

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
CLERK'S OFFICE

OCT 25 2007

STATE OF ILLINOIS  
Pollution Control Board

Midwest Generation EME, LLC )  
Petitioner, )  
)  
)  
v. )  
)  
Illinois Environmental Protection Agency, )  
Respondent )

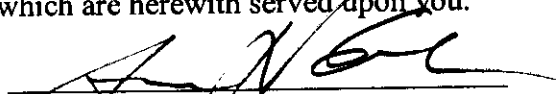
PCB No. 04-216  
(Trade Secret Appeal)

NOTICE OF FILING

To: Illinois Pollution Control Board, Attn: Clerk  
100 West Randolph  
Suite 11-500  
Chicago, Illinois 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 **Joint Motion to Stay 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: October 25, 2007

Schiff Hardin LLP  
6600 Sears Tower  
Chicago, IL 60606  
(312) 258-5687

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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STATE OF ILLINOIS  
Pollution Control Board

Midwest Generation EME, LLC,  
Petitioner,

v.

Illinois Environmental Protection Agency,  
Respondent.

PCB No. 04-216  
(Trade Secret Appeal)

**JOINT MOTION TO STAY PCB 04-216**

Pursuant to 35 Ill. Admin. Code § 101.514, Petitioner Midwest Generation EME, LLC ("Midwest Generation") and Respondent Illinois Environmental Protection Agency ("IEPA") jointly submit to the Illinois Pollution Control Board this Motion to Stay PCB 04-216 and hereby state as follows:

1. This matter comes before the Board on Midwest Generation's petition for review of a trade secret denial that IEPA issued in April 2004. Midwest Generation contends that one of its documents in IEPA's possession, a Continuing Property Record ("CPR"), is trade secret and should not be available to the public under the Freedom of Information Act ("FOIA").

2. Contemporaneously with this proceeding, the United States Environmental Protection Agency ("USEPA") is evaluating whether the very document at issue in Midwest Generation's Board petition is entitled to confidential treatment under the federal Freedom of Information Act, 5 U.S.C. § 442.

3. Because the state and federal proceedings contemplate the same document and involve substantially similar legal and factual issues, the Board ordered a stay of this proceeding, which, after one extension, was lifted on December 4, 2006. (See the accompanying

Status Report, filed contemporaneously with this motion, for the procedural history of this matter.)

4. Midwest Generation was recently advised that USEPA has submitted the CPR document to an independent contractor for review in connection with its FOIA determination. (*See Ex. B.*)

5. Accordingly, the parties jointly move the Board to stay PCB 04-216 for a period of six months.

6. A stay of PCB 04-216 is appropriate given that a substantially similar determination 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 is on-going at the USEPA level. Granting a stay would (1) avoid the costly and inefficient allocation of resources that is necessarily resulting from duplicative proceedings; (2) avoid practical difficulties that might arise from contrary FOIA determinations by state and federal agencies; and (3) allow the Board to be informed by a closely related federal determination.

7. The factors supporting the Board's prior issuance of a stay have renewed force today. The parties are poised to engage in expensive and time-consuming expert discovery and motion practice as the hearing in this matter approaches. As such, Midwest Generation and IEPA hereby request that this case be stayed for six months until April 17, 2008.

WHEREFORE, Midwest Generation and IEPA respectfully request that, pursuant to 35 Ill. Admin. Code § 101.514, the IPCB grant the parties' Joint Motion to Stay PCB 04-216 for six months and stay this proceeding until April 17, 2008.

Dated: October 25, 2007

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: Paula B. Wheeler  
Paula Becker Wheeler, Assistant  
Attorney General <sup>WASHINGTON (800)</sup>  
~~100 West Randolph Street, Suite 2001~~  
Chicago, Illinois 60601  
(312) 814-~~3772~~ 1511  
(312) 814-2347 (fax)

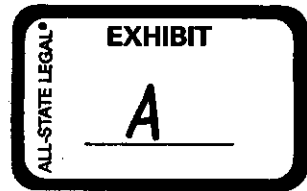
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MIDWEST GENERATION EME, LLC

By: Sheldon A. Zabel  
Sheldon A. Zabel  
Mary Ann Mullin  
Andrew N. Sawula

SCHIFF HARDIN LLP  
6600 Sears Tower  
Chicago, Illinois 60606  
(312) 258-5500

Attorneys for Midwest Generation EME, LLC



ILLINOIS POLLUTION CONTROL BOARD  
August 30, 2007

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

**HEARING OFFICER ORDER**

On August 27, 2007, the complainant submitted a revised and agreed proposal for a discovery schedule. The discovery schedule is accepted to the extent as follows. Answers to final interrogatories and final document requests due to be served on or before September 7, 2007. Fact discovery closes on September 14, 2007. Supplementation and amendments of prior discovery responses to be served on or before September 14, 2007. Pre-hearing disclosures regarding exhibits and witnesses and stipulated facts to be served on or before October 12, 2007. Supplemental discovery closes on January 14, 2008. Dispositive motions and motions in limine to be filed on or before February 25, 2008.

The parties or their legal representatives are directed to participate in a telephonic status conference with the hearing officer on September 11, 2007, at 1:00 p.m. The status conference must be initiated by the petitioner, but each party is nonetheless responsible for its own appearance. At the status conference, the parties must be prepared to discuss the status of the above-captioned matter and their readiness for hearing.

IT IS SO ORDERED.

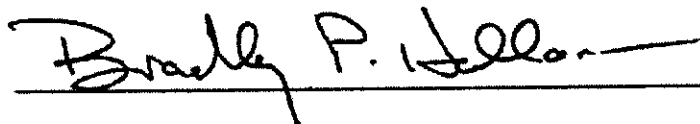
Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601  
312.814.8917

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on August 30, 2007, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on August 30, 2007:

John T. Therriault  
Illinois Pollution Control Board  
James R. Thompson Center  
100 W. Randolph St., Ste. 11-500  
Chicago, Illinois 60601

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
100 W. Randolph Street, Suite 11-500  
Chicago, Illinois 60601  
(312) 814-8917

PCB 2004-216  
Ann Alexander  
Office of the Attorney General  
188 West Randolph, 20th Floor  
Chicago, IL 60601

PCB 2004-216  
IEPA  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276

PCB 2004-216  
Katherine D. Hodge  
Illinois Environmental Regulatory  
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3150 Roland Avenue  
Springfield, IL 62703

PCB 2004-216  
N. LaDonna Driver  
Illinois Environmental Regulatory  
Group  
3150 Roland Avenue  
Springfield, IL 62703

PCB 2004-216  
Sheldon A. Zabel  
Schiff Hardin & Waite  
6600 Sears Tower  
233 South Wacker Drive  
Chicago, IL 60606-6473

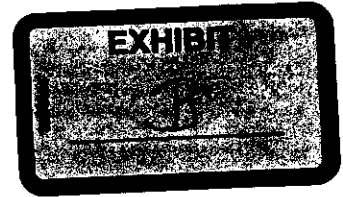
PCB 2004-216  
Mary Ann Mullin  
Schiff Hardin & Waite  
6600 Sears Tower  
233 South Wacker Drive  
Chicago, IL 60606-6473

PCB 2004-216  
Andrew N. Sawula  
Schiff Hardin & Waite  
6600 Sears Tower  
233 South Wacker Drive  
Chicago, IL 60606-6473

PCB 2004-216  
Keith I. Harley  
Chicago Legal Clinic  
205 West Monroe Street, 4th Floor  
Chicago, IL 60606



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590



REPLY TO THE ATTENTION OF:

**BY CERTIFIED U.S. MAIL**  
**RETURN RECEIPT REQUESTED**  
7001 0320 0006 1458 0027

September 11, 2007

Basil G. Constantelos, Director of Environmental, Health and Safety  
Midwest Generation EME, LLC  
One Financial Place  
440 S. LaSalle Street  
Suite 3500  
Chicago, Illinois 60605

Re: Notification of Disclosure to U.S. EPA Contractor

Dear Mr. Constantelos:

This letter concerns Midwest Generation EME, LLC's (Midwest Generation) confidential business information (CBI) claim for certain documents produced by Midwest Generation to U.S. Environmental Protection Agency (U.S. EPA) in response to U.S. EPA's issuance of Clean Air Act Section 114 information requests (Section 114 requests) dated February 13, 2003, and February 1, 2005. As you know, U.S. EPA received a Freedom of Information Act request for Midwest Generation's documents produced in response to the Section 114 requests, and Midwest Generation submitted information to substantiate its CBI claims with respect to the documents. U.S. EPA is now in the process of making a confidentiality determination for the documents claimed as CBI by Midwest Generation.

This letter is to notify you that U.S. EPA will be disclosing Midwest Generation's documents provided in response to the Section 114 information requests to its contractor, Industrial Economics, Inc., for the purpose of assisting U.S. EPA in the confidentiality determination. The contract number is EP-w06-065. If you have any comments concerning this disclosure, you must provide your comments in writing to Mark J. Palermo, Associate Regional Counsel (C-14J), U.S. EPA, 77 W. Jackson Blvd., Chicago, Illinois, 60604, no later than 5 days after you receive this letter. If you have any questions, please call me at (312) 886-6082.

Very Truly Yours,

Mark J. Palermo  
Associate Regional Counsel



cc: Mary Ann Mullin, Esq.  
Schiff Hardin LLP  
6600 Sears Tower  
Chicago, Illinois 60606  
Certified Mail # 7001 0320 0006 1458 0010

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

Midwest Generation EME, LLC, )  
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 Respondent. )  
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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 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, 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 trade secret determination or of Midwest Generation's confidentiality claims. The parties have conducted some fact discovery, however, several months of discovery remain, pursuant to the hearing officer's Scheduling Order in this matter (*See Ex. A*).

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 Production of Documents in November 2005.

10. 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.

11. 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.

12. 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.

13. Because a federal determination had not yet been issued as of August 4, 2006, Petitioner and Respondent jointly moved the Board to extend the stay of this matter. The Board did so, extending the stay to December 4, 2006.

14. As of December 4, 2006, USEPA had not completed its review of Midwest Generation's confidential business information claims. Accordingly, Midwest Generation moved for a further extension of the stay. At that time, IEPA opposed a further extension, citing the public's interest in timely access to the information sought by the FOIA request. The Board declined to further stay the proceeding.

15. USEPA recently notified Midwest Generation that Midwest Generation's CPR excerpts have been submitted to an independent contractor for review (*See Ex. B*).


16. The parties have continued to conduct scheduled status teleconferences with the IPCB Hearing Officer. Pursuant to the Hearing Officer's Scheduling Order, the parties are currently engaged in discovery. Fact discovery has been exchanged, however, discovery will not close until January 14, 2008.

17. Contemporaneously with this Status Report, Midwest Generation is filing an updated waiver of deadline for Board action, which extends such deadline until September 20, 2008.

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By:



Sheldon A. Zabel  
Mary Ann Mullin  
Andrew N. Sawula

SCHIFF HARDIN LLP  
6600 Sears Tower  
Chicago, Illinois 60606  
(312) 258-5500

Attorneys for  
Midwest Generation EME, LLC

Dated: October 25, 2007

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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 20, 2008 to September 20, 2008.

Respectfully submitted,

Midwest Generation EME, LLC

By:   
Sheldon A. Zabel  
Mary A. Mullin  
Andrew N. Sawula

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

Attorneys for  
Midwest Generation EME, LLC

October 25, 2007

**CERTIFICATE OF SERVICE**

I, the undersigned attorney, certify that I have served the attached Notice of Filing, Joint Motion to Extend the Stay of PCB 04-216, Status Report, and Waiver of Deadline for Board Action by U.S. Mail on this 25<sup>th</sup> day of October, 2007, upon the following persons:

To: Illinois Pollution Control Board, Attn: Clerk  
100 West Randolph  
Suite 11-500  
Chicago, Illinois 60601

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

  
Glenna L. Gilbert