

ILLINOIS POLLUTION CONTROL BOARD
February 15, 2007

MIDWEST GENERATION EME, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 04-216
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by A.S. Moore):

On December 11, 2006, petitioner, Midwest Generation EME, LLC (Midwest), filed a motion to extend the stay previously granted by the Board in this trade secret appeal. Midwest seeks an extension of the stay through April 4, 2007. Respondent, the Illinois Environmental Protection Agency (IEPA), filed a response opposing the requested extension.

For the reasons below, the Board denies Midwest's motion to extend the stay. The Board also addresses and denies Midwest's motion for partial reconsideration, a ruling on which had been reserved during the stay. In this order, the Board provides background on the case before discussing and ruling upon Midwest's motions.

BACKGROUND

On June 3, 2004, Midwest appealed an April 23, 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 04-216 and, in a June 17, 2004 order, accepted the case for hearing. In the IEPA determination being appealed, IEPA denied Midwest's claim for trade secret protection of information that Commonwealth Edison Company (ComEd) submitted to IEPA. Midwest states that a portion of the information submitted by ComEd is also owned by Midwest. 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 ComEd's submittal.

Midwest maintains that the information ComEd 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 six coal-fired power stations, all of which are in Illinois. The stations are formerly owned by ComEd and currently owned by Midwest.¹ ComEd originally

¹ ComEd has appealed a separate IEPA trade secret determination concerning the same information and other information submitted to IEPA by ComEd. That pending ComEd appeal is docketed as PCB 04-215.

submitted the claimed 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 from release under federal FOIA.

On June 13, 2004, IEPA filed the administrative record of its trade secret determination. On August 3, 2004, Sierra Club filed a motion to intervene in this trade secret appeal. IEPA supported Sierra Club's motion, but Midwest opposed intervention.

On August 18, 2004, Midwest filed a motion for the Board to partially reconsider its June 17, 2004 order, asking the Board to review IEPA's trade secret denial *de novo*. On September 21, 2004, IEPA filed a response, opposing Midwest's motion for partial reconsideration. On October 6, 2004, Midwest filed a motion for leave to file a reply to IEPA's response, attaching the reply. The Board grants Midwest's unopposed motion for leave and accepts the reply. By a November 4, 2004 order in the trade secret appeal Midwest Generation EME, LLC v. IEPA, PCB 04-185, the Board denied another Midwest motion to partially reconsider, which motion was also based on Midwest's *de novo* hearing request.

In a July 7, 2005 order, after reviewing pleadings on the issue from the parties, the Board declined to consolidate this appeal with the related trade secret appeal Commonwealth Edison Company v. IEPA, PCB 04-215. In an August 18, 2005 order, the Board denied Sierra Club's motion to intervene, but ruled that Sierra Club could participate in this proceeding through hearing statement, public comment, and *amicus curiae* briefing.

On August 25, 2005, the hearing officer issued an order setting a discovery schedule. The hearing officer noted in orders of October 7, November 10, and December 21, 2005, that discovery was proceeding as scheduled. On February 8, 2006, the hearing officer granted an agreed motion to amend the discovery schedule. On February 16, 2006, Midwest filed a motion to compel IEPA's answers to interrogatories and document requests. On March 2, 2006, IEPA filed a response opposing the motion to compel. On March 7, 2006, the hearing officer issued a revised discovery schedule. On March 16, 2006, Midwest filed a motion for leave to file a reply to IEPA's response concerning the motion to compel, attaching the reply. On March 28, 2006, IEPA filed a response opposing Midwest's motion for leave. In March 2006, depositions were conducted.

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. Midwest sought to stay this proceeding before the Board until the USEPA process concluded. IEPA opposed the motion. The Board issued a short-term stay, staying this proceeding for 120 days or until August 4, 2006. With the issuance of the stay, the Board reserved ruling on Midwest's motion to partially reconsider and related motion for leave, and the hearing officer suspended discovery and reserved ruling on Midwest's motion to compel and related motion for leave.

On August 3, 2006, Midwest filed an agreed motion to extend the original stay through

December 4, 2006. The Board granted the agreed motion in an order of August 17, 2006. The case has not been to hearing and has not concluded discovery. On December 12, 2006, the hearing officer accepted the parties' proposed discovery schedule as follows: final interrogatories and final document requests must be served by February 28, 2007; and answers to final interrogatories and final document requests must be served by March 30, 2007.

As noted, Midwest filed a motion to further extend the stay on December 11, 2006, which the Board rules on today. The motion includes a status report and a waiver of the Board's statutory decision deadline. On December 19, 2006, IEPA filed a response opposing Midwest's motion.²

Midwest has waived to September 26, 2007, the Board's deadline for deciding this appeal. The Board meeting before that deadline is currently scheduled for September 20, 2007. The hearing officer last held a status call with the parties on January 23, 2007.

The Board today, in separate orders, is likewise denying stay extensions in two other trade secret appeals involving claimed information that is also the subject of a confidentiality request pending before USEPA: Midwest Generation EME, LLC v. IEPA, PCB 04-185; Commonwealth Edison Company v. IEPA, PCB 04-215.

DISCUSSION

Stay Extension Request

Midwest Motion for Stay Extension

Midwest's motion for another extension of the stay (this time through April 4, 2007) reiterates 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 [claimed information]." Mot. at 2. The facts and claims at issue in the State and federal proceedings are "closely related," Midwest maintains. *Id.* According to the motion, these circumstances led Midwest to originally move the Board to stay this trade secret appeal, PCB 04-216, "pending the resolution of USEPA's determination." *Id.*

In the current motion, Midwest again emphasizes that the Board's April 6, 2006 order granting the initial 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 noted that "[t]he information claimed by Midwest [] at the federal and State levels to be protected from disclosure is identical." The Board further noted that "[t]he

² The Board cites Midwest's motion to extend the stay as "Mot. at _", and IEPA's response as "Resp. at _."

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 EME, LLC v. IEPA, PCB 04-216 (Apr. 6, 2006), citations omitted).

According to Midwest, the Board’s August 17, 2006 order found that the reasons for granting the initial stay likewise warranted extending the stay until December 4, 2006. *Id.* at 4.

Midwest states in its current motion that USEPA informed Midwest that USEPA hired a consultant, Industrial Economics, “to analyze the confidential nature” of the documents in question. Mot. at 4. According to the motion, USEPA found that Industrial Economics has “extensive expertise in the utility industry” and USEPA is waiting for the consultant to make recommendations before USEPA renders its confidentiality determination. Further, the motion continues, USEPA told Midwest that USEPA expects to receive the consultant’s recommendations “sometime after Christmas [2006].” *Id.* Midwest concludes that “[g]iven this development, the reasons underlying the Board’s prior stay of this proceeding remain equally true at this time.” *Id.*

IEPA Response

IEPA opposes Midwest’s request for a stay extension. IEPA quotes from the Board’s April 6, 2006, in which the Board originally granted a stay:

“The Board is mindful of the strong policy interest, evidenced in the [] Act, favoring public disclosure of environmental compliance information, particularly emission data.” The Board nonetheless granted a short-term [four] 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 [confidential business information] process” as Midwest requests. Resp. at 1-2 (quoting Midwest Generation, PCB 04-216 (Apr. 6, 2006), citations omitted).

IEPA states that after the Board granted the initial stay, IEPA “acceded to an agreed motion for a short-term extension of the stay” based on new information from USEPA that USEPA “was likely to issue a final decision within a few months.” Resp. at 2. IEPA stresses, however, that when the Board granted the agreed motion, the Board reemphasized that the Act favors public disclosure of emission data and accordingly stated: “The Board therefore cautions the parties that, absent especially compelling circumstances, the Board may be disinclined to further extend the stay.” *Id.* (quoting Midwest Generation, PCB 04-216 (Aug. 17, 2006).

IEPA argues that “[n]o such ‘especially compelling circumstances’ have emerged to warrant further continuation of the stay.” Resp. at 2. IEPA asserts that despite USEPA’s stated expectations at the time of the agreed motion, USEPA has not issued a determination on the FOIA request “nor stated any date certain by which it will do so.” *Id.* IEPA maintains that

USEPA's act of hiring a consultant "more than two and a half years after receiving the initial FOIA request," along with "vague statements" about when the consultant's recommendations would arrive, after which "USEPA's decision will follow [at] some indefinite time," do not amount to "especially compelling circumstances" to justify extending the stay. *Id.*

IEPA maintains that "in the interest of comity and efficiency," IEPA, through the agreed motion, was "willing once to give USEPA the opportunity to promptly resolve this matter and potentially alleviate the need for parallel proceedings." Resp. at 2-3. IEPA argues now, however, "with no end to USEPA's decisionmaking process in sight," extending the stay would contravene the Act's strong policy interest in publicly disclosing environmental compliance information. *Id.* at 3.

Board Analysis

The Board's procedural rules address motions for stays, providing: "Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed . . ." 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).

The Board acknowledges that some of the reasons for originally staying this trade secret appeal remain, such as avoiding the multiplicity of litigation and potentially conflicting determinations. Nor does IEPA disavow its earlier concession that USEPA's confidentiality determination would constitute persuasive authority for the Board here. Under the present circumstances, however, the reasons for extending the stay yet again are outweighed by the interest in making environmental compliance information publicly available under the Act. See 415 ILCS 5/7 (2004). Midwest's claimed information remains protected from public disclosure while this trade secret appeal is pending. Only by resuming this proceeding can the Board adjudicate whether IEPA properly determined that Midwest's claimed information is not entitled to trade secret protection.

The Board notes that it was well over a year ago, on September 27, 2005, that Midwest filed its first motion for stay based on the USEPA proceeding. The Board, by limiting the initial stay to four months, sought to avoid prejudice to IEPA, noting the Act's "strong policy interest . . . favoring public disclosure of environmental compliance information, particularly emission data." Midwest Generation, PCB 04-216, slip op. at 8 (Apr. 6, 2006).

In subsequently granting the agreed motion for a short-term extension of the original stay, the Board gave considerable weight to representations that a USEPA confidentiality determination was expected by early December 2006. Still, the Board cautioned the parties that "absent especially compelling circumstances, the Board may be disinclined to further extend the stay." Midwest Generation, PCB 04-216, slip op. at 3 (Aug. 17, 2006). The Board is so disinclined.

The Board finds that USEPA's retention of a consulting firm does not constitute "especially compelling circumstances" to justify extending the stay a second time and further delaying the public disclosure of environmental information that may not warrant trade secret protection. Unlike the agreed motion, Midwest's current motion is devoid of any estimate on when USEPA expects to issue its final confidentiality determination. Moreover, the Board can report that during the January 23, 2007 status call with the Board hearing officer, Midwest conveyed no information about whether any recommendations from the consultant, expected "sometime after Christmas [2006]" (Mot. at 4), have actually arrived with USEPA. Accordingly, the Board denies Midwest's motion for extension of the stay.

Motion to Partially Reconsider

Having denied Midwest's request to extend the stay, the Board turns to Midwest's motion for partial reconsideration of the Board's June 17, 2004 order. A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. A motion to reconsider may specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 5 (Feb. 19, 2004).

As noted, the Board reserved ruling on Midwest's motion to partially reconsider during the stay. The Board's June 17, 2004 order, which Midwest wants reconsidered in part, accepted this appeal for hearing. In Midwest's motion, which is opposed by IEPA, Midwest asks the Board to conduct a *de novo* hearing in this appeal of IEPA's trade secret denial. Under analogous circumstances, Midwest included substantially identical arguments and sought the same relief in a motion to partially reconsider filed in another pending trade secret appeal, Midwest Generation EME, LLC v. IEPA, PCB 04-185. That motion was likewise opposed by IEPA.

In PCB 04-185, on November 4, 2004, the Board devoted over twenty pages to considering the parties' positions, analyzing the issues, and ultimately denying Midwest's motion to partially reconsider. *See Midwest Generation*, PCB 04-185, slip op. at 12-34 (Nov. 4, 2004). In the interest of administrative economy, the Board will not repeat here all of the arguments and analyses already detailed by the Board in its November 4, 2004 order in PCB 04-185. Rather, the Board adopts its reasoning and findings from that order, essential aspects of which are summarized as follows:

The Board's trade secret rules (35 Ill. Adm. Code 130) provide the trade secret claimant with a meaningful opportunity to present evidence to IEPA in the form of a Statement of Justification before IEPA can make the information publicly available. Additionally, nothing in Part 130 precludes the claimant from submitting to IEPA an amended Statement in an attempt to respond to the deficiencies identified in an IEPA denial letter. Further, during any appeal of an IEPA denial, the claimed information must be kept confidential by the State agencies.

Unless a trade secret appeal before the Board is dismissed on a dispositive motion, the appeal will include a hearing. The Board hearing is generally limited to the record before IEPA at the time of denial. The hearing does, however, afford the trade secret claimant the opportunity to challenge IEPA's reasons for denial. In addition, the claimant may introduce new evidence if it can demonstrate either that the evidence was unavailable to the party and IEPA at the time that IEPA made its determination or that the claimant was not given the required opportunity to present a Statement of Justification to IEPA.

This process provides adequate safeguards against any erroneous loss of trade secret status. Moreover, requiring a *de novo* hearing in all trade secret appeals would impose additional administrative burdens on the State, promote forum-shopping, and hinder the timely release of environmental information to the public. See Midwest Generation, PCB 04-185, slip op. at 22, 24, 33 (Nov. 4, 2004).

There are a few instances in Midwest's *de novo* pleadings for PCB 04-216 where Midwest raises legal arguments about "emission data" that it did not make in its earlier PCB 04-185 filings. See Midwest Reply at 4-5. Midwest is not, and has never been, precluded by the Board from raising such arguments on the merits of this appeal. The Board finds, however, that none of the arguments made by Midwest warrant reconsideration of the Board's June 17, 2004 order. Accordingly, on the grounds articulated here and in the Board's November 4, 2004 decision in PCB 04-185, the Board denies Midwest's motion to partially reconsider filed in this proceeding, PCB 04-216.

Additionally, the Board will not order, on its own motion, a limited remand to IEPA to specify trade secret denial reasons in a supplemental determination, as the Board ordered on November 4, 2004, in PCB 04-185. See Midwest Generation, PCB 04-185, slip op. at 30-31, 33-34 (Nov. 4, 2004). Without commenting on IEPA's trade secret denial letter in PCB 04-216, the Board simply notes that the procedural postures of this proceeding and PCB 04-185, at the times of the respective rulings on the motions to partially reconsider, are quite different. On November 4, 2004, no discovery had been conducted in PCB 04-185. In contrast, and as described in the background section of this order, PCB 04-216 is presently in a relatively advanced stage of discovery. Should Midwest, however, wish the Board to entertain a motion for such a limited remand, the Board grants Midwest 21 days leave from its receipt of this order to so move the Board. IEPA may respond to any Midwest motion as provided in the Board's procedural rules. See 35 Ill. Adm. Code 101.500(d).

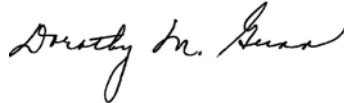
CONCLUSION

For the reasons above, the Board denies Midwest's motion to extend the stay of this trade secret appeal. By its terms, the stay ran through December 4, 2006. With this denial of Midwest's motion for another stay extension, the Board in this order also addresses and denies Midwest's motion for partial reconsideration. In addition, as more fully described above, the Board grants Midwest leave to file a motion for a limited remand.

Consistent with today's order, the Board directs the hearing officer to proceed expeditiously to hearing. Additionally, the Board directs Midwest to promptly file with the Board a copy of the USEPA final confidentiality determination concerning Midwest's claimed information if that determination is issued while this appeal is pending. As necessary, Midwest may make the filing consistent with the procedures of 35 Ill. Adm. Code 130 for protecting information from disclosure.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 15, 2007, by a vote of 4-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board