

ILLINOIS POLLUTION CONTROL BOARD

February 15, 2007

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

ORDER OF THE BOARD (by A.S. Moore):

On December 11, 2006, petitioner, Midwest Generation EME, LLC (Midwest), filed a motion to extend the stay previously granted by the Board in this trade secret appeal. Midwest seeks an extension of the stay through April 4, 2007. Respondent, the Illinois Environmental Protection Agency (IEPA), filed a response opposing the requested extension. For the reasons below, the Board denies Midwest's motion. In this order, the Board provides background on the case before discussing Midwest's motion, IEPA's response, and the Board's ruling.

BACKGROUND

On April 19, 2004, Midwest appealed a March 10, 2004 trade secret determination of IEPA under the Environmental Protection Act (Act) (415 ILCS 5 (2004)). The Board docketed the trade secret appeal as PCB 04-185 and, in a May 6, 2004 order, accepted the case for hearing. In the IEPA determination being appealed, IEPA denied Midwest's claim for trade secret protection of information that Midwest submitted to IEPA. IEPA made the determination after receiving Sierra Club's request, under Illinois' Freedom of Information Act (FOIA) (415 ILCS 140 (2004)), for a copy of Midwest's submittal.

Midwest maintains that the information it submitted to IEPA is entitled to trade secret status, exempt from public disclosure requirements under the Act. *See* 415 ILCS 5/7, 7.1 (2004). The information relates to Midwest's six coal-fired power stations, all of which are in Illinois. Midwest 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 whether to exempt the materials claimed to be confidential business information from release under federal FOIA.

On May 20, 2004, IEPA filed the administrative record of its trade secret determination. On May 27, 2004, Sierra Club filed a motion to intervene in this trade secret appeal. IEPA supported Sierra Club's motion, but Midwest opposed intervention. On July 1, 2004, Midwest

filed a motion for the Board to partially reconsider its May 6, 2004 order, asking the Board to review IEPA's trade secret denial *de novo*. IEPA opposed Midwest's motion for partial reconsideration.

In a November 4, 2004 order, the Board denied Sierra Club's motion to intervene, but ruled that Sierra Club could participate in this proceeding through hearing statement, public comment, and *amicus curiae* briefing. In the same order, the Board denied Midwest's motion to partially reconsider, but held that Midwest may present new evidence at the Board hearing in specified circumstances. Additionally, while retaining jurisdiction, the Board ordered a limited remand to IEPA, directing IEPA to issue a supplemental decision stating IEPA's reasons for denying trade secret protection. The Board required Midwest to file a pleading responsive to IEPA's supplemental decision.

On November 30, 2004, the Office of the Attorney General for the State of Illinois, acting as counsel for IEPA, filed a "Clarification of Trade Secret Determination." On December 9, 2004, Midwest filed a "Motion to Strike the Attorney General's Clarification of IEPA's Trade Secret Determination." On January 11, 2005, IEPA filed its response to Midwest's motion to strike with the hearing officer's leave. On January 19, 2005, Midwest filed a motion for leave to file a reply to IEPA's response, attaching the reply. In light of past stays of this trade secret appeal, the Board has reserved ruling on Midwest's motion to strike and related motion for leave.

On or about December 13, 2004, Midwest petitioned the Third District Appellate Court to review portions of the Board's November 4, 2004 order. In a January 20, 2005 order, the Board stayed the trade secret proceeding before the Board until the Third District Appellate Court disposed of Midwest's appeal or the Board ordered otherwise. On March 4, 2005, the court dismissed Midwest's appeal, granting the Board's motion to dismiss the appeal for lack of jurisdiction.

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.

As noted, Midwest filed a motion to further extend the stay on December 11, 2006, which the Board rules on today. The motion includes a status report and a waiver of the Board's statutory decision deadline. On December 19, 2006, IEPA filed a response opposing Midwest's motion.¹

Midwest has waived to September 26, 2007, the Board's deadline for deciding this appeal. The Board meeting before that deadline is currently scheduled for September 20, 2007.

¹ The Board cites Midwest's motion to extend the stay as "Mot. at _", and IEPA's response as "Resp. at _."

The case has not been to hearing. The hearing officer last held a status call with the parties on January 23, 2007.

The Board today, in separate orders, is likewise denying stay extensions in two other trade secret appeals involving claimed information that is also the subject of a confidentiality request pending before USEPA: Commonwealth Edison Company v. IEPA, PCB 04-215; and Midwest Generation EME, LLC v. IEPA, PCB 04-216.

DISCUSSION

Midwest Motion for Stay Extension

Midwest's motion for another extension of the stay (this time through April 4, 2007) reiterates that 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 [claimed information]." Mot. at 2. The facts and claims at issue in the State and federal proceedings are "closely related," Midwest maintains. *Id.* According to the motion, these circumstances led Midwest to originally move the Board to stay this trade secret appeal, PCB 04-185, "pending the resolution of USEPA's determination." *Id.*

In the current motion, Midwest again emphasizes that the Board's April 6, 2006 order granting the initial short-term stay found the stay appropriate because:

[T]he 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 noted that "[t]he information claimed by Midwest [] at the federal and State levels to be protected from disclosure is identical." The Board further noted that "[t]he potentially applicable legal standards for each proceeding 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." Mot. at 2-3 (quoting Midwest Generation EME, LLC v. IEPA, PCB 04-185 (Apr. 6, 2006), citations omitted).

According to Midwest, the Board's August 17, 2006 order found that the reasons for granting the initial stay likewise warranted extending the stay until December 4, 2006. *Id.* at 3.

Midwest states in its current motion that USEPA informed Midwest that USEPA hired a consultant, Industrial Economics, "to analyze the confidential nature" of the documents in question. Mot. at 4. According to the motion, USEPA found that Industrial Economics has "extensive expertise in the utility industry" and USEPA is waiting for the consultant to make recommendations before USEPA renders its confidentiality determination. Further, the motion continues, USEPA told Midwest that USEPA expects to receive the consultant's recommendations "sometime after Christmas [2006]." *Id.* Midwest concludes that "[g]iven this

development, the reasons underlying the Board's prior stay of this proceeding remain equally true at this time." *Id.*

IEPA Response

IEPA opposes Midwest's request for a stay extension. IEPA quotes from the Board's April 6, 2006, in which the Board originally granted a stay:

"The Board is mindful of the strong policy interest, evidenced in the [] Act, favoring public disclosure of environmental compliance information, particularly emission data." The Board nonetheless granted a short-term [four] month stay, on the reasoning that "[t]he risk of prejudice to IEPA from a stay of PCB 04-185 would be greatly diminished . . . by limiting the duration of the stay to a date-certain in the near future, rather than simply granting a stay "until resolution of the federal process" as Midwest requests. Resp. at 1-2 (quoting Midwest Generation, PCB 04-185 (Apr. 6, 2006), citations omitted).

IEPA states that after the Board granted the initial stay, IEPA "acceded to an agreed motion for a short-term extension of the stay" based on new information from USEPA that USEPA "was likely to issue a final decision within a few months." Resp. at 2. IEPA stresses, however, that when the Board granted the agreed motion, the Board reemphasized that the Act favors public disclosure of emission data and accordingly stated: "The Board therefore cautions the parties that, absent especially compelling circumstances, the Board may be disinclined to further extend the stay." *Id.* (quoting Midwest Generation, PCB 04-185 (Aug. 17, 2006).

IEPA argues that "[n]o such 'especially compelling circumstances' have emerged to warrant further continuation of the stay." Resp. at 2. IEPA asserts that despite USEPA's stated expectations at the time of the agreed motion, USEPA has not issued a determination on the FOIA request "nor stated any date certain by which it will do so." *Id.* IEPA maintains that USEPA's act of hiring a consultant "more than two and a half years after receiving the initial FOIA request," along with "vague statements" about when the consultant's recommendations would arrive, after which "USEPA's decision will follow [at] some indefinite time," do not amount to "especially compelling circumstances" to justify extending the stay. *Id.*

IEPA maintains that "in the interest of comity and efficiency," IEPA, through the agreed motion, was "willing once to give USEPA the opportunity to promptly resolve this matter and potentially alleviate the need for parallel proceedings." Resp. at 2-3. IEPA argues now, however, "with no end to USEPA's decisionmaking process in sight," extending the stay would contravene the Act's strong policy interest in publicly disclosing environmental compliance information. *Id.* at 3.

Board Analysis

The Board's procedural rules address motions for stays, providing: "Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed" 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 (2d Dist. 2004).

The Board acknowledges that some of the reasons for originally staying this trade secret appeal remain, such as avoiding the multiplicity of litigation and potentially conflicting determinations. Nor does IEPA disavow its earlier concession that USEPA’s confidentiality determination would constitute persuasive authority for the Board here. Under the present circumstances, however, the reasons for extending the stay yet again are outweighed by the interest in making environmental compliance information publicly available under the Act. *See* 415 ILCS 5/7 (2004). Midwest’s claimed information remains protected from public disclosure while this trade secret appeal is pending. Only by resuming this proceeding can the Board adjudicate whether IEPA properly determined that Midwest’s claimed information is not entitled to trade secret protection.

The Board notes that it was well over a year ago, on September 27, 2005, that Midwest filed its first motion for stay based on the USEPA proceeding. The Board, by limiting the initial stay to four months, sought to avoid prejudice to IEPA, noting the Act’s “strong policy interest . . . favoring public disclosure of environmental compliance information, particularly emission data.” *Midwest Generation*, PCB 04-185, slip op. at 8 (Apr. 6, 2006).

In subsequently granting the agreed motion for a short-term extension of the original stay, the Board gave considerable weight to representations that a USEPA confidentiality determination was expected by early December 2006. Still, the Board cautioned the parties that “absent especially compelling circumstances, the Board may be disinclined to further extend the stay.” *Midwest Generation*, PCB 04-185, slip op. at 3 (Aug. 17, 2006). The Board is so disinclined.

The Board finds that USEPA’s retention of a consulting firm does not constitute “especially compelling circumstances” to justify extending the stay a second time and further delaying the public disclosure of environmental information that may not warrant trade secret protection. Unlike the agreed motion, Midwest’s current motion is devoid of any estimate on when USEPA expects to issue its final confidentiality determination. Moreover, the Board can report that during the January 23, 2007 status call with the Board hearing officer, Midwest conveyed no information about whether any recommendations from the consultant, expected “sometime after Christmas [2006]” (Mot. at 4), have actually arrived with USEPA. Accordingly, the Board denies Midwest’s motion for extension of the stay.

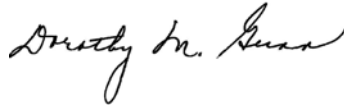
CONCLUSION

For the reasons above, the Board denies Midwest’s motion to extend the stay of this trade secret appeal. By its terms, the stay ran through December 4, 2006. With the denial of Midwest’s motion for another stay extension, the Board will turn to address Midwest’s motion to strike and related pleadings in a separate order.

Consistent with today's order, the Board directs the hearing officer to proceed expeditiously to hearing. Additionally, the Board directs Midwest to promptly file with the Board a copy of the USEPA final confidentiality determination concerning Midwest's claimed information if that determination is issued while this appeal is pending. 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, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 15, 2007, by a vote of 4-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board