

RECEIVED
CLERK'S OFFICE

JUL 07 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

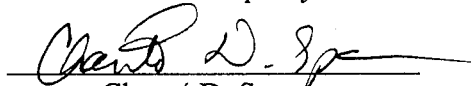
To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

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

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

Keith Harley
Chicago Legal Clinic, Inc.
205 West Monroe, 4th Floor
Chicago, Illinois 60606

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board **Commonwealth Edison Company's Response to the Sierra Club's Motion for Intervention**, a copy of which is herewith served upon you.


Chanté D. Spann

Date: July 7, 2004

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

RECEIVED
CLERK'S OFFICE

JUL 07 2004

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)

**COMMONWEALTH EDISON COMPANY'S RESPONSE TO THE SIERRA
CLUB'S MOTION FOR INTERVENTION**

Pursuant to 35 Ill. Admin. Code § 101.500, Commonwealth Edison Company (hereinafter, "ComEd") respectfully submits its Response to the Sierra Club's Motion for Intervention ("MOI") in the above-referenced proceeding and states as follows:

1. On January 30, 2004, ComEd submitted final responses to a Clean Air Act § 114 Information Request issued by the United States Environmental Protection Agency ("USEPA"). At USEPA's suggestion, ComEd submitted a courtesy copy of the final responses and attachments to the Illinois Environmental Protection Agency ("IEPA"). Included in ComEd's final responses were trade secrets and confidential business information relating to six coal-fired generating stations formerly owned by ComEd (collectively referred to as "Confidential Articles").

2. On March 11, 2004, in response to a request by the IEPA, ComEd submitted a statement of justification explaining why the Confidential Articles are trade secrets and must be protected pursuant to 35 Ill. Admin. Code Part 130.

3. On April 28, 2004, ComEd received a letter from the IEPA via U.S. mail denying trade secret protection for all of ComEd's Confidential Articles except for certain work order numbers included within the Confidential Articles.

4. On June 2, 2004, ComEd submitted a Petition for Review of the IEPA's Denial of Trade Secret Protection. On June 17, 2004, the Illinois Pollution Control Board (the "Board") accepted ComEd's petition for hearing. (Board Order, PCB 04-215, 6/17/04). The only issue before the Board at this time is whether the Confidential Articles submitted are trade secrets exempt from public inspection under the Illinois Environmental Protection Act ("the Act") (415 ILCS § 5/1 et. seq).

5. If the Board finds that the Confidential Articles submitted by ComEd are trade secrets, then the IEPA is required by law to withhold those Confidential Articles from public inspection. 415 ILCS §§ 5/7(a)(i), 5/7(a)(iv), 5/7.1(a); 5 ILCS § 140/7(a)(g). The Act does not provide for the discretionary release of trade secrets. 415 ILCS §§ 5/7(a)(i), 5/7(a)(iv), 5/7.1(a).

6. In its June 17, 2004 order, the Board indicated that pursuant to 35 Ill. Admin. Code § 130.214(a), hearings will be based exclusively on the record before the IEPA at the time that it issued its trade secret determination. (Board Order, PCB 04-215, 6/17/04). Also, the Board ruled that all hearings in this proceeding are to be held *in camera* and that the documents identified by ComEd as trade secrets will be "segregated and handled to avoid unauthorized disclosure." *Id.*

7. On June 21, 2004, the Sierra Club filed a Motion to Intervene in this proceeding. The Sierra Club indicated that on or about February 12, 2004, it submitted a Freedom of Information Act ("FOIA") Request to the IEPA seeking

disclosure of all documents submitted by ComEd on January 30, 2004. (Sierra Club MOI, ¶ 1). The Sierra Club further asserted that because it submitted the FOIA request for these Confidential Articles, it would be adversely affected and materially prejudiced if the Board finds that ComEd's submissions are trade secrets. (*Id.* at ¶ 11).

8. The Board may allow a person to intervene in a proceeding if: 1) "[t]he person has a conditional statutory right to intervene in the proceeding," 2) he or she will be materially prejudiced absent intervention, or 3) he or she may be adversely affected by a final Board order. 35 Ill. Admin. Code § 101.402(d). The Board will consider the following factors in determining whether to permit a person to intervene: 1) timeliness of the motion, and 2) "whether the intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding." 35 Ill. Admin. Code § 101.402(b).

9. The Sierra Club does not have, and has not alleged that it has, a statutory right to intervene in this trade secret appeal.

10. The Sierra Club will not be materially prejudiced if it is not allowed to intervene in this proceeding. The only issue in this proceeding is whether the Confidential Articles constitute trade secrets. This is a factual analysis to which Sierra Club has no relevant input. Because the Sierra Club's participation in this proceeding would have no bearing on its outcome, the Sierra Club cannot be "prejudiced" in any capacity by exclusion from this proceeding.

11. The Sierra Club's interests in access to the Confidential Articles are not affected in any way by whether it is allowed to intervene in this proceeding

because the Board reviews trade secret appeals based on the record before the IEPA at the time of its decision. The inquiry is not two-tiered. That is, the Board does not have to first determine that the Confidential Articles are trade secrets and then determine whether they may be disclosed. If the Board determines that the Confidential Articles are trade secrets then they cannot be disclosed and the Sierra Club has no legal interest whatsoever in the Confidential Articles. Therefore, any "adverse affect" that the Sierra Club could potentially suffer cannot be alleviated by the Sierra Club's participation in this proceeding. The Sierra Club's interests in ComEd's submissions are, as a legal matter, completely independent of the Board's trade secret determination.

12. Further, the intervention of the Sierra Club would unduly delay the proceeding and interfere with its order and efficiency. The Sierra Club did not compile the record reviewed by the IEPA and therefore has nothing to contribute which will reveal the decision-making process of the IEPA or ComEd's practices. Further, the Board has ordered that the proceedings should be held *in camera* and that the submissions made by ComEd cannot be revealed while this matter is pending. (Board Order, PCB 04-215, 6/17/04). The involvement of the Sierra Club would complicate the hearing because numerous safeguards and procedures would have to be employed to protect the Confidential Articles from disclosure to the Sierra Club.

13. Under these circumstances, the only assistance that the Sierra Club could offer this proceeding is legal argument, assuming that any legal issues arise. Legal arguments can be advanced more efficiently by the filing of an amicus curiae brief.

14. The “public interest” does not in any way make the Sierra Club’s participation in the proceeding more relevant. The Sierra Club does not need to intervene in this proceeding to create “a record of the public’s interest in having access to information” (Sierra Club MOI, ¶ 18), as that record was created when it submitted its FOIA request to the IEPA. The Illinois Attorney General¹ and IEPA are responsible for representing the public interest, and therefore, the public’s “interests” would not be enhanced by the inclusion of the Sierra Club in the proceeding. Further, the public’s interest in the information is not relevant to the Board’s determination of whether the information are ComEd’s trade secrets, the only issue before the Board at this time.

15. If the Board determines that the Sierra Club should be allowed to intervene in this trade secret appeal, the restrictions on the Sierra Club’s participation proposed by the Illinois Attorney General would need to be enhanced to protect ComEd’s trade secrets. For instance, the Illinois Attorney General has proposed that the Sierra Club shall be barred from serving discovery, interrogatories and requests to admit and be barred from conducting any depositions. However, these restrictions are insufficient to protect ComEd’s interests in its confidential business information and trade secrets. Due to the confidential nature of the information that is at issue, the Sierra Club would also need to be barred from access to answers to discovery, interrogatories and requests to admit that address the Confidential Articles, and barred

¹ As of the date of filing of this Response, ComEd has not been served with any pleadings or appearances from the office of the Illinois Attorney General. Upon information and belief, the Illinois Attorney General has filed an appearance in this matter and a response to the Sierra Club’s motion. By its acknowledgement of filings by the Illinois Attorney General, ComEd in no way waives its right to proper service, or any other rights to which

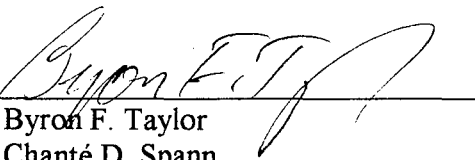
from being present during any deposition or hearing at which the Confidential Articles will be discussed.

16. For the reasons stated above, the Sierra Club has failed to demonstrate that it should be allowed to intervene in the proceeding at issue. Even subject to the restrictions proposed by the Illinois Attorney General, which are insufficient and would require enhancement, any marginal benefit of the Sierra Club's participation will be outweighed by the inconvenience, increased costs and disruption caused to the parties and to the Board.

WHEREFORE, Commonwealth Edison Company respectfully requests that the Illinois Pollution Control Board enter an order denying the Sierra Club's Motion to Intervene in the proceeding herein.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 
Byron F. Taylor
Chanté D. Spann
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, Illinois 60603
(312) 853-7000

it is entitled as a result of failure of proper service by the Illinois Attorney General.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

PCB No. 04-215
(Trade Secret Appeal)

CERTIFICATE OF SERVICE

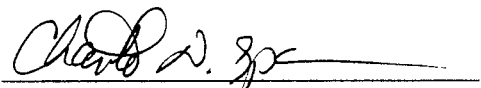
I, the undersigned, certify that I have served the attached Notice of Filing and Response of Commonwealth Edison Company to the Sierra Club's Motion for Intervention, by U.S. mail on this 7th day of July, 2004 upon the following persons:

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

Keith Harley
Chicago Legal Clinic, Inc.
205 West Monroe, 4th Floor
Chicago, Illinois 60606

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

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


Chanté D. Spann