

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD SEP 23 2005

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

STATE OF ILLINOIS
Pollution Control Board

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 to Stay PCB 04-215**, a copy of which is herewith served upon you.



Roshna Balasubramanian

Dated: September 23, 2005

Byron F. Taylor
Roshna Balasubramanian
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 S. Dearborn
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THIS FILING SUBMITTED ON RECYCLED PAPER

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Pollution Control Board

Commonwealth Edison Company,)
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**COMMONWEALTH EDISON COMPANY'S
MOTION TO STAY PCB 04-215**

Pursuant to 35 Ill. Admin Code § 101.514, Commonwealth Edison Company ("ComEd") respectfully submits this Motion to Stay PCB 04-215 and hereby states as follows:

1. On January 30, 2004, ComEd submitted excerpts from a Continuing Property Record ("CPR") and Generating Availability Data System ("GADs") data related to six coal-fired generating stations formerly owned by ComEd to the United States Environmental Protection Agency ("USEPA") in response to a Clean Air Act § 114 Information Request ("Information Request"). ComEd conspicuously marked the materials "confidential business information." ComEd submitted a courtesy copy to the Illinois Environmental Protection Agency ("IEPA").

2. By letter dated February 26, 2004, IEPA requested that ComEd submit a statement of justification describing why the excerpts from the CPR and the GADs data are trade secrets. IEPA requested this substantiation because of a Freedom of Information Act ("FOIA") request it received from the Sierra Club seeking release of ComEd's responses to the Information Request.

3. On March 11, 2004, in response to IEPA's request, ComEd submitted its statement of justification pursuant to 35 Ill. Admin. Code Part 130.

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4. On April 28, 2004, IEPA denied ComEd's trade secret claims and stated, without explanation, that the company's Information Request responses were not exempt from disclosure under 35 Ill. Admin. Code Part 130.

5. On June 2, 2004, ComEd filed a petition for review of the IEPA's denial of trade secret protection to excerpts from the CPR and GADs data. The Illinois Pollution Control Board ("Board") accepted the petition for hearing, and ComEd's appeal, PCB 04-215, 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 and of ComEd's trade secret claims.

6. On June 30, 2005, ComEd received a letter from USEPA requesting ComEd to provide the agency with information supporting its claims that the CPR and GADs data were 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, ComEd 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 responses, Sierra Club had filed an identical request with USEPA.

7. By letter dated August 5, 2005, ComEd submitted to USEPA a substantiation of its confidentiality claims.

8. Presently, both the Board and USEPA simultaneously are engaged in proceedings involving the same party in interest (ComEd), the same FOIA requestor (Sierra Club), and substantially similar determinations of confidentiality with respect to the CPR and GADs data. The facts and claims at issue in the state and federal proceedings are closely related.

9. Moreover, the applicable legal standards governing both the Board's trade secret determination and the federal confidentiality determination are substantially similar. The Board has in other instances looked to federal determinations of confidentiality under the federal FOIA

when interpreting its own trade secret provisions under 35 Ill. Admin. Code Part 130. See e.g., Monsanto v. Illinois EPA et al., PCB 85-19 (1985); Outboard Marine Corp. v. Illinois EPA et al., PCB 84-26 (1984).

10. Pursuant to 35 Ill. Admin. Code § 101.514, ComEd hereby requests that the Board stay PCB 04-15 pending resolution of the federal CBI determination process. The Board may appropriately grant a stay of its own proceeding to avoid inefficient allocations of resources and “potentially wasting administrative resources.” Midwest Generation EME, LLC v. Illinois EPA, PCB 04-185 (2005).

11. Granting a stay in this case would avoid the costly and inefficient allocation of resources that is necessarily resulting from duplicative proceedings; avoid practical difficulties that might arise from contrary FOIA determinations by state and federal agencies; and allow the Board to be informed by a closely related federal determination.

12. ComEd has filed contemporaneously with this motion a Status Report and a Memorandum in Support of Commonwealth Edison Company’s Motion to Stay PCB 04-215.

WHEREFORE, ComEd respectfully requests that, pursuant to 35 Ill. Admin. Code § 101.514, its Motion to Stay PCB 04-215 be granted.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 

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Roshna Balasubramanian
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Attorneys for Commonwealth Edison
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September 23, 2005

SEP 23 2005

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Commonwealth Edison Company
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PCB No. 04-215
(Trade Secret Appeal)

**MEMORANDUM IN SUPPORT OF
COMMONWEALTH EDISON COMPANY'S MOTION TO STAY PCB 04-215**

Commonwealth Edison Company ("ComEd"), by and through its attorneys,
Sidley Austin Brown & Wood LLP, respectfully submits this Memorandum in Support of its
Motion to Stay PCB 04-215.

I. FACTS

In 2003, ComEd received a Clean Air Act § 114 Request for Information ("Information Request") from the United States Environmental Protection Agency ("USEPA"). The Information Request sought information regarding six coal-fired generating stations owned by ComEd until 1999 and currently owned by Midwest Generation EME, LLC.¹ In the response ComEd submitted to USEPA on January 30, 2004, ComEd included certain financial and business data, marked conspicuously as "confidential business information" ("CBI"), that included excerpts from a Continuing Property Record ("CPR") and four years of Generating Availability Data System ("GADS") data (collectively, the "Confidential Articles"). The CPR excerpts are compilations ComEd prepared of detailed financial information relating to

¹ The six electric generating stations named in the Information Request were: Crawford, Joliet, Will County, Waukegan, Fisk, and Powerton.

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expenditures and investments at the six stations. The CPR identified additions and transfers worth \$100,000 or more that had taken place at each of the facilities over approximately 25 years. The GADs data compilations revealed information concerning planned outage hours, forced outage hours, maintenance outage hours, and total unit derated hours for each generating unit at each station. At USEPA's suggestion, ComEd sent an identical copy of its Information Request responses to the Illinois Environmental Protection Agency ("IEPA").

A. IEPA Denial of Trade Secret Status

By letter dated February 26, 2004, IEPA asked ComEd to provide a statement of justification for its confidentiality claims following the agency's receipt of a Freedom of Information Act ("FOIA") Request from the Sierra Club for ComEd's Information Request responses. Specifically, IEPA stated that, pursuant to the requirements of the Illinois Environmental Protection Act (hereinafter referred to as the "Illinois Act"), 415 ILCS § 7, and the Illinois Pollution Control Board's ("IPCB's" or the "Board's") implementing regulations, codified at 35 Ill. Admin. Code §130.201 et seq., ComEd must submit a "trade secret" justification.²

On March 11, 2004, ComEd submitted a statement of justification pursuant to 35 Ill. Admin. Code Part 130, as requested by IEPA. In its statement, ComEd set forth the legal requirements for trade secret status and argued that those requirements are satisfied. Specifically, ComEd detailed its corporate policies governing the handling of sensitive information and set forth the measures used to protect the confidential CPR and GADs data. ComEd's justification discussed the competitive value of the information and informed IEPA

² IEPA requested a trade secret justification despite ComEd's labeling of the Confidential Articles as "confidential business information." As such, ComEd provided its justification pursuant to 35 Ill. Admin. Code Part 130.

that releasing its information would place ComEd at an economic disadvantage, since informed observers and competitors could ascertain overall business strategies, alter bidding practices, and infer operational plans from a review of these materials.

On April 28, 2004, IEPA denied ComEd's trade secret claims and stated that the Confidential Articles were, in the agency's determination, not exempt from disclosure under the Illinois Act. In its denial, the agency simply stated, tracking the regulations without explanation, that ComEd failed to adequately demonstrate that the information had not been disseminated or published, that the information has competitive value, and that the information was not "emissions data."

B. Petition to IPCB for Review of IEPA Initial Determination

On June 2, 2004, ComEd timely petitioned the IPCB to review IEPA's ruling and reverse the negative trade secret determination, or alternatively, to remand the case for a determination of the articles' exemption from disclosure under the confidential business information provisions of the Illinois FOIA (5 ILCS § 140/7(1)(g)) and 2 Ill. Admin. Code Part 1828. In an order issued on June 17, 2004, the IPCB accepted for hearing the petition for review and agreed to examine whether the Confidential Articles are in fact trade secrets and, therefore, exempt from disclosure under the Illinois Act. The Board further granted ComEd's request that the hearing be conducted *in camera* and ordered IEPA to continue protecting the claimed information as confidential during the Board's review. The Board has ruled on certain procedural motions but has not yet engaged in a substantive review of IEPA's ruling and of ComEd's trade secret claims.

C. USEPA Proceeding

On May 20, 2004, just three months after Sierra Club had submitted a FOIA request to IEPA seeking access to ComEd's Information Request responses, Sierra Club filed a similar request with USEPA. Both FOIA requests sought access to the same data. ComEd was not made aware of Sierra Club's federal FOIA request, however, until June 30, 2005, the date on which ComEd received a USEPA request for substantiation of its confidentiality claims. Specifically, by letter dated June 29, 2005, USEPA requested that ComEd provide the agency with supporting information related to its claims of confidentiality, pursuant to 40 C.F.R. § 2.201 et seq., so that USEPA can make a determination as to whether it must provide copies of ComEd's responses to the FOIA requestor. By letter dated August 5, 2005, ComEd submitted a substantiation of its confidentiality claims under FOIA to USEPA. In particular, ComEd detailed both its policies for keeping the CPR and GADs data confidential, and its legal and practical explanations of how the information qualifies for protection. USEPA has not yet issued its determination of ComEd's CBI claims.

II. ARGUMENT

Pursuant to 35 Ill. Admin. Code § 101.514, ComEd moves this Board for a Stay of PCB 04-215 pending resolution of the federal CBI determination process. At this time, both the IPCB and USEPA currently are engaged in proceedings involving the same party in interest, the same FOIA requestor, and substantially similar determinations of confidentiality with respect to a single submission of data. Granting a stay would (1) avoid the costly and inefficient allocation of resources that is necessarily resulting from duplicative proceedings; (2) avoid

practical difficulties that might arise from contrary FOIA determinations by state and federal agencies; and (3) allow the Board to be informed by a closely related federal determination.

The Board may allow a stay where a substantially similar matter is pending in a different forum, so as to avoid the practical difficulties and inefficiencies that result from duplicative proceedings. See 35 Ill. Admin. Code § 101.514; Midwest Generation EME, LLC v. Illinois EPA, PCB No. 04-185 (2005)(stay granted at IPCB's own motion to "avoid potentially wasting administrative resources"). See also Village of Mapleton v. Cathy's Tap, 313 Ill. App. 3d 264, 268 (3d Dist. 2000)(stay granted to remove "the chance of conflicting judgment" in contemporaneous, similar federal proceeding). A duplicative proceeding is defined as a matter "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Admin. Code § 101.202. Illinois courts have recognized that this multiplicity results in an inefficient expenditure of resources for not only the forums, but the parties, who must prepare for both proceedings. Mapleton, 313 Ill. App. 3d at 268 (multiplicity of litigation is a valid consideration in granting motions to stay).

A substantially similar proceeding involving ComEd's confidentiality claims is currently under way at the federal level. Since August 5, 2005, the date on which ComEd submitted its substantiation letter, USEPA has been engaged in an analysis of the confidentiality of ComEd's CPR excerpts and GADs data. This evaluation was prompted by Sierra Club's FOIA request, identical to the one sent to IEPA, for ComEd's Information Request responses. The Confidential Articles at issue in both the IPCB and the USEPA proceedings are identical. In fact, the documents reviewed by IEPA, and on appeal, by the Board, are photocopies of the responses ComEd submitted to USEPA pursuant to the § 114 Information Request.

Not only do the state and federal proceedings share factual commonality, the applicable legal standards governing both confidentiality determinations are substantially similar. See Monstanto v. Illinois EPA et al., PCB 85-19 (1985)(citing federal judicial interpretations of the federal FOIA in support of ruling under 35 Ill. Admin. Code Part 120); Outboard Marine Corp. v. Illinois EPA et al., PCB 84-26 (1984)(“The Board notes that [its] broad construction of standing [under 35 Ill. Code Part 120] comports with the federal courts’ interpretation of standing under the [federal] “Freedom of Information Act” (5 USC 552, as amended)”). See also Cooper v. Illinois Dep’t of the Lottery et al., 640 N.E.2d 1299, 1303 (Ill. App. Ct. 1st Dist. 1994)(citing federal FOIA caselaw in trade secret analysis under Illinois FOIA). Both the Board’s trade secret regulations, codified at 35 Ill. Admin. Code Part 130, and similar trade secret provisions in the Illinois Freedom of Information Act, 5 ILCS § 140/7(1)(g), are frequently interpreted by the Board and by Illinois courts with reference to federal analyses of analogous federal FOIA standards. *Id.* In Monsanto and Outboard Marine Corp., for example, the IPCB considered federal cases interpreting the federal FOIA as guides during its own analyses of the trade secret provisions promulgated under § 7 of the Illinois Act. Similarly, Illinois courts have routinely held that “case law construing the federal statute should be used in Illinois to interpret [the Illinois FOIA].”³ E.g., Cooper, 640 N.E.2d at 1303; Roulette v. Dep’t of Central Mgmt. Services, 490 N.E.2d 60, 64 (Ill. App. Ct. 1st Dist. 1986). Achieving “consistent construction” between determinations of confidentiality at the state and federal levels in this case would be facilitated by a stay, which would allow the IPCB to be informed by the federal confidentiality determination during its own analysis. Stated differently, failure to grant a stay

³ Indeed, the Illinois FOIA exempts from disclosure “[i]nformation specifically prohibited from disclosure by federal or State law or rules or regulations adopted under federal or State law.” 5 ILCS § 140/7(1)(a). See also 2 Ill. Admin. Code § 1828.202(a)(1)(A).

will result in two adjudicatory bodies undertaking similar reviews of the facts, the record, and the applicable law, without the benefit of the other's precedent.

An additional pragmatic consideration counsels in favor of staying PCB 04-215. A stay of the Board proceedings avoids the serious, practical difficulties that could arise from contrary determinations by the two forums. Contrary determinations could result in the release of ComEd's confidential information at the federal level but not at the state level, or vice versa. Such an outcome not only places ComEd at risk of competitive disadvantage, it provides incentive for FOIA requestors to circumvent one agency's confidentiality determinations by simply directing their requests to another agency. Principles of comity caution against contrary determinations, at least where a stay of one proceeding remains possible. See e.g., Mather Investment Properties, L.L.C. v. Ill. State Trapshooters, PCB No. 04-29 (2005). Although ComEd does not contend that the Board would be bound by USEPA's or a federal court's determination, principles of comity encourage the Board to consider that determination.

Further, the Board need not relinquish jurisdiction by granting a stay. See e.g., Pearl v. Bicoastal Corp. et al., PCB No. 96-265 (1997)(Board retained jurisdiction over claims but consented to parties' request for stay to await developments in state remediation program and to await federal court determination of whether that court would exercise supplemental jurisdiction over state law claims also at issue in the Board proceeding, even though federal complaint was later-filed). Rather, a stay affords the Board an opportunity to consider the federal determination during its analysis and would permit the Board to issue a fully informed decision. Just as confidentiality determinations among various state agencies, including IEPA

and IDNR, are coordinated pursuant to state regulations, see e.g., 35 Ill. Admin. Code § 132.216, similar coordination of state and federal determinations makes sense.⁴

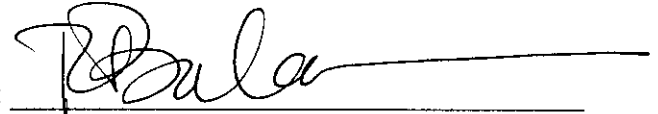
* * *

WHEREFORE, ComEd respectfully requests that, pursuant to 35 Ill. Admin. Code § 101.514, the IPCB grant ComEd's Motion to Stay PCB 04-215 pending resolution of the federal CBI determination process.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: _____



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Attorneys for Commonwealth
Edison Company

September 23, 2005

⁴ 35 Ill. Admin. Code § 130.402 further provides that

Any information accorded confidential treatment may be disclosed or transmitted to other officers, ... , or authorized representatives of this State or of the United States concerned with or for the purposes of carrying out the [Environmental Protection] Act or the federal environmental statutes and regulations; provided, however, that such information shall be identified as confidential by the Board, as the case may be [415 ILCS 5/7(e)]. (emphasis added).

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Illinois Environmental Protection Agency,)	
)	
Respondent.)	
)	

STATUS REPORT

Now comes Commonwealth Edison Company ("ComEd") and files a Status Report in conformance with the requirements of 35 Ill. Admin Code § 101.514.

1. On January 30, 2004, ComEd submitted excerpts from a Continuing Property Record ("CPR") and Generating Availability Data System ("GADs") data related to six coal-fired generating stations formerly owned by ComEd to the United States Environmental Protection Agency ("USEPA") in response to a Clean Air Act § 114 Information Request ("Information Request"). ComEd conspicuously marked the materials "confidential business information." ComEd submitted a courtesy copy to the Illinois Environmental Protection Agency ("IEPA").

2. By letter dated February 26, 2004, IEPA requested that ComEd submit a statement of justification describing why the excerpts from the CPR and the GADs data are trade secrets. On March 11, 2004, in response to IEPA's request, ComEd submitted its statement of justification pursuant to 35 Ill. Admin. Code Part 130.

3. On April 28, 2004, IEPA denied ComEd's trade secret claims and stated, without explanation, that the company's Information Request responses were not exempt from disclosure under 35 Ill. Admin. Code Part 130.

4. On June 2, 2004, ComEd filed with the Illinois Pollution Control Board ("Board" or "IPCB") a petition for review of the Illinois Environmental Protection Agency's ("IEPA's") denial of ComEd's trade secret claims. In its petition, ComEd requested the Board to reverse

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IEPA's trade secret determination or, alternatively, to remand the case for a determination of the articles' confidentiality under the confidential business information provisions of the Illinois Freedom of Information Act ("FOIA")(5 ILCS § 140/7(1)(g)) and 2 Ill. Admin. Code Part 1828.

5. On June 17, 2004, the Board accepted the petition for hearing. ComEd's appeal of IEPA's trade secret determination is docketed as PCB 04-215. This appeal has been assigned to IPCB Hearing Officer Bradley P. Halloran. To date in the matter of PCB 04-215, the Board has ruled on certain procedural motions but has not yet engaged in a substantive review of IEPA's trade secret determination and of ComEd's confidentiality claims.

6. Also in its June 17, 2004 Order, the Board requested the parties to address whether consolidation of PCB 04-215 and a factually related proceeding, docketed at PCB 04-216, was appropriate. PCB 04-216 involves a review of IEPA's denial of trade secret claims, asserted with respect to the same CPR at issue in PCB 04-215, by the six coal-fired generating stations' current owner, Midwest Generation EME, LLC ("Midwest Generation").

7. On July 26, 2004, pursuant to the Board's Order, the parties filed the following motions: IEPA filed a motion recommending consolidation of PCB 04-215 and PCB 04-216; both ComEd and Midwest Generation filed motions opposing consolidation.

8. On July 7, 2005, the Board issued an Order declining to consolidate PCB 04-215 and PCB 04-216.

9. A second procedural matter on which the Board has ruled involves Sierra Club's Motion to Intervene in PCB 04-215, filed June 21, 2004. Sierra Club claimed an interest in the proceedings because it had filed a Freedom of Information Act ("FOIA") request seeking access to ComEd's Information Request responses at issue in PCB 04-215. On July 7, 2004, ComEd filed a motion opposing Sierra Club's request to intervene and suggested that Sierra Club be allowed to participate by filing an amicus brief or submitting public comments. On August 18, 2005, the Board issued an order denying Sierra Club's Motion to Intervene but permitting Sierra Club to present oral and written statements during IPCB hearings and file amicus curiae briefs and public comments in the case.

10. Following a status teleconference on July 29, 2005, the parties filed a proposed discovery schedule with IPCB on August 4, 2005.

11. On August 25, 2005, the IPCB Hearing Officer entered an Order detailing a discovery schedule that commences with initial document requests and initial interrogatories served on or

before October 27, 2005 and ends with responses to final document requests and final interrogatories served on or before March 27, 2006.

12. A brief status teleconference with the IPCB Hearing Officer took place on September 22, 2005.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 

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Company

September 23, 2005

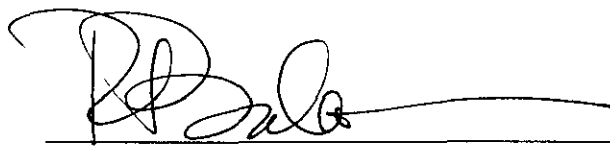
CERTIFICATE OF SERVICE

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 23rd day of September, 2005 upon the following persons:

Ann Alexander
Assistant Attorney General and
Environmental Counsel
188 West Randolph Street
Suite 2000
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Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
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Brad Halloran
Hearing Officer
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Chicago, Illinois 60601



Roshna Balasubramanian

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