

ILLINOIS POLLUTION CONTROL BOARD

February 15, 2007

COMMONWEALTH EDISON COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 04-215
)	(Trade Secret Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by A.S. Moore):

On December 19, 2006, petitioner, Commonwealth Edison Company (ComEd), filed a motion to extend the stay previously granted by the Board in this trade secret appeal. ComEd seeks an extension of the stay through April 4, 2007. Respondent, the Illinois Environmental Protection Agency (IEPA), filed a response opposing the requested extension. For the reasons below, the Board denies ComEd's motion. In this order, the Board provides background on the case before discussing ComEd's motion, IEPA's response, and the Board's ruling.

BACKGROUND

On June 2, 2004, ComEd appealed an April 23, 2004 trade secret determination of IEPA under the Environmental Protection Act (Act) (415 ILCS 5 (2004)). The Board docketed the trade secret appeal as PCB 04-215 and, in a June 17, 2004 order, accepted the case for hearing. In the IEPA determination being appealed, IEPA denied ComEd's claim for trade secret protection of information that ComEd submitted to IEPA. IEPA made the determination after receiving Sierra Club's request, under Illinois' Freedom of Information Act (FOIA) (415 ILCS 140 (2004)), for a copy of ComEd's submittal.

ComEd maintains that the information it submitted to IEPA is entitled to trade secret status, exempt from public disclosure requirements under the Act. *See* 415 ILCS 5/7, 7.1 (2004). The information relates to six coal-fired power stations, all of which are in Illinois. The stations are formerly owned by ComEd and currently owned by Midwest Generation EME, LLC.¹ ComEd originally submitted the claimed information to the United States Environmental Protection Agency (USEPA) in response to USEPA's information request under Section 114 of the federal Clean Air Act (42 U.S.C. § 7414). Sierra Club also submitted a federal FOIA request to USEPA for the same claimed information. USEPA has been and is currently in the process of

¹ Midwest Generation EME, LLC (Midwest) has appealed a separate IEPA trade secret determination concerning some of the same information submitted to IEPA by ComEd. That pending Midwest appeal is docketed as PCB 04-216.

determining whether to exempt the materials claimed to be confidential business information from release under federal FOIA.

On July 13, 2004, IEPA filed the administrative record of its trade secret determination. On June 21, 2004, Sierra Club filed a motion to intervene in this trade secret appeal. IEPA supported Sierra Club's motion, but ComEd opposed intervention. In a July 7, 2005 order, after reviewing pleadings on the issue from the parties, the Board declined to consolidate this appeal with the related trade secret appeal Midwest Generation EME, LLC v. IEPA, PCB 04-216. In an August 18, 2005 order, the Board denied Sierra Club's motion to intervene, but ruled that Sierra Club could participate in this proceeding through hearing statement, public comment, and *amicus curiae* briefing.

On August 25, 2005, the hearing officer issued an order setting a discovery schedule. The hearing officer noted in orders of September 22, November 10, and December 21, 2005, that discovery was proceeding as scheduled. On February 8, 2006, the hearing officer granted an agreed motion to amend the discovery schedule. On February 22, 2006, ComEd filed a motion to compel IEPA's answers to certain interrogatories and document requests. On March 2, 2006, IEPA filed a response opposing the motion to compel. On March 8, 2006, the hearing officer issued a revised discovery schedule. On March 15, 2006, ComEd filed a motion for leave to file a reply to IEPA's response concerning the motion to compel, attaching the reply. On March 28, 2006, IEPA filed a response opposing ComEd's motion for leave. In March 2006, depositions were conducted.

In an April 6, 2006 order, the Board ruled on ComEd's first motion to stay this appeal based on the pending USEPA determination of confidentiality. ComEd sought to stay this proceeding before the Board until the USEPA process concluded. IEPA opposed the motion. The Board issued a short-term stay, staying this proceeding for 120 days or until August 4, 2006. With the issuance of the stay, discovery was suspended and the hearing officer reserved ruling on ComEd's motion to compel and related motion for leave.

On August 1 2006, ComEd filed an agreed motion to extend the original stay through December 4, 2006. The Board granted the agreed motion in an order of August 17, 2006. The case has not been to hearing and has not concluded discovery. On December 12, 2006, the hearing officer accepted the parties' proposed discovery schedule as follows: final interrogatories and final document requests must be served by February 28, 2007; and answers to final interrogatories and final document requests must be served by March 30, 2007.

As noted, ComEd filed a motion to further extend the stay on December 19, 2006, which the Board rules on today. The motion includes a status report and a waiver of the Board's statutory decision deadline. On December 20, 2006, IEPA filed a response opposing Midwest's motion.²

² The Board cites ComEd's motion to extend the stay as "Mot. at _", and IEPA's response as "Resp. at _."

ComEd has waived to September 26, 2007, the Board's deadline for deciding this appeal. The Board meeting before that deadline is currently scheduled for September 20, 2007. The hearing officer last held a status call with the parties on January 23, 2007.

The Board today, in separate orders, is likewise denying stay extensions in two other trade secret appeals involving claimed information that is also the subject of a confidentiality request pending before USEPA: Midwest Generation EME, LLC v. IEPA, PCB 04-185; and Midwest Generation EME, LLC v. IEPA, PCB 04-216.

DISCUSSION

ComEd Motion for Stay Extension

ComEd's motion for another extension of the stay (this time through April 4, 2007) reiterates that the Board and USEPA are simultaneously 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." Mot. at 2. The facts and claims at issue in the State and federal proceedings are "closely related," ComEd maintains. *Id.* According to the motion, these circumstances led ComEd to originally move the Board to stay this trade secret appeal, PCB 04-215, "pending the resolution of USEPA's determination." *Id.*

In the current motion, ComEd again emphasizes that the Board's April 6, 2006 order granting the initial short-term stay found the stay appropriate because:

[T]he 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 proceeding 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." Mot. at 2-3 (quoting Commonwealth Edison Company v. IEPA, PCB 04-215 (Apr. 6, 2006), citations omitted).

According to ComEd, the Board's August 17, 2006 order found that the reasons for granting the initial stay likewise warranted extending the stay until December 4, 2006. *Id.* at 3.

ComEd states in its current motion that USEPA has "retained an economic consulting firm as a contractor and is or will be asking the contractor to review ComEd's [claimed confidential business information] materials." Mot. at 3. According to the motion, USEPA further indicated that the contractor's recommendation "may be available to USEPA for use in its determination process as early as January 2007." *Id.* ComEd concludes that "given the recent advancements in the USEPA's decision-making process," the "the reasons underlying the Board's prior stay of this proceeding remain equally true at this time." *Id.* at 3-4.

IEPA Response

IEPA opposes ComEd's request for a stay extension. IEPA quotes from the Board's April 6, 2006, in which the Board originally granted a stay:

“The Board is mindful of the strong policy interest, evidenced in the [] Act, favoring public disclosure of environmental compliance information, particularly emission data.” The Board nonetheless granted a short-term [four] month stay, on the reasoning that “[t]he risk of prejudice to IEPA from a stay [of PCB 04-215] would be greatly diminished . . . by limiting the duration of the stay to a date-certain in the near future, rather than simply granting a stay “until resolution of the federal [confidential business information determination] process” as [ComEd] requests. Resp. at 1-2 (quoting Commonwealth Edison, PCB 04-215 (Apr. 6, 2006), citations omitted).

IEPA states that after the Board granted the initial stay, IEPA “acceded to an agreed motion for a short-term extension of the stay” based on new information from USEPA that USEPA “was likely to issue a final decision within a few months.” Resp. at 2. IEPA stresses, however, that when the Board granted the agreed motion, the Board reemphasized that the Act favors public disclosure of emission data and accordingly stated: “The Board therefore cautions the parties that, absent especially compelling circumstances, the Board may be disinclined to further extend the stay.” *Id.* (quoting Commonwealth Edison, PCB 04-215 (Aug. 17, 2006).

IEPA argues that “[n]o such ‘especially compelling circumstances’ have emerged to warrant further continuation of the stay.” Resp. at 2. IEPA asserts that despite USEPA’s stated expectations at the time of the agreed motion, USEPA has not issued a determination on the FOIA request “nor stated any date certain by which it will do so.” *Id.* IEPA maintains that USEPA’s act of retaining a contractor “more than two and a half years after receiving the initial FOIA request,” along with “vague statements” about when the contractor’s recommendations would arrive, after which USEPA’s decision process would “follow in an unspecified time frame,” do not amount to “especially compelling circumstances” to justify extending the stay. *Id.*

IEPA maintains that “in the interest of comity and efficiency,” IEPA, through the agreed motion, was “willing once to give USEPA the opportunity to promptly resolve this matter and potentially alleviate the need for parallel proceedings.” Resp. at 2-3. IEPA argues now, however, “with no end to USEPA’s decisionmaking process in sight,” extending the stay would contravene the Act’s strong policy interest in publicly disclosing environmental compliance information. *Id.* at 3.

Board Analysis

The Board’s procedural rules address motions for stays, providing: “Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed” 35 Ill. Adm. Code 101.514(a). The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” See People v. State Oil

Co., PCB 97-103 (May 15, 2003), *aff'd sub nom State Oil Co. v. PCB*, 822 N.E.2d 876 (2d Dist. 2004).

The Board acknowledges that some of the reasons for originally staying this trade secret appeal remain, such as avoiding the multiplicity of litigation and potentially conflicting determinations. Nor does IEPA disavow its earlier concession that USEPA's confidentiality determination would constitute persuasive authority for the Board here. Under the present circumstances, however, the reasons for extending the stay yet again are outweighed by the interest in making environmental compliance information publicly available under the Act. *See* 415 ILCS 5/7 (2004). ComEd's claimed information remains protected from public disclosure while this trade secret appeal is pending. Only by resuming this proceeding can the Board adjudicate whether IEPA properly determined that ComEd's claimed information is not entitled to trade secret protection.

The Board notes that it was well over a year ago, on September 23, 2005, that ComEd filed its first motion for stay based on the USEPA proceeding. The Board, by limiting the initial stay to four months, sought to avoid prejudice to IEPA, noting the Act's "strong policy interest . . . favoring public disclosure of environmental compliance information, particularly emission data." Commonwealth Edison, PCB 04-215, slip op. at 8 (Apr. 6, 2006).

In subsequently granting the agreed motion for a short-term extension of the original stay, the Board gave considerable weight to representations that a USEPA confidentiality determination was expected by early December 2006. Still, the Board cautioned the parties that "absent especially compelling circumstances, the Board may be disinclined to further extend the stay." Commonwealth Edison, PCB 04-215, slip op. at 3 (Aug. 17, 2006). The Board is so disinclined.

The Board finds that USEPA's retention of a consulting firm does not constitute "especially compelling circumstances" to justify extending the stay a second time and further delaying the public disclosure of environmental information that may not warrant trade secret protection. Unlike the agreed motion, ComEd's current motion is devoid of any estimate on when USEPA expects to issue its final confidentiality determination. Moreover, the Board can report that during the January 23, 2007 status call with the Board hearing officer, ComEd conveyed no information about whether any recommendations from the consultant, expected "as early as January 2007" (Mot. at 3), have actually arrived with USEPA. Accordingly, the Board denies ComEd's motion for extension of the stay.

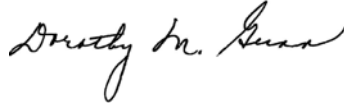
CONCLUSION

For the reasons above, the Board denies ComEd's motion to extend the stay of this trade secret appeal. By its terms, the stay ran through December 4, 2006. Consistent with today's order, the Board directs the hearing officer to proceed expeditiously to hearing. Additionally, the Board directs ComEd to promptly file with the Board a copy of the USEPA final confidentiality determination concerning ComEd's claimed information if that determination is issued while this appeal is pending. As necessary, ComEd may make the filing consistent with the procedures of

35 Ill. Adm. Code 130 for protecting information from disclosure.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 15, 2007, by a vote of 4-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board