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MAR 15 2006

STATE OF ILLINOIS  
Pollution Control Board

**BEFORE THE 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 **Commonwealth Edison Company's Motion for Leave to File the Attached Reply to Illinois Environmental Protection Agency's Memorandum in Opposition to Commonwealth Edison's Motion to Compel**, a copy of which is herewith served upon you.

  
\_\_\_\_\_  
Roshna Balasubramanian

Dated: March 15, 2006

Byron F. Taylor  
Roshna Balasubramanian  
Sidley Austin LLP  
One South Dearborn  
Chicago, Illinois 60603  
(312) 853-7000

MAR 15 2006

**STATE OF ILLINOIS**  
**Pollution Control Board**

**Respondent.**

**PCB No. 04-215**  
**(Trade Secret Appeal)**

ComEd has sought the Hearing Officer's assistance in the above-captioned matter in order to obtain critical information from IEPA through discovery. IEPA has filed a Memorandum in Opposition ("Response") to ComEd's Motion to Compel, in which the Agency incorrectly claims that prior rulings by the Illinois Pollution Control Board in a procedurally unrelated matter, to which ComEd was never a party, are dispositive of ComEd's motion. ComEd requests leave to respond to IEPA's objections by properly characterizing the scope of those prior rulings and the legal standards applicable to its Motion to Compel. ComEd further seeks to reply to IEPA's contention that answering ComEd's discovery requests is practically unfeasible, by clarifying methods by which the Agency's responsive documents could be

located. Granting ComEd's request for leave to file the attached Reply will provide ComEd with a fair and complete opportunity to respond to IEPA's arguments.

WHEREFORE, ComEd respectfully requests that the Hearing Officer grant its Motion for Leave to File the attached Reply.

Dated: March 15, 2006

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By:   
Byron F. Taylor  
Roshna Balasubramanian

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One South Dearborn  
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Attorneys for Commonwealth  
Edison Company

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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**Commonwealth Edison Company,**

**Petitioner,**

**v.**

**Illinois Environmental Protection Agency,**

**Respondent.**

STATE OF ILLINOIS  
Pollution Control Board

**PCB No. 04-215**  
**(Trade Secret Appeal)**

**COMMONWEALTH EDISON COMPANY'S REPLY IN SUPPORT OF**  
**MOTION TO COMPEL**

Petitioner Commonwealth Edison Company ("ComEd") respectfully submits this Reply to Respondent Illinois Environmental Protection Agency's ("IEPA's" or "the Agency's") Memorandum in Opposition ("Response") to ComEd's Motion to Compel, which ComEd filed with the Illinois Pollution Control Board ("IPCB" or "the Board") on February 22, 2006. In addition to the legal and factual bases for compelling IEPA's responses to discovery that were previously set forth in ComEd's Motion to Compel, ComEd further states as follows:

**I.**

On October 28, 2005, pursuant to the Hearing Officer's Scheduled Discovery Order, ComEd served IEPA with written discovery related to this trade secret appeal. ComEd's written discovery was designed to obtain information relevant to: (1) the issues central to this appeal—namely, the grounds on which IEPA denied ComEd's trade secret claim; and (2) the extent to which IEPA's Administrative Record was complete and was properly compiled. The Board's regulations, and its written opinions concerning the scope of discovery, provide that such discovery requests in advance of the hearing are permissible. Nevertheless, IEPA has flatly

refused to produce any information responsive to several of ComEd's requests and, in fact, claims that any attempt to even look for certain responsive information is unduly burdensome. The Agency's unilateral determination that it need only selectively participate in discovery is unsupportable.

Although IEPA acknowledges in its Response that discovery may be conducted to "determine whether the record filed by the Agency is complete," Res'p Mem. at 10, it argues nevertheless that ComEd's request for certain documents that were before the Agency when the trade secret denial was issued calls for "irrelevant" information. *Id.* In support of its refusal to produce documents, IEPA relies on selected excerpts from Board cases resolving permit appeals,<sup>1</sup> including the Board's statement in Oscar Meyer & Co. v. Environmental Protection Agency, PCB 78-14 (June 8, 1978) that "How or why the Agency arrived at a different conclusion on the same facts is simply not relevant to the Board determination." That quotation, however, does not relate to the parameters of discovery. *Id.* Rather, the Board was discussing the appropriate standard of review of agency permit decisions and stated that it would conduct its own review of the facts without deference to Agency legal interpretations of the same information. *Id.* What Oscar Meyer does establish is that discovery "*should be allowed* to insure that the record ... contains all of the material concerning the [] application that was before the Agency when the denial statement was issued." *Id.* (emphasis added).

IEPA appears to suggest that the only information relevant to whether the Administrative Record is complete is "communications regarding the subject Sierra Club FOIA

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<sup>1</sup> Appeals of permit denials and appeals of trade secret denials are governed by the same Board rules concerning appeals of final agency decisions. 35 Ill. Admin. Code § 105.Subpart B. An important distinction exists, however, between permit and trade secret determinations, in that the initial permitting determination by the agency must rely only on the permit application submitted by the emission source. See e.g., Oscar Meyer & Co. v. Environmental Protection Agency, PCB 78-14 (June 8, 1978). By contrast, no such provision requires agency determinations of trade secret claims to be limited to the information contained in the applicant's statement of justification. See 35 Ill. Admin. Code § 130.Subparts B and C.

request,” since those were the only documents it produced.<sup>2</sup> *Id.* How Respondent arrived at such a narrow interpretation is not clear. The “subject” at issue here is ComEd’s request that the excerpts from its Continuing Property Record (“CPR”) and Generating Availability Data System (“GADS”) data be afforded trade secret protection. As such, materials before the Agency when it issued its denial statement fall within the proper purview of ComEd’s discovery requests on appeal. If one follows IEPA’s logic, the Agency can refuse to proffer any documents in discovery when one of the issues is whether the Administrative Record is complete. The net effect of such reasoning is that there can be no meaningful documentary discovery into whether the Administrative Record is, in fact, complete.

The Board has already ruled in this case, when explaining that the hearing shall be based on the record before IEPA at the time it issued its trade secret determination, that “the Board hearing affords petitioner the opportunity to challenge IEPA’s reasons for denial.” Order, Commonwealth Edison Company v. IEPA, PCB 04-215, and Midwest Generation EME, LLC v. IEPA, PCB 04-216 (June 17, 2004). Consequently, the limitation imposed by the Board is that “information developed *after* IEPA’s decision typically is not admitted at hearing or considered by the Board.” *Id.* (emphasis added). No such limitation was imposed on the traditional scope of discovery into the adequacy of the record.

Petitioner also notes that IEPA has confused certain aspects of Midwest Generation EME, LLC’s (“Midwest Generation’s”) trade secret proceedings in PCB 04-185 and PCB 04-216 with ComEd’s trade secret proceeding in PCB 04-215, leading to the misimpression that Board orders addressing certain of Midwest Generation’s previous motions in other

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<sup>2</sup> IEPA even claims that its other trade secret determinations concerning information similar to ComEd’s CPR and GADS data excerpts are irrelevant, Res’p Mem. at 10, yet the Agency has packed the Administrative Record with irrelevant judicial opinions involving other utilities from other states. Adm. Record at 869-1205, PCB 04-215 (July 13, 2004).

proceedings are equally applicable to ComEd in this proceeding. Res'p Mem. *passim*. For instance, ComEd has not asserted a due process violation in connection with this matter. More significantly, ComEd was not a party in the PCB 04-185 case, from which Respondent has repeatedly cited the Board's November 4, 2004 Order regarding the scope of certain aspects of the hearing in that case.

## II.

IEPA also cannot avoid compliance with ComEd's discovery requests on the ground that IEPA's paper files are organized by emission source, not by type of determination or subject matter. First, Respondent has failed to indicate why a search of its files, particularly its electronic files, could not be easily accomplished. Additionally, IEPA suggests that circulating a request among Agency employees for recollections of trade secret determinations would be "disruptive." Res'p Mem. at 12. Although it may be true that reviewing files and identifying responsive information in furtherance of discovery may disrupt normal work routines, such considerations do not provide a legally cognizable excuse for a party served with discovery to avoid any attempt at compliance. For example, polling of current IEPA employees, by circulation of a simple e-mail message to the Agency's relevant divisions, likely would yield information that would direct Respondent to specific files in lieu of reviewing every file. In short, IEPA does not appear to claim that no responsive documents exist, nor does it state that such documents cannot be located. Rather, IEPA argues that because it cannot with certainty locate *all* responsive documents, it need not bother locating *any* responsive documents. As a result, ComEd has been preparing for depositions and other discovery without the benefit of IEPA's responsive documents.

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WHEREFORE, ComEd respectfully requests that the Hearing Officer grant its  
Motion to Compel.

Dated: March 15, 2006

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 

Byron F. Taylor  
Roshna Balasubramanian

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Attorneys for Commonwealth  
Edison Company




**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served the attached Commonwealth Edison Company's Motion for Leave to File the Attached Reply to Illinois Environmental Protection Agency's Memorandum in Opposition to Commonwealth Edison's Motion to Compel by U.S. mail on this 15<sup>th</sup> day of March, 2006 upon the following persons:

Ann Alexander  
Assistant Attorney General and  
Environmental Counsel  
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Chicago, Illinois 60601

Dorothy Gunn, Clerk  
Illinois Pollution Control Board  
100 West Randolph  
Suite 11-500  
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Brad Halloran  
Hearing Officer  
Illinois Pollution Control Board  
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\_\_\_\_\_  
Roshna Balasubramanian