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AUG 03 2006

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

STATE OF ILLINOIS  
Pollution Control Board

Midwest Generation EME, LLC )  
Petitioner, )  
 )  
 )  
v. )  
 )  
Illinois Environmental Protection Agency, )  
Respondent )

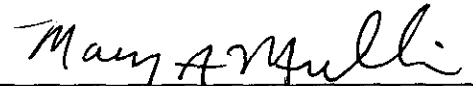
PCB No. 04-185  
(Trade Secret Appeal)

**NOTICE OF FILING**

To: Brad Halloran  
Hearing Officer  
Illinois Pollution Control Board  
100 West Randolph  
Suite 11-500  
Chicago, Illinois 60601

Ann Alexander  
Assistant Attorney General and  
Environmental Counsel  
188 West Randolph Street  
Suite 2000  
Chicago, Il. 60601

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board the **Agreed Motion to Extend the Stay of PCB 04-185, Status Report and Waiver of Decision Deadline for Board Action**, copies of which are herewith served upon you.

  
Mary A. Mullin

Date: August 3, 2006

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

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Petitioner,

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PCB No. 04-185  
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**AGREED MOTION TO EXTEND THE STAY OF PCB 04-185**

Pursuant to 35 Ill. Admin. Code § 101.514, Petitioner Midwest Generation EME, LLC ("Midwest Generation") submits to the Illinois Pollution Control Board (the "Board") this Agreed Motion to Extend the Stay Granted in PCB 04-185 and hereby state as follows:

1. This case comes before the Board on Midwest Generation's petition to review the Illinois Environmental Protection Agency's ("IEPA's") March 2004 denial of trade secret protection for certain information related to Midwest Generation's coal fired generating stations located in Illinois. Midwest Generation initially submitted this information to the United States Environmental Protection Agency ("USEPA") in response to an Information Request issued under Section 114 of the Clean Air Act (the "Response"), and then Midwest Generation provided its Response to IEPA as a courtesy. Midwest Generation conspicuously marked certain material "confidential business information" (the "Marked Material").

2. 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 ruling or of Midwest Generation's trade secret claims.

3. In July 2005, Midwest Generation learned that ComEd received a letter from the United States Environmental Protection Agency ("USEPA") requesting it to provide the agency with information supporting its claims that ComEd's initial Information Request Response, including the CPR, constituted 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 ComEd's Information Request Response, Sierra Club had filed an identical request with USEPA. Because Midwest Generation has independent claims to the confidentiality of the CPR, Midwest Generation submitted a substantiation of its confidentiality claims to USEPA on July 28, 2005.

4. Presently, both the Board and USEPA simultaneously are engaged in proceedings involving the same party in interest (Midwest Generation), the same FOIA requestor (Sierra Club), and substantially similar determination of confidentiality with respect to the confidential articles. The facts and claims at issue in the state and federal proceedings are closely related. As such, Midwest Generation motioned the Board for a stay of PCB 04-185 pending the resolution of the USEPA's determination.

5. On April 6, 2006, the Board issued an Order granting Midwest Generation's initial request for a stay of PCB 04-185 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 Midwest Generation 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.”

6. We note that, in June 2006, pursuant to a second FOIA request from Sierra Club to USEPA requesting additional Information Request Responses, Midwest Generation submitted to USEPA a second statement of justification with respect to a larger set of documents; both statements of justification discuss the basis for claiming the Marked Material as protected CBI. This substantiation concerned all of the information both Midwest Generation and ComEd claimed confidential in their additional Information Request Responses. This substantiation consisted of 44 pages of text, numerous affidavits and exhibits.

7. Midwest Generation has been informed that on July 27, counsel for IEPA communicated with USEPA concerning its progress on the FOIA request for the subject documents. Based on those discussions, counsel for IEPA now believes that resolution of the USEPA FOIA request is likely, albeit not certain, within the next four months. Counsel for Midwest Generation also communicated with USEPA concerning the status of its CBI determinations, USEPA reported that it is diligently working on its determination, but did not provide a specific time estimate for its determination. While Midwest Generation is hopeful that this matter can be resolved in the next four months, Midwest Generation believes it could take longer.

8. Counsel for Midwest Generation and IEPA agree that it is in the interest of justice to continue the Board’s stay of proceedings in this matter for a period of 4 months, until December 4, 2006. Consistent with the Board’s April 6, 2004 Order specifying that “any request by Midwest Generation to extend the stay must be directed to the Board and include a status

report and, as appropriate, a waiver of the Board's decision deadline," Midwest Generation has attached a status report and waiver of decision deadline to this motion.

WHEREFORE, Midwest Generation and IEPA respectfully request that, pursuant to 35 Ill. Admin. Code § 101.514, the Board grant the Agreed Motion to Extend the Stay of PCB 04-185 for four months, up to and including December 4, 2006.

Dated: August 3, 2006

MIDWEST GENERATION EME, LLC

By: Mary A. Mullin  
Sheldon A. Zabel  
Mary A. Mullin

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

Attorneys for  
Midwest Generation EME, LLC

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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**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.

A brief status teleconference with the Hearing Officer took place on September 22, 2005. On September 23, 2005, Midwest Generation filed a motion to stay PCB 04-185 pending resolution of the substantially similar proceeding currently underway at USEPA. IEPA filed a motion in opposition to a stay of PCB 04-185, and Midwest filed a reply to IEPA's opposition.

Discovery continued pursuant to the Hearing Officer's scheduling order. Both Midwest and IEPA exchanged Interrogatories and Requests for the Production of Documents in November 2005. In March 2006, Midwest Generation filed a motion to compel certain discovery. IEPA opposed the motion. This motion is currently pending before the Board.

In March 2006, depositions in PCB 04-185 were conducted. Specifically, Midwest Generation deposed three employees of IEPA, each of whom had been identified in IEPA's Interrogatory responses as having been involved in the decision to deny Midwest Generation's trade secret claims.

Also in March 2006, USEPA informed Midwest Generation that the Sierra Club had sent a FOIA request for Midwest Generation and ComEd's additional responses and submittals to USEPA. USEPA provided Midwest Generation with an opportunity to submit a substantiation for its claims of confidentiality as to this additional material and to supplement its original substantiation. On June 2 2006, Midwest Generation submitted its substantiation consisting of 44 pages of text, and numerous affidavits and exhibits to USEPA.

On April 6, 2006, the Board issued an Order granting a stay of this case until August 4, 2006. Following the issuance of a stay, discovery in PCB 04-185 was suspended. The parties have continued to conduct scheduled status teleconferences with the Hearing Officer. A status teleconference took place on June 15, 2006. On June 28, 2006, Midwest filed an updated waiver of deadline for Board action, which extends such deadline until March 26, 2007.



Dated: August 3, 2006

Respectfully submitted,

MIDWEST GENERATION EME, LLC

By: Mary Ann Mullin  
Sheldon A. Zabel  
Mary Ann Mullin

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,  
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**PROPOSED BOARD ORDER**

For the reasons stated in its April 4, 2006 Order, the Board hereby grants the Agreed Motion to Extend the Stay in PCB 04-185. The stay is here extended until December 4, 2006.

**SO ORDERED,**

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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**MIDWEST GENERATION EME, LLC'S  
WAIVER OF DEADLINE FOR BOARD ACTION**

Comes now Midwest Generation EME, LLC, ("Midwest Generation") by and through its attorneys, and states that on June 28, 2006, pursuant to 35 Ill. Admin. Code §101.308(c)(2), Midwest Generation waived the statutory decision deadline for Board action in the above-captioned matter from October 6, 2006 to March 26, 2007. Midwest Generation adopts its waiver of decision deadline for Board action and incorporates the same by reference as if it were fully expressed herein.

Respectfully submitted,

Midwest Generation EME, LLC

By: 

Sheldon A. Zabel  
Mary A. Mullin

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

Attorneys for Midwest Generation EME, LLC

August 3, 2006

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served the attached Notice of Filing and, Agreed Motion to Extend the Stay of PCB 04-185, Status Report and Proposed Order, by U.S. Mail on this 3rd day of August, 2006 upon the following persons:

To: Brad Halloran  
Hearing Officer  
Illinois Pollution Control Board  
100 West Randolph  
Suite 11-500  
Chicago, Illinois 60601

Ann Alexander  
Assistant Attorney General and  
Environmental Counsel  
188 West Randolph Street  
Suite 2000  
Chicago, Il. 60601

A handwritten signature in cursive script, appearing to read "Mary Annfull", is written over a horizontal line.

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