy of avoiding duplicative litigation. See Village of Mapleton v. Cathy’s Tap, Inc., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000).

Both Midwest and IEPA presently want to extend the stay to a date-certain in the near future. The Board finds that the reasons for issuing the short-term stay originally, as discussed above, likewise warrant the stay’s short-term extension now. See Midwest Generation, PCB 04-185 (Apr. 6, 2006). Currently, a USEPA final determination on confidentiality is anticipated by the beginning of December 2006. Under these circumstances, and considering all of the relevant factors, the Board finds that the requested stay extension is appropriate. Accordingly, the Board grants the agreed motion, extending the stay through December 4, 2006, unless the Board by order ends the stay sooner. The Board again stresses, however, that it is “mindful of the strong policy interest, evidenced in the Act, favoring public disclosure of environmental compliance information, particularly emission data. See 415 ILCS 5/7(b)-(d) (2004).” Midwest Generation, PCB 04-185 (Apr. 6, 2006). The Board therefore cautions the parties that, absent especially compelling circumstances, the Board may be disinclined to further extend the stay.

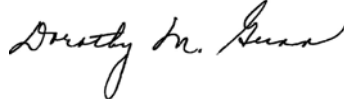
CONCLUSION

The Board grants the agreed motion of Midwest and IEPA to extend the stay of this trade secret appeal. The stay is accordingly in effect through December 4, 2006, unless the Board issues an order terminating the stay earlier. To ensure compliance with the Board’s deadline for deciding this appeal, the Board will terminate the stay as needed to allow time for hearing and a final decision. If, during the stay, USEPA issues a final confidentiality determination concerning

Midwest's claimed information, Midwest must promptly file with the Board a copy of USEPA's determination. As necessary, Midwest may make the filing consistent with the procedures of 35 Ill. Adm. Code 130 for protecting information from disclosure. Any request to again extend the stay must be directed to the Board and include a report on the status of the USEPA process and, as appropriate, a waiver of the Board's decision deadline. *See* 35 Ill. Adm. Code 101.514.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 17, 2006, by a vote of 4-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board