

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC,)	
Petitioner)	PCB 04-216
)	Trade Secret Appeal
v.)	
)	
Illinois Environmental Protection Agency,)	
Respondent)	

NOTICE OF FILING

To:	Dorothy Gunn, Clerk	Sheldon A. Zabel
	Illinois Pollution Control Board	Mary A. Mullin
	100 West Randolph	Andrew N. Sawula
	Suite 11-500	Schiff Hardin LLP
	Chicago, Illinois 60601	6600 Sears Tower
		Chicago, Illinois 60606

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

Please take notice that today we have filed with the Office of the Clerk of the Pollution Control Board Respondent's Memorandum in Opposition to Midwest Generation's Motion to Extend the Stay of PCB 04-216. A copy is herewith served upon the assigned Hearing Officer and the attorneys for the Petitioner, Midwest Generation EME, LLC.

Dated: Chicago, Illinois
December 19, 2006

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
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BY: 

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MEMORANDUM IN OPPOSITION TO MIDWEST GENERATION'S MOTION TO EXTEND THE STAY OF PCB 04-216

Preliminary Statement

Respondent Illinois Environmental Protection Agency ("IEPA") submits this memorandum in opposition to the motion by Petitioner Midwest Generation EME, LLC ("Midwest Generation") to extend the now-expired stay of PCB 04-216. The Board, citing the "strong policy interest" favoring disclosure of environmental compliance information, expressed disinclination in its August decision to further continue the stay "absent especially compelling circumstances." No such circumstances are present here.

Facts

Respondent accepts Midwest Generation's statement of facts solely with respect to the chronology of events set forth in it, and not with respect to any qualitative descriptions of those events.

Argument

In its initial decision granting a stay of these proceedings over Respondent's objection, the Board stated, "The Board is mindful of the strong policy interest, evidenced in the [Illinois Environmental Protection] Act, favoring public disclosure of environmental compliance information, particularly emission data." Midwest Generation EME, LLC v. IEPA, PCB 04-216 (April 6, 2006), at 8. The Board nonetheless granted a short-term 3 month stay, on the

reasoning that “[t]he risk of prejudice to IEPA from a stay of PCB 04-216 would be greatly diminished . . . by limiting the duration of the stay to a date-certain in the near future, rather than simply granting a stay ‘until resolution of the federal CBI process’ as Midwest requests.” Id.

Prior to expiration of the 3-month stay, IEPA acceded to an agreed motion for a short-term extension of the stay based on new information it had received from USEPA Region 5 that USEPA was likely to issue a final decision within a few months. The Board, in granting the agreed motion, cited its earlier statement that the Act favors public disclosure of environmental compliance information, particularly emission data, and stated, “The Board therefore cautions the parties that, absent especially compelling circumstances, the Board may be disinclined to further extend the stay.” Midwest Generation EME, LLC v. IEPA, PCB 04-216 (August 17, 2006), at 3.

No such “especially compelling circumstances” have emerged to warrant further continuation of the stay. Notwithstanding its stated expectations at the time of the agreed motion, USEPA has not yet issued a decision on the pending Freedom of Information Act (FOIA) request, nor stated any date certain by which it will do so. In support of its motion, Petitioner cites only the fact that USEPA has, more than two and a half years after receiving the initial FOIA request, decided to hire a consultant “to analyze the confidential nature of the documents.” (Petitioner’s memorandum at ¶ 9) USEPA has told Midwest Generation that the newly-hired consultant “expects” to issue its recommendation on the matter “sometime after Christmas,” and that USEPA’s decision will follow some indefinite time after that. Id.

These vague statements cannot, by any stretch, be considered “especially compelling circumstances” justifying continuation of the Board’s temporary stay. IEPA, in the interest of comity and efficiency, was willing once to give USEPA the opportunity to promptly resolve this

matter and potentially alleviate the need for parallel proceedings. But at this juncture, with no end to USEPA's decisionmaking process in sight, a continued stay would contravene the "strong policy interest . . . favoring public disclosure of environmental compliance information," and perpetrate the prejudice that the Board sought to alleviate by granting a short-term rather than indefinite stay.

Conclusion


For the foregoing reasons, IEPA respectfully requests that Midwest Generation's motion to extend the stay of PCB 04-216 be denied.

Dated: Chicago, Illinois
December 19, 2006

Respectfully submitted,

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental
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CERTIFICATE OF SERVICE

I hereby certify that I did on the 19th day of December, 2006 send by First Class Mail, with postage thereon fully paid and deposited into the possession of the United States Postal Service, a true and correct copy of the following instruments entitled Notice of Filing and Memorandum in Opposition to Midwest Generation's Motion to Extend the Stay of PCB 04-216, to:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Sheldon A. Zabel
Mary A. Mullin
Andrew N. Sawula
Schiff Hardin LLP
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