

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)

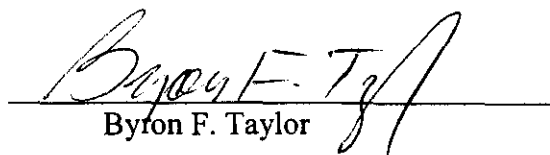
NOTICE OF FILING

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 Reply in Support of Motion to Stay 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

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

PCB 04-215  
Trade Secret Appeal

RECEIVED  
CLERK'S OFFICE  
OCT 21 2005  
STATE OF ILLINOIS  
Pollution Control Board

**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).<sup>1</sup> 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.

---

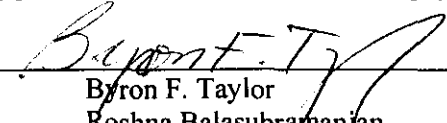
<sup>1</sup> The Illinois Environmental Protection Act does not provide IEPA with express statutory authority to issue broad information requests comparable to the authority provided to USEPA under Section 114 of the federal CAA. Thus, 40 C.F.R. §2.301(h)(3)(i) is inapplicable.

**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

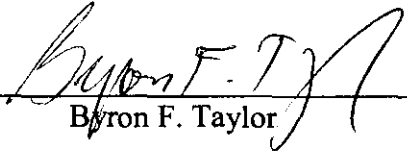
**CERTIFICATE OF SERVICE**

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**