

ILLINOIS POLLUTION CONTROL BOARD
August 21, 2008

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 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 such that the stay is in effect through November 21, 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 June 3, 2004, Midwest appealed an April 23, 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 04-216 and accepted the case for hearing. In the IEPA determination, IEPA denied Midwest's claim for trade secret protection of information that Commonwealth Edison Company (ComEd) submitted to IEPA. Midwest states a portion of the information submitted by ComEd is also owned by Midwest. IEPA made the trade secret determination after receiving Sierra Club's request, under Illinois' Freedom of Information Act (FOIA) (415 ILCS 140 (2006)), 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 (2006). 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 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

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.

whether to exempt the materials claimed to be confidential business information from release under federal FOIA.

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.

On May 31, 2007, Midwest filed a motion for interlocutory appeal of the hearing officer's order denying motions to compel discovery. On June 14, 2007, IEPA filed its response opposing Midwest's motion. In light of today's ruling on the joint motion for stay, the Board does not address these pleadings at this time.

On August 30, 2007, the hearing officer issued a revised discovery schedule 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. Hearing Officer Order, PCB 04-216, at 1 (Aug. 30, 2007).

On September 27, 2007, the hearing officer issued an order noting that, according to the parties, discovery was proceeding.

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 for four months. 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: Midwest Generation EME, LLC v. IEPA, PCB 04-185; and Commonwealth Edison Company v. IEPA, PCB 04-215.

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 four-month stay 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 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. *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 document at issue” in Midwest’s trade secret appeal before the Board “is 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.* at 3. 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 “remain true today,” adding that the parties are “poised to engage in expensive and time-consuming discovery and 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 are “expected to prepare an agreed scheduling order for the completion of supplemental discovery and the filing of pre-hearing motions.” Status Report at 3.

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 for a limited time period. The Board finds that such a 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 04-216 (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 04-216 (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 a time-limited stay is appropriate. As mentioned above, in Commonwealth Edison Company v. IEPA, PCB 04-215, ComEd has appealed a separate IEPA trade secret determination concerning the same information and other information submitted to IEPA by ComEd. In PCB 04-215, ComEd and IEPA have sought a three-month stay, while in PCB 04-216, Midwest and IEPA have sought a four-month stay. Each motion asks that the stay run from the date of the Board’s respective grant. The Board is today granting a stay in PCB 04-215 until November 21, 2008, and does the same here as the appeals are related and have proceeded on parallel procedural tracks to date.


Accordingly, the Board grants the joint motion but for three rather than four months. The appeal is stayed through November 21, 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 discussions 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

As described above, the Board grants the joint motion of Midwest and IEPA to stay this trade secret appeal. The stay is in effect through November 21, 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 that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board