

ILLINOIS POLLUTION CONTROL BOARD

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JUL 24 2008

STATE OF ILLINOIS
Pollution Control Board

PCB 04-185
(Trade Secret Appeal)

MIDWEST GENERATION EME, LLC
Petitioner,

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 we have today filed with the Office of the Clerk of the Pollution Control Board the parties' Joint Motion to Stay PCB 04-185 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

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STATE OF ILLINOIS
Pollution Control Board

Midwest Generation EME, LLC,
Petitioner,

v.

Illinois Environmental Protection Agency,
Respondent.

PCB No. 04-185
(Trade Secret Appeal)

JOINT MOTION TO STAY PCB 04-185

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 04-185 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 certain business and financial information ("Marked Material") related to Midwest Generation's coal-fired generating stations located in Illinois 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 documents at issue in Midwest Generation's Board petition are entitled to confidential treatment under the federal Freedom of Information Act, 5 U.S.C. § 552.

3. Because the state and federal proceedings contemplate the same documents 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. In October, 2007, Midwest Generation was advised that USEPA had submitted the Marked Material 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 proceedings, the Board granted the parties' joint motion to stay the matter until April 5, 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 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 04-185 is appropriate given 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

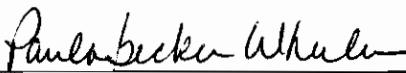
necessarily is resulting from duplicative proceedings; (2) avoid practical difficulties that might arise from contrary FOIA determinations by state and federal agencies; and (3) allow the Board to be informed by a closely related federal determination.

8. The factors supporting the Board's prior issuance of a stay have renewed force today. The parties are poised to engage in expensive and time-consuming 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 04-185 and stay this proceeding until November 18, 2008.

Dated: July 24, 2008

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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MIDWEST GENERATION EME, LLC

By: 
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Attorneys for Midwest Generation EME, LLC

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC,)	
)	
Petitioner,)	
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v.)	PCB No. 04-185
)	(Trade Secret Appeal)
)	
Illinois Environmental Protection Agency,)	
)	
Respondent.)	
)	

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. This matter concerns the trade secret status of certain information Midwest Generation originally submitted to the United States Environmental Protection Agency (“USEPA”) pursuant to an information request under Section 114 of the Clean Air Act regarding Midwest Generation’s coal-fired generating stations located in Illinois. At the suggestion of USEPA, Midwest Generation sent an identical courtesy copy of this information to the Illinois Environmental Protection Agency (“IEPA”). In its submittal to USEPA, Midwest Generation prominently marked some of the information as confidential (“Marked Material”).

2. On January 23, 2004, Midwest Generation submitted a Statement of Justification to IEPA describing why it considered the Marked Material to be trade secrets.

3. On March 10, 2004, IEPA denied Midwest Generation’s trade secret claims and stated that the information was not exempt from disclosure under 35 Ill. Admin. Code Part 130.

4. On April 19, 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 Marked Material’s 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 May 6, 2004, the Board accepted the petition for hearing, and Midwest Generation’s appeal, PCB 04-185, 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.

6. On June 30, 2005, Midwest Generation received a letter from USEPA requesting that Midwest Generation provide the agency with information supporting its claims that the Marked Material was confidential information exempt from disclosure under the federal FOIA (5 U.S.C. § 552 et seq.) and 40 C.F.R. § 2.201 et seq. At that time, Midwest Generation learned that on May 20, 2004, just three months after Sierra Club had submitted a FOIA request to IEPA seeking access to Midwest Generation’s Information Request responses, Sierra Club had filed an identical request with USEPA. By letter dated August 5, 2005, Midwest Generation submitted to USEPA a substantiation of its confidentiality claims.

7. On April 6, 2006, the Board issued an Order granting Midwest Generation’s initial request for a stay of this matter until August 4, 2006. Specifically, the Board ruled that a stay of PCB 04-185 is appropriate because the 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 notes that “[t]he information claimed by ComEd at the federal and State levels to be protected from disclosure is identical.” The Board further notes that “[t]he potentially applicable legal standards for each proceedings 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.”

8. On June 2, 2006, pursuant to a second FOIA request from Sierra Club to the USEPA, Midwest Generation submitted a supplemental statement of justification with respect to the project chart and generation chart.

9. 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.

10. As of December 4, 2006, USEPA had not completed its review of the Marked Materials. 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.

11. 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.

12. Pursuant to the Hearing Officer’s Scheduling Order, the parties have engaged in fact discovery. Currently, the parties are expected to prepare an agreed scheduling

order for the completion of discovery, including the depositions of witnesses and submission of expert witness reports.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Paula Becker Wheeler

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Attorneys for
Midwest Generation EME, LLC

Dated: July 24, 2008

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached **Joint Motion to Stay PCB 04-185, 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,

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Midwest Generation EME, LLC