

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

NOV 14 2005

STATE OF ILLINOIS
Pollution Control Board

Commonwealth Edison Company,)
)
Petitioner,)
)
v.)
)
Illinois Environmental Protection Agency,)
)
Respondent.)

PCB No. 04-215
(Trade Secret Appeal)

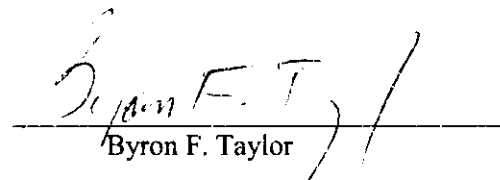
NOTICE OF FILING

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

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, Illinois 60601

PLEASE TAKE NOTICE that we have filed today with the Office of the Clerk of the Pollution Control Board **Commonwealth Edison Company's Response to Respondent IEPA's Motion to Strike Petitioner Commonwealth Edison's Reply In Support of Motion to Stay**, a copy of which is herewith served upon you.


Byron F. Taylor

Dated: November 14, 2005

Byron F. Taylor
Roshna Balasubramanian
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 S. Dearborn
Chicago, Illinois 60603
(312)853-7000

THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NOV 14 2005

Commonwealth Edison Company,

Petitioner,

v.

Illinois Environmental Protection Agency,

Respondent.

STATE OF ILLINOIS
Pollution Control Board

PCB No. 04-215
(Trade Secret Appeal)

**RESPONSE TO IEPA'S MOTION TO STRIKE COMMONWEALTH EDISON COMPANY'S
REPLY IN SUPPORT OF MOTION TO STAY**

Pursuant to 35 Ill. Admin Code § 101.500, Commonwealth Edison Company ("ComEd") respectfully submits this Response to the Illinois Environmental Protection Agency's ("IEPA's") Motion to Strike ComEd's Reply in Support of its Motion to Stay PCB 04-215, and hereby states as follows:

1. On September 23, 2005, ComEd filed with the Illinois Pollution Control Board ("IPCB" or "the Board") a Motion to Stay PCB 04-215.
2. On October 6, 2005, Respondent IEPA filed a Memorandum in Opposition (hereinafter "Response") to ComEd's Motion to Stay.
3. On October 21, 2005, within fourteen days of the date of filing of IEPA's Response, ComEd filed a Reply to IEPA's Memorandum in Opposition (hereinafter "Reply," a copy of which is included with this filing as "Attachment A"). While ComEd included a Notice of Motion and Certificate of Service, ComEd inadvertently omitted from its October 21, 2005 filing a request for leave to file the Reply.
4. ComEd became aware of IEPA's Response by reviewing the IPCB's website. ComEd never received service of that Response.
5. On October 31, 2005, IEPA moved to strike ComEd's Reply in its entirety for failing to obtain leave of the Board.

THIS FILING SUBMITTED ON RECYCLED PAPER

6. In light of ComEd's prompt and timely filing of its Reply to IEPA's Response, and so as to grant ComEd the opportunity to reply to Respondent's contentions, ComEd respectfully requests that the Board deny IEPA's Motion to Strike and consider ComEd's previously filed Reply as timely and properly filed.

7. ComEd additionally observes that pursuant to 35 Ill. Adm. Code § 101.500(d), which provides that a motion for leave to reply may be filed within fourteen days after service of the response, the time period for submitting a Motion for Leave to File a Reply to IEPA's Response has not lapsed because ComEd never received service of IEPA's Response. Accordingly, this filing may be considered as a timely request for such leave.

WHEREFORE, Commonwealth Edison Company respectfully requests that IEPA's Motion to Strike ComEd's Reply in Support of its Motion to Stay be denied and that the Board consider ComEd's Reply in its entirety.

Dated: Chicago, Illinois
November 14, 2005

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 

Byron F. Taylor
Roshna Balasubramanian
Sidley Austin Brown & Wood LLP
10 S. Dearborn
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Commonwealth Edison
Company

THIS FILING SUBMITTED ON RECYCLED PAPER

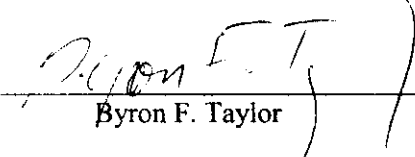
CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Notice of Filing and Commonwealth Edison Company's Motion to Stay PCB 04-215 by U.S. mail on this 14th day of November, 2005 upon the following persons:

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

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

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


Byron F. Taylor

THIS FILING SUBMITTED ON RECYCLED PAPER

Attachment A

RECEIVED
CLERK'S OFFICE

)

)

)


)

)

OCT 21 2011

STATE OF ILLINOIS
Pollution Control Board

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


Byron F. Taylor

Byron F. Taylor
Roshna Balasubramanian
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 S. Dearborn
Chicago, Illinois 60603

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

OCT 21 2005

STATE OF ILLINOIS
Pollution Control Board

Commonwealth Edison Company,
Petitioner,

v.

Illinois Environmental Protection Agency,
Respondent.

PCB 04-215

Trade Secret Appeal

COMMONWEALTH EDISON'S REPLY IN SUPPORT OF MOTION TO STAY

Petitioner Commonwealth Edison Company ("ComEd") respectfully submits this Reply to Respondent Illinois Environmental Protection Agency's ("IEPA's") opposition to the Motion to Stay PCB 04-215, which ComEd filed with the Illinois Pollution Control Board ("IPCB" or "the Board") on September 23, 2005. In addition to the legal and factual bases for staying the above-captioned matter previously set forth in ComEd's motion and supporting memorandum, ComEd further states as follows:

I.

The Board and the United States Environmental Protection Agency ("USEPA" or "the Agency"), administrative agencies both, simultaneously are engaged in proceedings involving the same party in interest, the same Freedom of Information Act ("FOIA") requestor, and substantially similar determination of confidentiality with respect to a single submission of data. That the Board's and the Agency's efforts are duplicative is apparent on its face. Even Respondent does not contest this claim. Resp. Mem. Opp. 5, fn. 1. (criteria to be applied in both matters is "roughly similar."); *id.* at 2 (accepting ComEd's statement of facts). In fact, Respondent agrees that USEPA's determination here will carry "persuasive authority." *Id.* at 5. Nor does Respondent dispute that the Board and the Illinois Supreme Court have repeatedly approved of stays to avoid the waste of administrative resources that necessarily results from contemporaneous duplicative matters. *Cf. Village of Mapleton v. Cathy's Tap*, 313 Ill. App. 3d 264, 266 (3d Dist. 2000); *Mather Investment, L.L.C. v. Ill. State Trapshooters*, PCB No. 04-29, 2005 WL 1943585 (2005).

Limited by the inability to distinguish between the Board and USEPA determinations, IEPA instead attempts to avoid a stay by arguing that one of these two contemporaneous proceedings is actually not a "proceeding." Resp. Mem. Opp. *passim*. The fact that USEPA's mechanism for taking final agency action on confidentiality claims under FOIA does not involve an administrative adversarial proceeding is of no import. Both USEPA's and IPCB's decisions regarding ComEd's trade secret claims may properly be characterized as administrative since the Board, like USEPA, is an administrative body created by statute. 415 ILCS 5/5. The Board's procedural rules do not limit the availability of a stay to cases in which the analogous proceeding is in a court of law. 35 Ill. Admin. Code § 101.514. Nor does the Board's definition of "duplicative" so limit stays to judicial tribunals; to the contrary, a "duplicative" matter is defined simply as one "identical or substantially similar to one brought before the Board or another *forum*." 35 Ill. Admin. Code § 101.202 (emphasis added). Case law cited by Respondent governing agency *investigations* of a matter also before the Board is inapposite. The Board has made clear that what makes an investigation *not* "duplicative" is that it is not part of an "adjudicatory proceeding by a tribunal, *either administrative or judicial*." See Resp. Mem. Opp. 3 (quoting Finley v. IFCO ICS-Chicago, Inc., PCB 02-208, slip op. at 9 (2002)). Here, both administrative proceedings—neither of which is pending in a constitutional court—are adjudications of a FOIA request and the interested business's legal objections to the request.

Not only does Respondent fail to differentiate between the two proceedings, but to the contrary, Respondent's opposition memorandum agrees that USEPA's decision has "persuasive authority" for the Board. Resp. Mem. Opp. at 5. The procedural history of PCB 04-215 makes evident the substantial overlap between the Board's and USEPA's current determinations. It was only in response to a USEPA Request for Information ("Information Request"), pursuant to § 114 of the Clean Air Act, that ComEd compiled and submitted the Confidential Articles at issue here. In fact, IEPA never requested—formally or informally—the information that Sierra Club now seeks from it. Rather, ComEd submitted the data to IEPA as a courtesy, at the informal request of USEPA during ComEd's dealings with the latter agency.

The interrelationship between the proceedings is made even more complex by the federal/state implementation aspects of the federal Clean Air Act ("CAA") and USEPA's FOIA regulations. As a state agency charged with duties under the federal CAA, IEPA could be considered an "authorized representative" for USEPA and receive copies of confidential information submitted to USEPA under Section 114 of the CAA, only if IEPA can demonstrate that state laws and procedures exist which "provide adequate protection to the interests of affected businesses." 40 C.F.R. §2.301(h)(3)(ii).¹ Thus, conflicting determinations in which the IEPA and Board release ComEd's confidential information and USEPA determines that such information should be protected could have far reaching implications for IEPA. That is, companies would have no incentive to voluntarily cooperate by copying IEPA on Section 114 responses containing confidential information, and USEPA may well be obligated to deny written requests from IEPA for such information because IEPA will not be able to demonstrate that it will be able to protect such information from disclosure.

In summary, the duplicative nature of PCB 04-215 and the USEPA proceeding, pragmatic efficiency considerations, the prudent concern with avoiding conflicting judgments concerning the same matter, and the Board's likely interest in having available to it USEPA's decision prior to its own deliberation, all counsel heavily in favor of a stay.

II.

As Respondent correctly notes, the Board's procedural rules governing motions to stay require that a "waiver of any decision deadline" support such filings. 35 Ill. Admin. Code § 101.514. ComEd has already waived the statutory decision deadline for Board action in this matter, by appropriate filing on June 6, 2005. The statutory decision deadline is March 29, 2006. However, in response to Respondent's concern, ComEd is filing contemporaneously with this Reply an additional Waiver of Deadline for Board Action to take effect if, and when, the Board stays PCB 04-215.

¹ The Illinois Environmental Protection Act does not provide IEPA with express statutory authority to issue broad information requests comparable to the authority provided to USEPA under Section 114 of the federal CAA. Thus, 40 C.F.R. §2.301(h)(3)(i) is inapplicable.

CONCLUSION

For the foregoing reasons, ComEd respectfully requests that its Motion to Stay PCB 04-215 be granted.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 

Byron F. Taylor
Roshna Balasubramanian
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 South Dearborn Ave.
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Commonwealth Edison Company

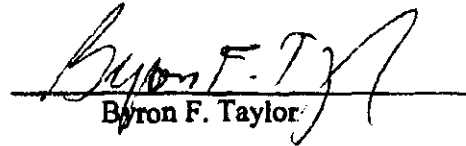
CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Notice of Filing and Commonwealth Edison's Reply in Support of Motion to Stay by U.S. mail on this 21st day of October, 2005 upon the following persons:

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

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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



Byron F. Taylor

One of the Attorneys for
Commonwealth Edison
Company

THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

OCT 21 2005

STATE OF ILLINOIS
Pollution Control Board

Commonwealth Edison Company,

Petitioner,

v.

Illinois Environmental Protection Agency,

Respondent.

PCB No. 04-215

(Trade Secret Appeal)

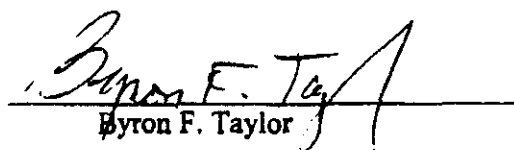
NOTICE OF FILING

To: Dorothy Gunn, Clerk
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, Illinois 60601

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

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board one original and nine copies of **Commonwealth Edison Company's Waiver of Deadline for Board Action for PCB 04-215**, a copy of which is herewith served upon you.


Byron F. Taylor

Dated: October 21, 2005

Byron F. Taylor
Roshna Balasubramanian
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 S. Dearborn
Chicago, Illinois 60603

THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

OCT 21 2005

Commonwealth Edison Company,)
)
Petitioner,)
)
v.)
)
Illinois Environmental Protection Agency,)
)
Respondent.)

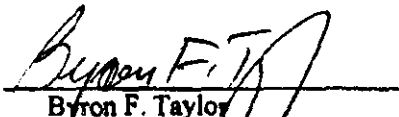
PCB No. 04-215 STATE OF ILLINOIS
(Trade Secret Appeal) Pollution Control Board

COMMONWEALTH EDISON COMPANY'S
WAIVER OF DEADLINE FOR BOARD ACTION

Should the Illinois Pollution Control Board grant Commonwealth Edison Company's Motion to Stay, which was filed on September 23, 2005, pursuant to 35 Ill. Admin. Code § 101.308(c)(2), Commonwealth Edison Company waives the statutory decision deadline for Board action for twelve (12) months following the date on which the stay is lifted in the above-captioned matter.

Respectfully submitted,

Commonwealth Edison Company

By: 
Byron F. Taylor
Roshna Balasubramanian
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 S. Dearborn
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Commonwealth Edison Company

THIS FILING SUBMITTED ON RECYCLED PAPER

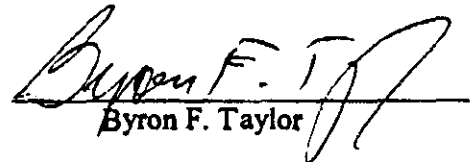
CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Notice of Filing and Commonwealth Edison's Waiver of Deadline for Board Action by U.S. mail on this 21st day of October, 2005 upon the following persons:

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

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

A handwritten signature in black ink, appearing to read "Byron F. Taylor", is written over a horizontal line.

Byron F. Taylor
One of the Attorneys for
Commonwealth Edison
Company

THIS FILING SUBMITTED ON RECYCLED PAPER