

BEFORE THE 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: Dorothy Gunn, Clerk
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

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

PLEASE TAKE NOTICE that we have filed today with the Office of the Clerk of the Pollution Control Board a **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.


Andrew N. Sawula

Date: December 11, 2006

Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500

2. The Board accepted the petition for hearing, and Midwest Generation's appeal, PCB 04-216, 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 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 the CPR, 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 a substantially similar determination of confidentiality with respect to the CPR. 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 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.” April 6, 2006 Order at 8. 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 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. On August 3, 2006, Midwest Generation and IEPA filed an Agreed Motion to Extend the Stay of PCB 04-216 (“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 CPR, 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 04-216 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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Attorneys for
Midwest Generation EME, LLC

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

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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. On January 30, 2004, Commonwealth Edison ("ComEd") submitted excerpts from a Continuing Property Record ("CPR") related to six coal-fired generating stations formerly owned by ComEd and currently owned by Midwest Generation to the United States Environmental Protection Agency ("USEPA") in response to a Clean Air Act § 114 Information Request ("Information Request"). ComEd conspicuously marked the materials "confidential business information" and submitted a courtesy copy to the Illinois Environmental Protection Agency ("IEPA").

2. On March 11, 2004, Midwest Generation submitted a statement of justification describing why Midwest Generation, as the current owner of the generating stations, also considered the CPR a trade secret.

3. By letter dated April 23, 2004, IEPA denied Midwest Generation's trade secret claims and stated, without explanation, that the CPR was not exempt from disclosure under 35 Ill. Admin. Code Part 130.

4. On June 3, 2004, Midwest Generation filed with the Illinois Pollution Control Board ("Board" or "IPCB") a petition for review of the Illinois Environmental Protection Agency's ("IEPA's") denial of Midwest Generation's trade secret claims. In its petition, Midwest Generation requested the Board to reverse IEPA's trade secret determination or, alternatively, to remand the case for a determination of the articles' confidentiality under the confidential business information provisions of the Illinois Freedom of Information Act ("FOIA")(5 ILCS § 140/7(1)(g)) and 2 Ill. Admin. Code Part 1828.

5. On June 17, 2004, the Board accepted the petition for hearing. Midwest Generation's appeal of IEPA's trade secret determination is docketed as PCB 04-216. This appeal has been assigned to IPCB Hearing Officer Bradley P. Halloran. To date 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.

6. Following a status teleconference on July 29, 2005, the parties filed a proposed discovery schedule with IPCB on August 4, 2005.

7. On August 25, 2005, the IPCB Hearing Officer entered an Order detailing a discovery schedule that commenced with initial document requests and initial interrogatories served on or before October 27, 2005 and ended with responses to final document requests and final interrogatories served on or before March 27, 2006.

8. On September 23, 2005, Midwest Generation filed with the Board 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 Generation filed a reply to IEPA's opposition.

9. Discovery continued pursuant to the Hearing Officer's scheduling order. Both Midwest Generation and IEPA exchanged Interrogatories and Requests for the Production of Documents in November 2005.

10. On February 16, 2006, Midwest Generation filed a motion to compel answers to Interrogatories and Document Requests. This motion is fully briefed by both parties.

11. 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.

12. Also 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.

13. On April 6, 2006, shortly after depositions concluded in PCB 04-216, the Board issued an Order granting a stay of this case until August 4, 2006.

14. Following the issuance of a stay, discovery in PCB 04-216 was suspended. Accordingly, the Hearing Officer has not ruled on Midwest Generation's motion to compel.

15. On June 28, 2006, Midwest Generation filed an updated waiver of deadline for Board action, which extends such deadline until March 12, 2007.

16. On August 17, 2006, the Board issued an Order granting Midwest Generation's Agreed Motion to Extend the Stay of PCB 04-216 until December 4, 2006.

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

18. 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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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-216. 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 12, 2007 to September 26, 2007.

Respectfully submitted,

Midwest Generation EME, LLC

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Attorneys for Midwest Generation EME,
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 04-216, 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
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Ann Alexander
Assistant Attorney General and
Environmental Counsel
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Brad Halloran
Hearing Officer
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Andrew N. Sawula