ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

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

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board Midwest Generation EME, LLC's Motion for Leave to File the Attached Reply to Illinois Environmental Protection Agency's Response to Midwest Generation's Motion to Stay, a copy of which is herewith served upon you.

Mary A. Mullin

Dated: October 21, 2005

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

CH2\1312140.1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC **Petitioner,**	)	**PCB 04-185** **Trade Secret Appeal**
v.	)	
Illinois Environmental Protection Agency, **Respondent.**	)	

MOTION FOR LEAVE TO FILE THE ATTACHED REPLY TO ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO MIDWEST GENERATION'S MOTION TO STAY

Pursuant to 35 Ill. Adm. Code 101.500(e), Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Motion for Leave to File the attached Reply to the Illinois Environmental Protection Agency's ("IEPA's") Response to Midwest Generation's Motion to Stay. In support of this motion, Midwest Generation states as follows:

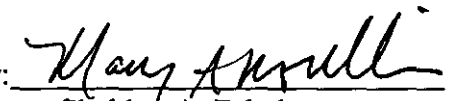
Midwest Generation will be materially prejudiced unless it is allowed to file the attached Reply. First, in its Response to Midwest Generation's Motion to Stay, IEPA argues that Midwest Generation's Motion should be denied because it was not accompanied by a Waiver of Decision Deadline. In the attached Reply, Midwest Generation responds that there is currently such a waiver on file with the Board; in addition Midwest Generation concurrently files an additional waiver. Furthermore, in its Response, IEPA incorrectly characterizes the nature of the FOIA proceedings before USEPA; Midwest Generation will be prejudiced unless it has an opportunity to properly characterize the proceedings before USEPA.

WHEREFORE, Midwest Generation respectfully requests that the Board grant Midwest Generation's Motion for Leave to File the attached Reply.

Dated: October 21, 2005

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) 258-5687

Attorneys for
Midwest Generation EME, LLC

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC	)	
Petitioner,	)	**PCB 04-185**
	)	**Trade Secret Appeal**
v.	)	
	)	
	)	
Illinois Environmental Protection Agency,	)	
Respondent.	)	

REPLY TO ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO MIDWEST GENERATION'S MOTION TO STAY

Petitioner, Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Reply to the Illinois Environmental Protection Agency's Response to Midwest Generation's Motion to Stay PCB 04-185. In support of this Reply, Midwest Generation states as follows:

1. In its Response to Midwest Generation's Motion to Stay, Respondent asserted that there was no proceeding underway before the United States Environmental Protection Agency ("USEPA") concerning the confidentiality of the documents at issue in this matter. This assertion is wrong. The USEPA's legal office is in the midst of making a final confidentiality determination in accordance with the administrative process set forth in 40 CFR Part 2. On June 30, 2005, Midwest Generation was informed that USEPA made a preliminary determination, pursuant to 40 CFR 2.204(d)(1), that the documents may be entitled to confidential treatment. See Attachment 1. Accordingly, USEPA gave Midwest Generation an opportunity to submit comments to support its confidentiality claims pursuant to 40 CFR 2.204(h)(1)(ii). Midwest Generation submitted comments and now the USEPA legal office is now in the process of making a final confidentiality determination under the standards set forth in 40 CFR 2.205. A final confidentiality determination constitutes final agency action. 40 CFR 2.205(f)(2).

Respondent's statement that "USEPA is merely in the process of evaluating a FOIA request prior to making an initial determination" is simply inaccurate.

2. Respondent has argued that the Motion to Stay should be denied because Midwest Generation has not filed a waiver of decision deadline. Midwest Generation waived the statutory decision deadline for Board action in this matter, by appropriate filing on June 9, 2005. The statutory decision deadline is April 11, 2006. However, in response to the Respondent's concern, Midwest Generation is concurrently filing an additional Waiver of Deadline for Board Action to take effect if, and when, the Board stays PCB 04-185.

WHEREFORE, Midwest Generation respectfully requests that the Board grant its Motion to Stay 04-185.

Dated: October 21, 2005

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) 258-5687

Attorneys for
Midwest Generation EME, LLC

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

REPLY TO THE ATTENTION OF:

C-14J

Certified Mail
Return Receipt Requested

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: Midwest Generation EME, LLC, Response to U.S. EPA's Section 114 of the Clean Air Act Information Request dated February 13, 2003

Dear Mr. Constantelos:

The United States Environmental Protection Agency ("U.S. EPA") has received a request under the Freedom of Information Act ("FOIA") for certain records pertaining to Midwest Generation EME, LLC's response to U.S. EPA's February 13, 2003, Section 114 of the Clean Air Act Information Request. This letter is sent to you as Midwest Generation's representative for the February 13, 2003, Information Request. You asserted a business confidentiality claim covering part of this information. In accordance with U.S. EPA's FOIA regulations (40 C.F.R. Part 2), the request has been initially denied to afford you an opportunity to substantiate your claim before a final determination is made.

This letter is to notify you that the U.S. EPA, Region 5 will be making a final confidentiality determination concerning this information. If you feel that some or all of the above information is entitled to confidential treatment, please specify which portions of the information you consider confidential. Please be specific by page, paragraph, and sentence when identifying the information subject to your claim. Any information not specifically identified as subject to a confidentiality claim will be disclosed to the requestor without further notice to you. For each item or class of information that you identify as being subject to your claim, please answer the

following questions:

1. For what period of time do you request that the information be maintained as confidential? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to U.S. EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?

3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information still be considered confidential?

4. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.

5. Is the information contained in any publicly available material such as promotional publications, annual reports, articles, etc.? Is there any means by which a member of the public could obtain access to the information?

6. For each category of information claimed as confidential, discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?

7. Do you assert that the information is "voluntarily submitted" as defined at 40 C.F.R. § 2.201(i)? If so, explain why, and how disclosure would tend to lessen U.S. EPA's ability to obtain similar information in the future.

8. Any other issue you deem relevant.

Please note that you bear the burden of substantiating your confidentiality claim pursuant to 40 C.F.R. § 2.208(e). Conclusory allegations will be given little or no weight in the determination. If you wish to claim any of the information in your response as confidential, you must mark the response "CONFIDENTIAL" or with a similar designation, and must bracket all text so claimed. Information so designated will be disclosed by U.S. EPA only to the extent allowed by, and by means of, the procedures set forth in 40 C.F.R. Part 2. If you fail to claim the information as confidential upon submission it may be made available to the public without further notice to you.

Your comments must be postmarked or hand delivered to this office by the 15th working day after your receipt of this letter. You may seek an extension of time to submit your comments, but the request must be made to me before the end of the 15 day period. Except in the extraordinary circumstances, no extension will be made without the permission of the requester. Failure to submit your comments within that time will be regarded as a waiver of your confidentiality claim, and U.S. EPA will be free to release the information.

Should you have any questions in this matter, please call Sabrina Argentieri, Associate Regional Counsel, at (312) 353-5485.

Sincerely,

Bertram C. Frey

Bertram C. Frey
Acting Regional Counsel

cc: Jane Montgomery
Schiff Hardin, LLP
6600 Sears Tower
Chicago, IL 60606

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Midwest Generation EME, LLC's Motion for Leave to File the Attached Reply To Illinois Environmental Protection Agency's Response To Midwest Generation's Motion To Stay, by U.S. Mail, upon the following persons:

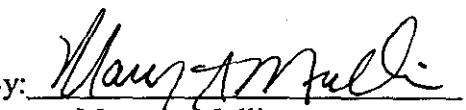
Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
Office of the Attorney General
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

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

Dated: Chicago, Illinois
October 21, 2005

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
Mary A. Mullin

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(312) 258-5687

One of the Attorneys for
Midwest Generation EME, LLC

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