

**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, IL 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 the **Agreed Motion to Extend the Stay of PCB 04-215, Status Report and Waiver of Decision Deadline for Board Action**, copies of which are herewith served upon you.



Roshna Balasubramanian

Date: August 1, 2006

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

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

Commonwealth Edison Company  
 Petitioner,

v.

Illinois Environmental Protection Agency,  
 Respondent

PCB No. 04-215  
 (Trade Secret Appeal)

**AGREED MOTION TO EXTEND THE STAY OF PCB 04-215**

Pursuant to 35 Ill. Admin. Code § 101.514, Petitioner Commonwealth Edison Company ("ComEd") submits to the Illinois Pollution Control Board this Agreed Motion to Extend the Stay Granted in PCB 04-215 and hereby states as follows:

1. This case comes before the Board on ComEd's petition to review the Illinois Environmental Protection Agency's ("IEPA's") April 2004 denial of trade secret protection for certain confidential articles submitted to IEPA by ComEd. The confidential articles also were submitted to the United States Environmental Protection Agency ("USEPA") pursuant to an **Information** Request issued under Section 114 of the Clean Air Act ("Information Request"). The articles were provided to IEPA as a courtesy.

2. 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.

3. On June 30, 2005, ComEd received a letter from the United States **Environmental** Protection Agency ("USEPA") requesting ComEd to provide the agency with information supporting its claims that the articles are confidential business information ("CBI")

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 Freedom of Information Act ("FOIA") request to IEPA seeking access to ComEd's Information Request responses, Sierra Club had filed an identical request with USEPA. By letter dated August 5, 2005, ComEd submitted to USEPA a substantiation of its confidentiality claims.

4. 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 articles. The facts and claims at issue in the state and federal proceedings are closely related. As such, ComEd motioned the Board for a stay of PCB 04-215 pending the resolution of USEPA's determination,

5. On April 6, 2006, the Board issued an Order granting ComEd's initial request for a stay of PCB 04-215 until August 4, 2006. Specifically, the Board ruled that a stay of PCB 04-215 is appropriate because the pending federal process is "substantially similar" to the Board's, and thus "a stay of the latter may avoid multiplicity and the potential for unnecessarily expending the resources of the Board and those before it." In its Order, the Board notes that "[t]he information claimed by ComEd at the federal and State levels to be protected from disclosure is identical." The Board further notes that "[t]he potentially applicable legal standards for each proceedings are also similar if not the same." Thus, USEPA's determination would amount to "persuasive authority"; alternatively, "public release by USEPA of the documents at issue may render this appeal before the Board moot,"

6. USEPA has not yet issued a determination on the confidentiality of the articles. We note that, in June 2006, pursuant to a second FOIA request from Sierra Club to

USEPA, ComEd submitted to USEPA a statement of justification with respect to a larger set of the same type of data previously submitted; both statements of justification discuss the basis for claiming such data as protected CBI.

7. ComEd has been informed that on July 27, counsel for IEPA communicated with USEPA concerning its progress on the FOIA request for ComEd's articles. Based on those discussions, counsel for IEPA represented that it now believes resolution of the USEPA FOIA request is likely, albeit not certain, within the next four months. Counsel for ComEd also communicated with USEPA concerning the status of its CBI determinations, and USEPA reported that it is diligently working on its determination but did not provide a specific time estimate for its determination.

8. Counsel for ComEd and IEPA agree that it is in the interest of justice to continue the Board's stay of proceedings in this matter for a period of 4 months, until December 4, 2006. Consistent with the Board's April 6, 2004 Order specifying that "any request by ComEd to extend the stay must be directed to the Board and include a status report and, as appropriate, a waiver of the Board's decision deadline," ComEd has attached a status report and waiver of decision deadline to this motion.

\* \* \*

WHEREFORE, ComEd respectfully requests that, pursuant to 35 Ill. Admin. Code § 101.514, IPCB grant the Agreed Motion to Extend the Stay of PCB 04-215 for four months, up to and including December 4, 2006.

Dated: August 1, 2006

COMMONWEALTH EDISON COMPANY

By:  \_\_\_\_\_

Byron F. Taylor

**Roshna Balasubramanian**

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Attorneys for Commonwealth Edison  
Company

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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	)	
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	)	(Trade Secret Appeal)
	)	
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 certain 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 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.

13. On September 23,2005, ComEd filed with the Board a motion to stay PCB 04-215 pending resolution of the substantially similar proceeding currently underway at USEPA. IEPA filed a motion in opposition to a stay of PCB 04-215, and ComEd filed a reply to IEPA's opposition.



14. Discovery continued pursuant to the Hearing Officer's scheduling order. Both ComEd and IEPA exchanged Interrogatories and Requests for the Production of Documents in November 2005.

15. In March 2006, depositions in PCB 04-215 were conducted. Specifically, ComEd deposed three employees of IEPA, each of whom had been identified in IEPA's Interrogatory responses as having been involved in the decision to deny ComEd's trade secret claims.

16. Shortly after depositions concluded in PCB 04-215, on April 6, 2006, the Board issued an Order granting a stay of this case until August 4, 2006.

17. Following the issuance of a stay, discovery in PCB 04-215 was suspended.

18. The parties have continued to conduct scheduled status teleconferences with the IPCB Hearing Officer. A status teleconference took place on June 15, 2006.

19. On June 22, 2006, ComEd filed an updated waiver of deadline for Board action, which extends such deadline until March 26, 2007.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By:  \_\_\_\_\_

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Attorneys for Commonwealth Edison  
Company

August 1, 2006

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

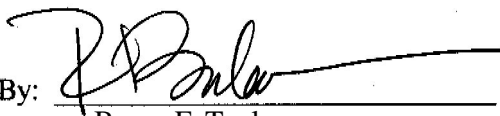
Commonwealth Edison Company,	)	
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Petitioner,	)	
	)	
v.	)	PCB No. 04-215
	)	(Trade Secret Appeal)
Illinois Environmental Protection Agency,	)	
	)	
Respondent.	)	

**COMMONWEALTH EDISON COMPANY'S  
WAIVER OF DEADLINE FOR BOARD ACTION**

Comes now Commonwealth Edison Company, by and through its attorneys, and states that on June 22, 2006, pursuant to 35 Ill. Admin. Code §101.308(c)(2), Commonwealth Edison Company waived the statutory decision deadline for Board action in the above-captioned matter from September 26, 2006 to March 26, 2007. **ComEd** adopts its waiver of decision deadline for Board action and incorporates the same by reference as if it were fully expressed herein.

Respectfully submitted,

Commonwealth Edison Company

By:   
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(312) 853-7000

Attorneys for Commonwealth Edison Company

August 1, 2006

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<b>Petitioner</b>	)	<b>PCB 04-215</b>
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<b>v.</b>	)	
	)	
<b>Illinois Environmental Protection Agency,</b>	)	
<b>Respondent</b>	)	

**PROPOSED BOARD ORDER**

For the reasons stated in its April 6, 2006 Order, the Board hereby grants the Agreed Motion to Extend the Stay in PCB 04-215. The stay is hereby extended until December 4, 2006.

**IT IS *SO* ORDERED.**

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served the attached Notice of Filing and Agreed Motion to Extend the Stay of PCB 04-215 by U.S. Mail on this 1st of August, 2006 upon the following persons:

To: Dorothy Gunn, Clerk  
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