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SEP 27 2005

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION EME, LLC

Petitioner,

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,**

Respondent.

PCB 04-185

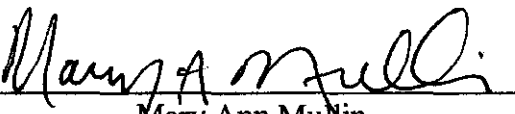
(Trade Secret Appeal)

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 an original (1) and nine (9) copies of Midwest Generation EME, LLC's Motion to Stay PCB 04-185, Memorandum in Support of Midwest Generation's Motion to Stay IPCB 04-185, and Midwest Generation's Status Report, a copy of which is herewith served upon you.


Mary Ann Mullin

Dated: September 27, 2005

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

CERTIFICATE OF SERVICE

: I, the undersigned, certify that I have served the attached Midwest Generation EME, LLC's Motion to Stay PCB 04-185, Memorandum in Support of Midwest Generation's Motion to Stay IPCB 04-185, and Midwest Generation's Status Report by U.S. Mail, upon the following persons

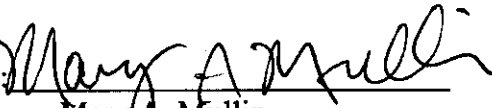
Lisa Madigan
Matthew Dunn
Ann Alexander
Paula Becker Wheeler
Office of the Attorney General
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601

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

Dated: Chicago, Illinois
September 27, 2005

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
Mary A. Mullin

SCHIFF HARDIN LLP
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Chicago, Illinois 60606
(312) 258-5687

One of the Attorneys for
Midwest Generation EME, LLC

ILLINOIS POLLUTION CONTROL BOARD

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PCB 04-185

(Trade Secret Appeal)

**MIDWEST GENERATION EME, LLC'S
MOTION TO STAY IPCB 04-185**

Pursuant to 35 Ill. Adm. Code §101.514, Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Motion to Stay PCB 04-185, and hereby states as follows:

1. PCB 04-185 concerns Midwest Generation's appeal of the Illinois Environmental Protection Agency's ("IEPA") negative trade secret determination concerning certain business and financial information Midwest Generation originally submitted to the United States Environmental Protection Agency ("USEPA") in response to an Information Request under §114 of the federal Clean Air Act (the "Response"). At the time of submittal, Midwest Generation conspicuously marked certain information contained in the Response as "confidential business information" (the "Confidential Articles") exempt from disclosure under the Freedom of Information Act ("FOIA") 5 USC §552. At the suggestion of USEPA, Midwest Generation sent a copy of the Response to IEPA.

2. Subsequently, the Sierra Club submitted an FOIA request to IEPA requesting a copy of the Response. IEPA directed Midwest Generation to file a Statement of Justification for its trade secret claims as required by the Illinois Environmental Protection Act ("Illinois Act"), 415 ILCS §7 and the Illinois Pollution Control Board's (the "Board") implementing regulations codified at 35 Ill. Adm. Code §130.201 et seq. Midwest Generation submitted the Statement of Justification, but IEPA summarily determined that many of Midwest Generation's claims did not constitute trade secrets under the Illinois Act and therefore were not exempt from disclosure under 35 Ill. Adm. Code Part §130. Midwest Generation has filed this matter with the Illinois Pollution Control Board ("Board") to review IEPA's determination.

3. Midwest Generation has recently learned that the Sierra Club also submitted a FOIA request to USEPA for the Response. The Sierra Club submitted its request to USEPA on April 19, 2004, but it was not until June 30, 2005 that USEPA informed Midwest Generation of this request and provided Midwest Generation an opportunity to submit information supporting its claim that certain information in the Response was confidential business information protected from disclosure under FOIA.

4. On July 28, 2005, Midwest Generation submitted this information and the USEPA is now in the process of determining whether to exempt the materials claimed to be confidential business information from release under FOIA. Therefore, both USEPA and the Board are currently addressing the same fundamental question: Are the Confidential Articles exempt from disclosure.

5. For the reasons set forth in the accompanying Memorandum in Support of the Motion to Stay, Midwest Generation respectfully requests that the Board Stay 04-

185 until resolution of the federal process for determining if Confidential Articles are exempt from disclosure.

Dated: September 27, 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,

v.

Illinois Environmental Protection Agency,
Respondent

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STATE OF ILLINOIS
Pollution Control Board

IPCB No. 04-185
(Trade Secret Appeal)

**MEMORANDUM IN SUPPORT OF MIDWEST GENERATION EME, LLC'S
MOTION TO STAY IPCB 04-185**

Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this Memorandum in Support of its Motion to Stay IPCB 04-185.

I. INTRODUCTION

The matter before the Illinois Pollution Control Board ("Board") is the appeal of an Illinois Environmental Protection Agency ("IEPA") determination under the provisions of 35 Ill. Admin. Code Part 130 that certain of Midwest Generation's business and financial information in IEPA's possession does not constitute trade secret information exempt from disclosure to third parties. As more fully set forth below, IEPA made this determination in response to a Sierra Club Freedom of Information Act ("FOIA") request for this information. IEPA has taken the position that it can now release this information to the Sierra Club. Midwest Generation has petitioned the Board to review this determination.

Midwest Generation originally submitted the information at issue to the United States Environmental Protection Agency ("USEPA") in response to an information request pursuant to Section 114 of the Clean Air Act. Midwest Generation

sent a copy of the information to IEPA at the suggestion of USEPA. Midwest Generation recently learned that the Sierra Club has an identical FOIA request pending before USEPA. USEPA is now in the process of determining whether the information constitutes confidential business information ("CBI") under the federal FOIA and is, therefore, exempt from disclosure. See 5 U.S.C. § 552 and 40 C.F.R. Part 2 Subpart B. Accordingly, Midwest Generation moves the Board to stay PCB 04-185 until the federal CBI determination is completed.

II. FACTS

In 2003, Midwest Generation received an information request pursuant to Section 114 of the Clean Air Act ("Information Request") from USEPA, seeking information regarding six of Midwest Generation's coal-fired generating stations. The Information Request specified that Midwest Generation could assert a claim of business confidentiality and that information subject to such a claim would be available to the public only to the extent allowed under 40 C.F.R. Part 2, Subpart B. Information Request at 2 (Attached hereto as attachment 1). In the response Midwest Generation submitted to USEPA on November 6, 2003 (the "Response"), Midwest Generation included certain financial and business data marked conspicuously as "confidential business information." This information consisted of data on two charts, which Midwest Generation spent many months compiling specifically for its Response. The first chart listed monthly net and gross generation, monthly net and gross heat rate and monthly average coal heat content for each unit (the "Generation Chart"). The second chart described certain maintenance projects undertaken at the stations, identified the dates the projects were undertaken, and detailed expenditures for the projects (the "Project Chart"). (Collectively, the Generation Chart and Project Chart are referred to hereinafter

as the "Confidential Articles.") At USEPA's suggestion, Midwest Generation sent an identical copy of its Response to IEPA.

A. IEPA Denial of Trade Secret Status

By letter dated January 5, 2004, IEPA asked Midwest Generation to provide a Statement of Justification for its confidentiality claims following the agency's receipt of a FOIA Request from the Sierra Club for the Response. Specifically, IEPA stated that, pursuant to the requirements of the Illinois Environmental Protection Act (the "Illinois Act") and the Illinois Pollution Control Board's (the "Board's") implementing regulations, codified at 35 Ill. Admin. Code § 130.201 et seq., Midwest Generation must submit a "trade secret" justification.

On January 23, 2004, Midwest Generation submitted a Statement of Justification as requested by IEPA. In its statement, Midwest Generation set forth the legal requirements for trade secret status and argued that those requirements are satisfied. Specifically, Midwest Generation detailed its corporate policies governing the handling of sensitive information and set forth the measures used to protect the Confidential Articles. Midwest Generation's justification discussed the competitive value of the information and informed IEPA that releasing its information would place Midwest Generation at an economic disadvantage because informed observers and competitors could ascertain overall business strategies, alter bidding practices and infer operational plans from a review of these materials. Midwest Generation's Statement of Justification was accompanied by an Affidavit from a corporate official attesting that the confidential information was not public knowledge.

On March 10, 2004, IEPA denied Midwest Generation's trade secret claims and stated that the Confidential Articles were, in the agency's determination, not exempt from disclosure under the Illinois Act. In its denial, the agency simply stated, tracking the regulations without explanation, that Midwest Generation failed to adequately demonstrate that the Confidential Articles had not been disseminated or published and/or that the information has competitive value. Additionally, IEPA asserted that the Project Chart constituted "emission data."

On April 19, 2004, Midwest Generation timely petitioned the Board to review IEPA's ruling and reverse the negative trade secret determination. In an order issued on May 6, 2004, the Board accepted the petition for review.

B. USEPA Proceeding

On June 30, 2005, Midwest Generation learned that an identical Sierra Club FOIA request was pending with USEPA. Although the FOIA request was submitted on April 2, 2004, USEPA did not inform Midwest Generation of the request or ask Midwest Generation to submit information supporting its claims of confidentiality until June 30, 2005. By letter dated July 28, 2005, Midwest Generation provided USEPA with a substantiation of its confidentiality claims. USEPA is currently reviewing the confidential status of the Response.

II. ARGUMENT

Pursuant to 35 Ill. Admin. Code 101.514, Midwest Generation moves this Board to stay IPCB 04-185, pending resolution of the federal CBI determination

process.¹ The Board and USEPA are currently addressing the same fundamental question: Are the Confidential Articles exempt from disclosure? Granting a stay would (1) avoid the costly and inefficient allocation of resources that is necessarily resulting from duplicative proceedings, (2) avoid practical difficulties that might arise from contrary determinations by state and federal agencies, and (3) allow the Board to be informed by a closely related federal determination.

Illinois courts have recognized that multiplicity of litigation results in an inefficient expenditure of resources for both the forums and the parties, who must prepare for both proceedings. Village of Mapleton v. Cathy's Tap, 313 Ill. App. 3d at 264, 268 (3rd Dist. 2000) (multiplicity of litigation is a valid consideration in granting motions to stay). Board regulations define a duplicative proceeding as a matter "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Admin. Code 101.202. A substantially similar proceeding involving Midwest Generation's confidentiality claims is currently under way at the federal level. Since July 28, 2005, the date on which Midwest Generation submitted its substantiation letter, USEPA has been engaged in an analysis of the confidentiality of the Confidential Articles. This evaluation was prompted by Sierra Club's FOIA request, substantively identical to the one sent to IEPA, for the Response. The Confidential Articles at issue in both the Board and the USEPA proceedings are identical. In fact, the documents reviewed by IEPA, and on appeal, by the Board, are photocopies of the Response.

Not only do the state and federal proceedings share factual commonality, but the applicable legal standards governing both confidentiality determinations are also

¹ Midwest Generation has also moved to stay PCB 04-216, a trade secret appeal concerning different information which is subject to a separate FOIA Request pending before USEPA.

substantially similar. See Monsanto v. Illinois EPA et al., PCB 85-19 (1985) (citing federal judicial interpretations of the federal FOIA in support of ruling under 35 Ill. Admin. Code Part 120); Outboard Marine Corp. v. Illinois EPA et al., PCB 84-26 (1984) (“The Board notes that [its] broad construction of standing [under 35 Ill. Code Part 120] comports with the federal courts’ interpretation of standing under the [federal] ‘Freedom of Information Act’ (5 USC 552, as amended)”). See also, Cooper v. Dep’t of the Lottery, 640 N.E.2d 1299 (Ill. App. Ct. 1st Dist. 1994) (citing federal FOIA caselaw in trade secret analysis under Illinois FOIA). Both the Board’s trade secret regulations, codified at 35 Ill. Admin. Code Part 130, and similar trade secret provisions in the Illinois FOIA, are frequently interpreted by the Board and by Illinois courts with reference to federal analyses of analogous federal FOIA standards. Id. In Monsanto and Outboard Marine Corp., for example, the IPCB considered federal cases interpreting the federal FOIA as guides during its own analyses of the trade secret provisions promulgated under Section 7 of the Illinois Act. Monsanto, PCB 85-19; Outboard Marine Corp., PCB 84-26. Similarly, Illinois courts have routinely held that “caselaw construing the federal statute should be used in Illinois to interpret [the Illinois FOIA].”² E.g., Cooper, 640 N.E.2d at 1303; Roulette v. Dep’t of Cent. Mgmt. Servs., 490 N.E.2d 60.

For one issue that the Board and USEPA will be deciding simultaneously, federal regulation is controlling. The Illinois Act excludes “emission data” from protection as a trade secret and incorporates the federal definition of “emission data”. See 415 ILCS 5/7. While Midwest Generation vehemently opposes the characterization of the Project Chart, a listing of maintenance projects, as “emission data,” IEPA’s denial

² Indeed, Illinois FOIA exempts from disclosure “[i]nformation specifically prohibited from disclosure by federal or State law or rules or regulations adopted under federal or State law.” 5 ILCS 140/7(1)(a). See also 2 Ill. Admin. Code § 1828.202(a)(1)(A).

of trade secret protection was based, in part, on its determination that the Project Chart constituted "emission data" under the regulations implementing Section 114 of the Clean Air Act. Id. Accordingly, the Board and USEPA will be simultaneously applying the federal regulatory term "emission data" to the Project Chart. USEPA has the primary duty to interpret the Clean Air Act and its own regulations, and the Board, at the least, owes deference to those interpretations. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). In fact, the Board may be bound by USEPA's interpretations but, even if not bound, principles of comity encourage the Board to consider that determination. Doing so is particularly appropriate in this instance because the IEPA determination rests on its interpretation of an USEPA regulation. See, e.g., Mather Investment Properties LLC v. Ill. State Trapshooters, IPCB 04-29 (2005). (Principles of comity caution against contrary determinations, at least where a stay of one proceeding remains possible.) Achieving "consistent construction" between determinations of trade secret status at the state and federal levels in this case would be facilitated by a stay, which would allow IPCB to be informed by the federal confidentiality determination during its own analysis.

A denial of a FOIA request at the federal level, but not at the state level, provides an incentive for FOIA requestors to circumvent one agency's confidentiality determinations by simply directing their requests to another agency. Just as confidentiality determinations among various state agencies, including IEPA and IDNR, are coordinated pursuant to state regulations, see, e.g., 35 Ill. Admin. Code 132.216, similar coordination of state and federal determinations makes sense. This coordination also promotes the efficient allocation of resources. If, for example, at the conclusion of

the federal process, the Confidential Articles are released to the Sierra Club, the Board proceedings will be largely moot.

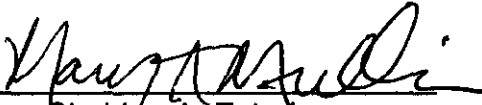
* * *

WHEREFORE, Midwest Generation respectfully requests that its Motion to Stay IPCB 04-185 pending USEPA's determination of Midwest Generation's confidentiality claims be granted, pursuant to 35 Ill. Admin. Code 101.514.

Dated: September 27, 2005

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 
Sheldon A. Zabel
Mary Ann Mullin

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5687

Attorneys for
Midwest Generation EME, LLC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

Midwest Generation EME, LLC
One Financial Plance
440 S. LaSalle Street
Suite 3500
Chicago, Illinois 60605

ATTENTION: Basil G. Constantelos, Dire
Environmental, Health

Rec'd
Feb. 7, 2005
[Signature]

Attachment
to
Memorandum
in Support
of 02/1-185

Request to Provide Information Pursuant to t

The United States Environmental Protection Agency (U.S. EPA) is requiring Midwest Generation (you) to submit certain information concerning the following stations: Crawford, Joliet, Will County, Waukegan, Fisk, Powerton. Appendix A specifies the information that you must submit. You must submit this information to us within 45 days of receipt of this request.

We are issuing this information request under Section 114(a) of the Clean Air Act (Act), 42 U.S.C. § 7414(a). Section 114(a) authorizes the Administrator of U.S. EPA to require the submission of information. The Administrator has delegated this authority to the Director of the Air and Radiation Division, Region 5.

Midwest Generation owned and operated emission sources at several plants located in Illinois. You are required to provide the information specified herein in order to determine whether your emission sources were complying with the Illinois State

Implementation Plan and applicable provisions of the New Source Performance Standards at 40 C.F.R. Part 60.

You must send all required information to:

Attn: Compliance Tracker, AE-17J
Air Enforcement and Compliance Assurance Branch
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

We suggest that you provide copies to the Illinois Environmental Protection Agency (IEPA):

Julie Armitage, Acting Manager
Compliance and Systems Management Section
Bureau of Air
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62702

You may consider the information confidential that you submit to us. You may assert a claim of business confidentiality for any portion of the submitted information, except emission data, under 40 C.F.R. Part 2, Subpart B. Information subject to a business confidentiality claim is available to the public only to the extent allowed under 40 C.F.R. Part 2, Subpart B. Failure to assert a business confidentiality claim makes all submitted information available to the public without further notice.

Midwest Generation must submit all requested information under an authorized signature certifying that the information is true and complete to the best knowledge of the certifying official after due inquiry. Knowingly providing false

information, in response to this request, may be actionable under Section 113(c)(2) of the Act, and 18 U.S.C. §§ 1001 and 1341.

We may use any information submitted in response to this request in an administrative, civil, or criminal action.

This request is not subject to the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq., because it seeks collection of information from specific individuals or entities as part of an administrative action or investigation.

Failure to comply fully with this request for information may subject Commonwealth Edison to an enforcement action under Section 113 of the Act, 42 U.S.C. § 7413.

You should direct any questions about this request for information to Kathy Memmos at (312) 353-4293.

2/1/2005

Date

A handwritten signature in black ink, appearing to read 'S. Rothblatt', written over a horizontal line.

Stephen Rothblatt, Director
Air and Radiation Division

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Pollution Control Board

IPCB No. 04-185
(Trade Secret Appeal)

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Illinois Environmental Protection Agency,
Respondent

STATUS REPORT

In compliance with 35 Ill. Adm. Code §101.514, Midwest Generation EME, LLC ("Midwest Generation") respectfully submits this status report on the above captioned matter:

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 six of Midwest Generation's coal-fired generating stations. At the suggestion of USEPA, Midwest Generation sent an identical 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.

By letter dated January 5, 2004, IEPA asked Midwest Generation to provide a Statement of Justification for its confidentiality claims following the agency's receipt of a FOIA Request from the Sierra Club for the information. On January 23, 2004, Midwest Generation submitted a Statement of Justification as requested by IEPA. On March 10, 2004, IEPA denied Midwest Generation's trade secret claims and stated that the information was not exempt from disclosure. On April 19, 2004 Midwest Generation

petition the Illinois Pollution Control Board ("Board") for review of this determination: by an Order dated May 5, 2004, the Board accepted the Petition for Review.

The Board has ruled on certain procedural motions in this matter, but discovery has not begun. By Order dated November 4, 2004, the Board denied Sierra Club's Motion to Intervene, ordered the IEPA to clarify its trade secret determination, and partially denied Midwest Generation's Motion for Partial Reconsideration. On November 30, 2004, IEPA filed a document purporting to be a clarification of its trade secret determination. On December 9, 2004, Midwest Generation filed a Motion to Strike IEPA's Clarification. The Board has not yet ruled on this motion.


On December 13, 2004, Midwest Generation filed a Petition for Review of the Board's November 4, 2004 Order with the Third Appellate District. On January 20, 2005, the Board, on its own motion, stayed this matter pending the Third District Appellate Court's decision on Midwest Generation's appeal. On March 4, 2005, the Third District dismissed Midwest Generation's Appeal.

Currently, the parties are waiting for the Board to rule on Midwest Generation's Motion to Strike. The next telephone status conference in this matter is scheduled for November 10, 2005.

Dated: September 27, 2005

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: 

Sheldon A. Zabel
Mary Ann Mullin
Andrew N. Sawula

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Midwest Generation EME, LLC