

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 filed today with the Office of the Clerk of the Pollution Control Board a **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: December 19, 2006

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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 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. Additionally, in June 2006, following a second FOIA request from Sierra Club, ComEd submitted to USEPA a statement of justification with respect to a larger set of confidential business information, of the same type as that previously submitted; both of ComEd’s statements of justification discuss the basis for claiming such data as protected CBI.

5. Presently, 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.

6. 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.” Indeed, “public release by USEPA of the documents at issue may render this appeal before the Board moot.”

7. For these same reasons, in August 2006, the Board agreed to continue the stay until December 4, 2006, after Petitioner filed an Agreed Motion in which the parties notified the Board that a federal determination had not yet been issued and sought an extension of the stay. In its Order dated August 17, 2006, the Board observed that “the reasons for issuing the short-term stay originally ... likewise warrant the stay’s short-term extension now.” *See Commonwealth Edison Company v. IEPA*, PCB 04-215 (Aug. 17, 2006). The Board indicated that because of the policy interest underlying public disclosure, “absent especially compelling circumstances, the Board may be disinclined to further extend the stay.” *Id.* The Order then instructed that requests for additional extensions of the stay “must be directed to the Board and include a report on the status of the USEPA process and, as appropriate, a waiver of the Board’s decision deadline.” *Id.*

8. Mindful of the Board’s balancing between the policy interests underlying disclosure and the compelling judicial interests in avoiding duplicative and potentially conflicting state and federal decisions, ComEd hereby informs the Board based on information and belief that USEPA has retained an economic consulting firm as a contractor and is or will be asking the contractor to review ComEd’s CBI materials. USEPA further indicated that the contractor’s recommendation may be available to USEPA for use in its determination process as early as January 2007.

9. The reasons underlying the Board’s prior stay of this proceeding remain equally true at this time. USEPA is undertaking a review of identical materials under

substantially similar legal standards, and public release by USEPA of the documents at issue may render this appeal before the Board moot. USEPA has represented that its review is moving forward diligently. ComEd believes that a short-term extension of the stay in this matter for a period of 4 months remains in the interest of justice, given the recent advancements in the USEPA's decision-making process.

* * *

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 April 4, 2007.

Dated: December 19, 2006

COMMONWEALTH EDISON COMPANY

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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 as 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. On February 22, 2006, ComEd filed a motion to compel IEPA's answers to certain of its interrogatories and document requests. This matter was fully briefed by the parties.

16. 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.

17. 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.

18. Following the issuance of a stay, discovery in PCB 04-215 was suspended. Accordingly, the IPCB Hearing Officer has not ruled on ComEd's motion to compel.

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

20. On August 17, 2006, the Board issued an Order granting ComEd's Agreed Motion to Extend the Stay of PCB 04-215 until December 4, 2006.

21. The parties have continued to conduct scheduled status teleconferences with the IPCB Hearing Officer. A brief status teleconference took place on December 5, 2006.

22. Contemporaneously with this Status Report, ComEd is filing an updated waiver of deadline for Board action, which extends such deadline until September 26, 2007.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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Attorneys for Commonwealth Edison
Company

December 19, 2006

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

Pursuant to 35 Ill. Admin. Code §101.308(c)(2), Commonwealth Edison

Company hereby waives the statutory decision deadline for Board action in the above-captioned matter from March 26, 2007 to September 26, 2007.

Respectfully submitted,

Commonwealth Edison Company

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PROPOSED BOARD ORDER

For the reasons stated in its April 6, 2006 Order, the Board hereby grants Petitioner's
Motion to Extend the Stay in PCB 04-215. The stay is hereby extended until April 4, 2007.

IT IS SO ORDERED.

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Notice of Filing and Commonwealth Edison Company's Motion to Extend the Stay of PCB 04-215 by U.S. Mail on this 19th day of December, 2006 upon the following persons:

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
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