

ILLINOIS POLLUTION CONTROL BOARD

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JUL 24 2008

STATE OF ILLINOIS
Pollution Control Board

MIDWEST GENERATION EME, LLC
Petitioner,

PCB 04-216
(Trade Secret Appeal)

v.

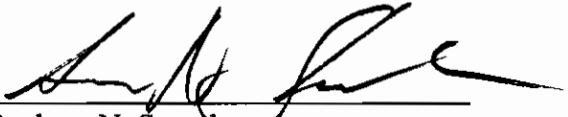
ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

NOTICE OF FILING

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

Brad P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the parties' Joint Motion to Stay PCB 04-216 and accompanying Status Report, copies of which are herewith served upon you.


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

Dated: July 24, 2008

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC,
Petitioner,

v.

Illinois Environmental Protection Agency,
Respondent.

PCB No. 04-216
(Trade Secret Appeal)

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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 for the Illinois Pollution Control Board’s consideration this Motion to Stay PCB 04-216. The parties have entered into settlement discussions and at this time are endeavoring to resolve this dispute without the continued intervention of the Board. For this reason, and as more fully set forth below, the parties respectfully request a stay of this matter until November 18, 2008.

1. This matter arose from 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”), constitutes a trade secret and should not be released to the public under the Illinois Freedom of Information Act (“FOIA”), 5 ILCS § 140 et seq.

2. Contemporaneously with this Board 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. § 552.

3. The state and federal proceedings involve the same documents and substantially similar legal and factual issues. Recognizing the duplicative nature of these simultaneous proceedings and in the interests of parity and judicial economy, the Board ordered a stay of its 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. In October 2007, Midwest Generation was advised that USEPA submitted the CPR to an independent contractor for review in connection with its FOIA determination. The parties so advised the Board and, in light of the developments in the USEPA proceeding, the Board granted the parties' joint motion to stay the matter until April 17, 2008.

5. Currently, the parties are exchanging settlement ideas and are evaluating the possibilities for a resolution of this dispute. In light of the parties' mutual interest in reaching a negotiated settlement and the belief that settlement efforts will continue, the parties hereby request a stay of four months. Both Midwest Generation and IEPA are mindful of the Board's direction that further stays of this proceeding should be requested judiciously. The Board has held previously that settlement efforts constitute a compelling justification for a time-limited stay. *See, e.g., Stephan Co. v. IEPA*, No. PCB 01-72, 2001 WL 118403 (Jan 4., 2001); *People v. Old World Industries et al.*, No. PCB 97-168, 1997 WL 796642 (Dec. 18, 1997).

6. A stay would enable the parties to focus on settlement without simultaneously conducting supplemental discovery and preparing for a hearing. In so doing, the resources of the parties and the Board are conserved, and a good-faith attempt at settlement can receive the parties' full attention.

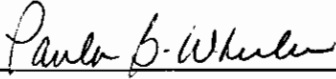
7. Additionally, a stay of PCB 04-216 is appropriate for the previously adopted reasons that a substantially similar determination involving the same party in interest, the same FOIA requestor, and the same set of confidential articles is on-going at the USEPA level. Granting a stay would (1) avoid the costly and inefficient allocation of resources that necessarily is 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.

8. The factors supporting the Board's prior issuance of a stay remain true today. The parties are poised to engage in expensive and time-consuming discovery and motion practice as the hearing in this matter approaches.


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 four months from the date on which the Board issues such an Order. Midwest Generation hereby incorporates by reference, as if fully set forth herein, its Waiver of Decision Deadline for Board Action, filed on May 21, 2008, which extends the statutory decision deadline for Board action in the above-captioned matter to March 19, 2009.

Dated: July 24, 2008

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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 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.

11. 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.

12. 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.

13. 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. The Board declined to further stay the proceeding.

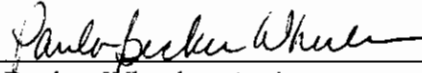
14. In October 2007, USEPA notified Midwest Generation that Midwest Generation's confidential articles have been submitted to an independent contractor for review. The parties jointly sought a stay of the proceeding. The Board granted a stay until April 5, 2008.

15. On May 21, 2008, Midwest Generation filed a waiver of deadline for Board action which extends such deadline until March 19, 2009.


16. Currently the parties are expected to prepare an agreed scheduling order for the completion of supplemental discovery and the filing of pre-hearing motions.

Dated: July 24, 2008

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached **Joint Motion to Stay PCB 04-216, Status Report, and Waiver of Decision Deadline for Board Action**, by U.S. Mail, upon the following persons:

Lisa Madigan
Matthew Dunn
Paula Becker Wheeler
Office of the Attorney General
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601

Dated: Chicago, Illinois
July 24, 2008

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: _____


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One of the Attorneys for
Midwest Generation EME, LLC