

ILLINOIS POLLUTION CONTROL BOARD

August 21, 2008

MIDWEST GENERATION EME, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 04-185
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

On July 24, 2008, petitioner, Midwest Generation EME, LLC (Midwest), and respondent, the Illinois Environmental Protection Agency (IEPA), filed a joint motion for a time-limited stay of this trade secret appeal. For the reasons below, the Board grants the motion. The stay is in effect through November 18, 2008, unless the Board issues an order terminating the stay earlier. In this order, the Board provides background on the case before discussing and ruling on the joint motion.

BACKGROUND

On April 19, 2004, Midwest appealed a March 10, 2004 trade secret determination of IEPA under the Environmental Protection Act (Act) (415 ILCS 5 (2006)). The Board docketed the trade secret appeal as PCB 04-185 and, in a May 6, 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 Midwest submitted to IEPA. IEPA made the determination after receiving Sierra Club's request, under Illinois' Freedom of Information Act (FOIA) (415 ILCS 140 (2006)), for a copy of Midwest's submittal.

Midwest maintains that the information it submitted to IEPA is entitled to trade secret status, exempt from public disclosure requirements under the Act. *See* 415 ILCS 5/7, 7.1 (2006). The information relates to Midwest's six coal-fired power stations, all of which are in Illinois. Midwest originally 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 May 20, 2004, IEPA filed the administrative record of its trade secret determination. On May 27, 2004, Sierra Club filed a motion to intervene in this trade secret appeal. IEPA supported Sierra Club's motion, but Midwest opposed intervention. On July 1, 2004, Midwest

filed a motion for the Board to partially reconsider its May 6, 2004 order, asking the Board to review IEPA's trade secret denial *de novo*. IEPA opposed Midwest's motion for partial reconsideration.

In a November 4, 2004 order, the Board denied Sierra Club's motion to intervene, but ruled that Sierra Club could participate in this proceeding in various ways. In the same order, the Board denied Midwest's motion to partially reconsider, but held that Midwest may present new evidence at the Board hearing in specified circumstances. Additionally, while retaining jurisdiction, the Board ordered a limited remand to IEPA, directing IEPA to issue a supplemental decision stating IEPA's reasons for denying trade secret protection. The Board required Midwest to file a pleading responsive to IEPA's supplemental decision.

On November 30, 2004, the Office of the Attorney General for the State of Illinois, acting as counsel for IEPA, filed a "Clarification of Trade Secret Determination." On December 9, 2004, Midwest filed a "Motion to Strike the Attorney General's Clarification of IEPA's Trade Secret Determination." On January 11, 2005, IEPA filed its response to Midwest's motion to strike with the hearing officer's leave. On January 19, 2005, Midwest filed a motion for leave to file a reply to IEPA's response, attaching the reply.

On or about December 13, 2004, Midwest petitioned the Third District Appellate Court to review portions of the Board's November 4, 2004 order. In a January 20, 2005 order, the Board stayed the trade secret proceeding before the Board until the Third District Appellate Court disposed of Midwest's appeal or the Board ordered otherwise. On March 4, 2005, the court dismissed Midwest's appeal, granting the Board's motion to dismiss the appeal for lack of jurisdiction.

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. 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.

Midwest filed a motion to further extend the stay on December 11, 2006. On December 19, 2006, IEPA filed a response opposing Midwest's motion. The Board denied Midwest's motion by order of February 15, 2007.

With the February 15, 2007 denial of stay extension, the Board, on April 19, 2007, granted Midwest's motion to strike portions of IEPA's supplemental determination as delineated in the Board order of April 19, 2007. Consistent with the Board's November 4, 2004 order, the Board's April 19, 2007 order required Midwest to file, within 30 days, a pleading responsive to IEPA's supplemental determination, as amended by the Board's April 19, 2007 order.

On May 22, 2007, the hearing officer issued an order accepting the parties' proposed discovery schedule as follows:

Initial interrogatories and document requests (limited to 25 of each, including subparts) must be served on or before August 17, 2007. Responses to initial interrogatories and document requests must be served on or before September 17, 2007. Depositions must be completed on or before December 17, 2007. Final interrogatories and document requests (limited to 15 each, including subparts) must be served on or before January 17, 2008. Responses to final interrogatories and document requests must be served on or before February 29, 2008. Supplementation or amendments of prior discovery responses must be served on or before March 14, 2008. Pre-hearing disclosure of the respective parties' list of exhibits and witnesses and their list of stipulated facts must be filed on or before April 11, 2008. Supplemental discovery closes on June 27, 2008. Dispositive motions and motions in limine must be filed on or before August 1, 2008. Hearing Officer Order, PCB 04-185, at 1 (May 22, 2007).

On May 29, 2007, Midwest filed its amended petition for review. The next day, Midwest filed a notice of substitution of an exhibit to its amended petition. In light of today's ruling on the joint motion for stay, the Board does not address these pleadings at this time.

On September 27, 2007, the hearing officer issued an order noting that, according to the parties, discovery was proceeding as scheduled. On October 25, 2007, the parties filed a joint motion to stay this appeal through April 17, 2008, which the Board granted by order of November 15, 2007.

On July 24, 2008, Midwest and IEPA filed a joint motion to stay this proceeding through November 18, 2008 (Joint Mot.). Accompanying the joint motion is a status report. On May 21, 2008, Midwest had filed a waiver of the Board's deadline for deciding this appeal, extending the deadline from September 20, 2008 to March 19, 2009. A Board meeting is currently scheduled for March 19, 2009. The case has not been to hearing, but as noted above, has been in discovery.

The Board today, in separate orders, is likewise granting joint motions for time-limited stays in two other trade secret appeals involving claimed information that is also the subject of a confidentiality request pending before USEPA: Commonwealth Edison Company v. IEPA, PCB 04-215; and Midwest Generation EME, LLC v. IEPA, PCB 04-216.

DISCUSSION

In their joint motion, Midwest and IEPA represent that they are "exchanging settlement ideas and are evaluating the possibilities for a resolution of this dispute." Joint Mot. at 2. The parties seek a stay through November 18, 2008, based on their "mutual interest in reaching a negotiated settlement and the belief that settlement efforts will continue." *Id.* The parties wish to:

focus on settlement without simultaneously conducting 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. *Id.*

Midwest and IEPA emphasize that they are “mindful of the Board’s direction that further stays of this proceeding should be requested judiciously.” Joint Mot. at 2. Accordingly, the parties assert that the Board has in the past held that “settlement efforts constitute a compelling justification for a time-limited stay,” citing Stepan Company v. IEPA, PCB 01-72 (Jan 4, 2001) and People v. Old World Industries, Inc., PCB 97-168 (Dec. 18, 1997).

Additionally, the parties reiterate their points from prior stay requests; specifically, that USEPA is evaluating whether the “very documents at issue” in Midwest’s trade secret appeal before the Board “are entitled to confidential treatment under the federal Freedom of Information Act, 5 U.S.C. § 552.” Joint Mot. at 1. Midwest was advised in October 2007 that USEPA had submitted Midwest’s claimed information to “an independent contractor for review in connection with [USEPA’s] FOIA determination.” *Id.* at 2. According to the parties, 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 same claimed material. *Id.* Midwest and IEPA maintain that granting their requested 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. *Id.*

Midwest and IEPA assert that the factors supporting the Board’s prior issuance of a stay “have renewed force today,” adding that the parties are “poised to engage in expensive and time-consuming motion practice as the hearing in this matter approaches.” Joint Mot. at 3. The status report filed along with the joint motion states that the parties have engaged in fact discovery pursuant to the hearing officer’s scheduling order and are “expected to prepare an agreed scheduling order for the completion of discovery, including the depositions of witnesses and submission of expert witness reports.” Status Report at 3-4.

The Board notes that Section 101.514(a) of its procedural rules addresses motions for stays:

Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion. (See also Section 101.308 of this Part.) 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 (2nd Dist. 2004). When exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: (1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum, *i.e.*, in the Board proceeding. See A. E.

Staley Mfg. Co. v. Swift & Co., 84 Ill. 2d 245, 254, 419 N.E.2d 23, 27-28 (1980); *see also* Environmental Site Developers v. White & Brewer Trucking, Inc.; People v. White & Brewer Trucking, Inc., PCB 96-180, PCB 97-11 (July 10, 1997) (applying the Illinois Supreme Court's A.E. Staley factors). The Board may also weigh the prejudice to the nonmovant from staying the proceeding against the policy of avoiding duplicative litigation. *See* Village of Mapleton v. Cathy's Tap, Inc., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3rd Dist. 2000).

Both parties presently want to stay this proceeding through November 18, 2008. The Board finds that the requested stay will serve the purposes articulated by the parties, as set forth above. The Board places considerable weight on the parties' representation that good-faith settlement discussions are underway, and on the fact that IEPA has joined in this motion for stay. The Board also emphasizes that the stay would last to a date-certain in the near future. In addition, the FOIA requestor, Sierra Club, has not sought to oppose the joint motion for stay, and Midwest has waived the Board's decision deadline to March 19, 2009.

When previously granting time-limited stays in this case, the Board advised the parties as follows:

The Board again stresses, however, that it is "mindful of the strong policy interest, evidenced in the Act, favoring public disclosure of environmental compliance information, particularly emission data. *See* 415 ILCS 5/7(b)-(d) (2004)." Midwest Generation, PCB 04-185 (Apr. 6, 2006). The Board therefore cautions the parties that in the future, absent especially compelling circumstances, the Board may be disinclined to extend the stay. Midwest Generation, PCB 04-185 (Nov. 15, 2007).

The parties cite Stepan Company and Old World Industries for the broad proposition that efforts to settle provide a compelling justification for granting a time-limited stay. Stepan Company was a permit appeal and Old World Industries was an enforcement action. Here, of course, Sierra Club has been closely involved, making a FOIA request to IEPA for the contested materials and seeking to intervene in this appeal. The Board is concerned that there be no undue delay in making publicly available any environmental compliance information that is properly subject to disclosure.

Sierra Club, however, as noted, has not sought to oppose this joint motion for stay, and the Board acknowledges that "the law generally favors the encouragements of settlements." Chemetco, Inc. v. PCB, 140 Ill. App. 3d 283, 288-89, 488 N.E.2d 639, 643 (5th Dist. 1986). Further, the Board agrees with the parties that the stay will allow them to fully devote their resources toward settlement. *See* Stepan Company, PCB 01-72, slip op. at 1. Moreover, settlement holds out the prospect that at least some of the materials at issue may be made available for public review sooner than if the case is fully litigated before the Board, decided on the merits, and conceivably appealed from here. *See* 415 ILCS 5/41 (2006).

Under these circumstances, and considering all of the relevant factors, the Board finds that the requested stay is appropriate. The Board therefore grants the joint motion, staying this appeal through November 18, 2008, unless the Board by order ends the stay sooner. Any future

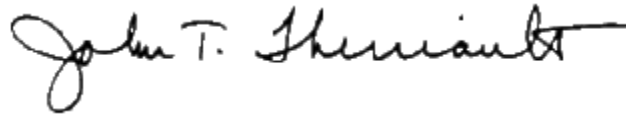
stay request must include not only a decision-deadline waiver and updated information on the status of the USEPA proceeding, but also a realistic appraisal of whether and when the on-going settlement efforts may bear fruit. *See Old World Industries*, PCB 97-168 (in granting a three-month stay, the Board noted that “it has previously granted the parties several stays in this matter and therefore encourages the parties to settle this matter as expeditiously as possible or proceed to hearing.”); *see also* 35 Ill. Adm. Code 101.514.

CONCLUSION

The Board grants the joint motion of Midwest and IEPA to stay this trade secret appeal. The stay is in effect through November 18, 2008, unless the Board issues an order terminating the stay earlier. If, during the stay, USEPA issues a final confidentiality determination concerning Midwest’s claimed information, Midwest must promptly file with the Board a copy of USEPA’s determination. 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, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 21, 2008, by a vote of 4-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is fluid and cursive, with the first name "John" and last name "Therriault" clearly legible.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board