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DEC 11 2006
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION EME, LLC
Petitioner,

v.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

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) **PCB 04-185**
) **(Trade Secret Appeal)**
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MIDWEST GENERATION EME, LLC'S
MOTION TO EXTEND THE STAY OF PCB 04-185

Pursuant to 35 Ill. Adm. Code 101.514, Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Motion to Extend the Stay of PCB 04-185, and hereby states as follows:

1. This case comes before the Board on Midwest Generation's petition to review the Illinois Environmental Protection Agency's ("IEPA's") March 2004 denial of trade secret protection for certain business and financial information related to Midwest Generation's coal-fired generating stations located in Illinois. Midwest Generation initially submitted this information to the United States Environmental Protection Agency ("USEPA") in response to an Information Request issued under Section 114 of the Clean Air Act (the "Response"), and then Midwest Generation provided its Response to IEPA as a courtesy. Midwest Generation conspicuously marked the material "confidential business information" (the "Marked Material").

2. The Board accepted the petition for hearing, and Midwest Generation's appeal, PCB 04-185, is currently before the Board. To date, the Board has ruled on certain 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 June 2005, Midwest Generation received a letter from the United States Environmental Protection Agency (“USEPA”) requesting it to provide the Agency with information supporting its claims that the Marked Material 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. Shortly thereafter, Midwest Generation learned that soon after Sierra Club had submitted a FOIA request to IEPA seeking access to the Marked Material, Sierra Club had filed an identical request with USEPA. Midwest Generation submitted a substantiation of its confidentiality claims to USEPA on July 28, 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 a substantially similar determination of confidentiality with respect to the Marked Material. 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 04-185 pending the resolution of USEPA’s determination.

5. On April 6, 2006, the Board issued an Order granting Midwest Generation’s initial request for a stay of PCB 04-185 until August 4, 2006. Specifically, the Board ruled that a stay of PCB 04-185 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.” April 6, 2006 Order at 7. In its Order, the Board noted that “[t]he information claimed by Midwest Generation at the federal and State levels to be protected from disclosure is identical.” *Id.* The Board further noted that “[t]he potentially applicable legal standards for each proceeding are also similar if not the same.” *Id.* 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.” *Id.*

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 Marked Material as protected CBI. This substantiation concerned all of the information both Midwest Generation and Commonwealth Edison claimed confidential in their additional Information Request Responses. This substantiation consisted of 44 pages of text, numerous affidavits and exhibits.

7. On August 3, 2006, Midwest Generation and IEPA filed an Agreed Motion to Extend the Stay of PCB 04-185 (“Agreed Motion”) beyond the August 4, 2006 deadline set forth by the Board in its April 6, 2006 Order. In the Agreed Motion, Midwest Generation explained that counsel for IEPA communicated with USEPA concerning its progress on the FOIA request for the subject documents. Based on those discussions, counsel for IEPA believed that resolution of the USEPA FOIA request was likely to occur by December 4, 2006. Midwest Generation also communicated with USEPA concerning the status of its CBI determinations. At that time, USEPA reported that it was diligently working on its determination, but did not provide a specific time estimate for its determination. As a result, Midwest Generation concluded in the Agreed Motion that while it was hopeful that this matter could be resolved by December 4, 2006, it believed it could take longer.

8. On August 17, 2006, the Board granted the Agreed Motion, finding that the reasons for issuing the stay in its April 6, 2006 Order likewise warranted the stay’s extension to December 4, 2006. August 17, 2006 Order at 3. The Order specified that requests for

additional extensions of 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.” *Id.* at 4.

9. USEPA has informed Midwest Generation that the Agency has hired a consultant, Industrial Economics, to analyze the confidential nature of the documents, including the Marked Material, submitted to USEPA. USEPA chose Industrial Economics to perform this task because USEPA determined this consultant had extensive expertise in the utility industry. Currently, USEPA is waiting for Industrial Economics’ recommendations before making its determination. USEPA has told Midwest Generation that it expects this recommendation sometime after Christmas.

10. Given this development, the reasons underlying the Board’s prior stay of this proceeding remain equally true at this time. USEPA is undertaking a review of identical materials under substantially similar legal standards. USEPA’s review will be informed by outside expertise that could benefit the Board. Further, public release by USEPA of the documents at issue may render this appeal before the Board moot. Midwest Generation believes that a short-term extension of the stay in this matter for a period of 4 months, until April 4, 2007, remains in the interest of justice.

11. Midwest Generation has attached a status report and a waiver of decision deadline to this motion.

WHEREFORE, Midwest Generation respectfully requests that, pursuant to 35 Ill. Adm. Code § 101.514, the Board grant Midwest Generation’s Motion to Extend the Stay of PCB 04-185 for four months, up to and including April 4, 2007.

Dated: December 11, 2006.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Sheldon A. Zabel
Mary Ann Mullin
Andrew N. Sawula

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Chicago, Illinois 60606
(312) 258-5500

Attorneys for
Midwest Generation EME, LLC

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC,)
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 Petitioner,)
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 v.)
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Illinois Environmental Protection Agency,)
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 Respondent.)
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PCB No. 04-189
(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. Admin Code § 101.514.

1. This matter concerns the trade secret status of certain information Midwest Generation originally submitted to the United States Environmental Protection Agency ("USEPA") pursuant to an information request under Section 114 of the Clean Air Act regarding Midwest Generation's coal-fired generating stations located in Illinois. At the suggestion of USEPA, Midwest Generation sent an identical courtesy copy of this information to the Illinois Environmental Protection Agency ("IEPA"). In its submittal to USEPA, Midwest Generation prominently marked some of the information as confidential ("Marked Material").

2. On January 23, 2004, Midwest Generation submitted a Statement of Justification describing why it considered the Marked Material to be trade secrets.

3. On March 10, 2004, IEPA denied Midwest Generation's trade secret claims and stated, without explanation, that the information was not exempt from disclosure under 35 Ill. Admin. Code Part 130.

4. On April 19, 2004, Midwest Generation petitioned the Illinois Pollution Control Board (the "Board") for review of this determination. By an Order dated May 6, 2004, the Board accepted the Petition for Review.

5. The Board has ruled on certain procedural motions in this matter, but discovery has not begun. By an Order dated November 4, 2004, the Board denied Sierra Club's Motion to Intervene, ordered the IEPA to clarify its trade secret determination, and partially denied Midwest Generation's Motion for Partial Reconsideration. On November 30, 2004, IEPA filed a document purporting to be a clarification of its trade secret determination. On December 9, 2004, Midwest Generation filed a Motion to Strike IEPA's Clarification. The Board has not yet ruled on this motion.

6. On December 13, 2004, Midwest Generation filed a Petition for Review of the Board's November 4, 2004 Order with the Third Appellate District. On January 20, 2005, the Board, on its own motion, stayed this matter pending the Third District Appellate Court's decision on Midwest Generation's appeal. On March 4, 2005, the Third District dismissed Midwest Generation's appeal.

7. On September 23, 2005, Midwest Generation filed a motion to stay PCB 04-185 pending resolution of the substantially similar proceeding currently underway at USEPA. IEPA filed a motion in opposition to a stay of PCB 04-185, and Midwest Generation filed a reply to IEPA's opposition.

8. In March 2006, USEPA informed Midwest Generation that the Sierra Club had sent a FOIA request for Midwest Generation's 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, numerous affidavits and exhibits to USEPA.

9. On April 6, 2006, the Board issued an Order granting a stay of this case until August 4, 2006. On June 28, 2006, Midwest Generation filed an updated waiver of deadline for Board action, which extends such deadline until March 26, 2007.

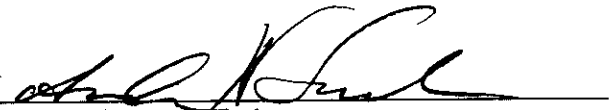
10. On August 17, 2006, the Board issued an Order granting Midwest Generation's Agreed Motion to Extend the Stay of PCB 04-185 until December 4, 2006.

11. The parties have continued to conduct scheduled status teleconferences with the IPCB Hearing Officer. A status teleconference took place on December 5, 2006.

12. Contemporaneously with this Status Report, Midwest Generation is filing an updated waiver of deadline for Board action, which extends such deadline until September 26, 2007.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

BY: 

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Mary Ann Mullin
Andrew N. Sawula

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Chicago, Illinois 60606
(312) 258-5500

Attorneys for
Midwest Generation EME, LLC

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PCB 04-185

(Trade Secret Appeal)

PROPOSED BOARD ORDER

For the reasons stated in its April 6, 2006 Order, the Board hereby grants the Motion to Extend the Stay of PCB-185. The stay is hereby extended until April 4, 2007.

IT IS SO ORDERED.

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

Pursuant to 35 Ill. Admin. Code §101.308(c)(2), Midwest Generation EME, LLC hereby waives the statutory decision deadline for Board action in the above-captioned matter from March 26, 2007 to September 26, 2007.

Respectfully submitted,

Midwest Generation EME, LLC

By: 

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LLC

December 11, 2006

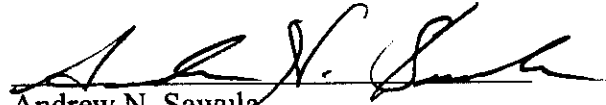
CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Notice of Filing, Motion to Extend the Stay of PCB 04-185, Status Report, Proposed Order, and Waiver of Deadline for Board Action by U.S. Mail on this 11th day of December, 2006 upon the following persons:

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
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Environmental Counsel
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Andrew N. Sawula