

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD


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

NOTICE OF FILING

To:	Clerk of the Board	Paula Becker Wheeler
	Illinois Pollution Control Board	Assistant Attorney General
	100 West Randolph	69 West Washington, Suite 1800
	Suite 11-500	Chicago, Il. 60602
	Chicago, Illinois 60601	

Bradley P 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 **Joint Motion to Stay PCB 04-215, Status Report and Waiver of Decision Deadline for Board Action**, copies of which are herewith served upon you.



Roshna Balasubramanian

Date: October 25, 2007

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)

JOINT MOTION TO STAY PCB 04-215

Pursuant to 35 Ill. Admin. Code § 101.514, Petitioner Commonwealth Edison Company (“ComEd”) and Respondent Illinois Environmental Protection Agency (“IEPA”) jointly submit to the Illinois Pollution Control Board this Motion to Stay PCB 04-215 and hereby state as follows:

1. This matter comes before the Board on ComEd's petition for review of a trade secret denial that IEPA issued in April 2004. ComEd contends that two of its documents in IEPA's possession, a Continuing Property Record ("CPR") and a limited excerpt of Generating Availability Data System ("GADS") data, are trade secret and should not be available to the public under the Illinois Freedom of Information Act ("FOIA"), 5 ILCS § 140 et seq.

2. Contemporaneously with this proceeding, the United States Environmental Protection Agency (“USEPA”) is evaluating whether the very documents at issue in ComEd’s Board petition are entitled to confidential treatment under the federal Freedom of Information Act, 5 U.S.C. § 552.

3. Because the state and federal proceedings contemplate the same documents and involve substantially similar legal and factual issues, the Board ordered a stay of this proceeding, which, after one extension, was lifted on December 4, 2006. (See the

accompanying Status Report, filed contemporaneously with this motion, for the procedural history of this matter.)

4. ComEd was recently advised that USEPA has submitted the CPR and GADS excerpt to an independent contractor for review in connection with its FOIA determination (*see* Ex. A).

5. Accordingly, the parties jointly move the Board to stay PCB 04-215 for a period of six months.

6. A stay of PCB 04-215 is appropriate given that a substantially similar determination involving the same party in interest, the same FOIA requestor, and the same set of confidential articles is on-going at the USEPA level. Granting a stay would (1) avoid the costly and inefficient allocation of resources that necessarily is 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.

7. The factors supporting the Board's prior issuance of a stay have renewed force today. The parties are poised to engage in expensive and time-consuming expert discovery and motion practice as the hearing in this matter approaches. As such, ComEd and IEPA hereby request that this case be stayed for six months until April 25, 2008.

WHEREFORE, ComEd and IEPA respectfully request that, pursuant to 35 Ill. Admin. Code § 101.514, the IPCB grant the parties' Joint Motion to Stay PCB 04-215 for six months and stay this proceeding until April 25, 2008.

Dated: October 25, 2007

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Paula B. Wheeler

Paula Becker Wheeler
Assistant Attorney General
69 West Washington
Chicago, Illinois 60602
(312) 814-3772
(312) 814-2347 (fax)

COMMONWEALTH EDISON COMPANY

By: Byron F. Taylor

Byron F. Taylor
Roshna Balasubramanian
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One South Dearborn
Chicago, Illinois 60603
(312) 853-4717
(312) 853-7036 (fax)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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)	
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 a Continuing Property Record ("CPR") and a limited excerpt of 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."

2. ComEd submitted a courtesy copy of its Information Request response to the Illinois Environmental Protection Agency ("IEPA").

3. By letter dated February 26, 2004, IEPA requested that ComEd submit a statement of justification describing why the excerpts from the CPR and 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.

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

5. On April 28, 2004, IEPA denied ComEd's trade secret claims and stated that the company's Information Request responses were not exempt from disclosure under 35 Ill. Admin. Code Part 130.

6. On June 2, 2004, ComEd filed with the Illinois Pollution Control Board 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. The parties have conducted some fact discovery, however, several months of discovery remain, pursuant to the hearing officer's Scheduling Order in this matter.

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

8. 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."

11. In June 2006, pursuant to a second FOIA request from Sierra Club, ComEd submitted a statement of justification with respect to a larger set of GADS data; both statements of justification discuss the basis for claiming GADS data as protected CBI.

12. Because a federal determination had not yet been issued as of August 4, 2006, Petitioner and Respondent jointly moved the Board to extend the stay of this matter. The Board did so, extending the stay to December 4, 2006.

13. As of December 4, 2006, USEPA had not completed its review of ComEd's confidential business information claims. Accordingly, ComEd moved for a further extension of the stay. At that time, IEPA opposed a further extension, citing the public's interest in timely access to the information sought by the FOIA request. The Board declined to further stay the proceeding.

14. USEPA recently notified ComEd that ComEd's confidential articles have been submitted to an independent contractor for review (*see* Ex. A).

15. Pursuant to the Hearing Officer's Scheduling Order, the parties are currently engaged in discovery. Fact discovery has been exchanged, however, discovery will not close until January 14, 2008.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 

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

Attorneys for Commonwealth Edison
Company

October 25, 2007



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

BY CERTIFIED U.S. MAIL
RETURN RECEIPT REQUESTED
7001 0320 0006 1458 0003

September 11, 2007

Neena Hemmady, Manager of Environmental Services
Commonwealth Edison
Environmental Service Department, 3rd FL
3 Lincoln Center
Oak Brook Terrace, Illinois 60181

Re: Notification of Disclosure to U.S. EPA Contractor

Dear Ms. Hemmady:

This letter concerns Commonwealth Edison's confidential business information (CBI) claim for certain documents produced by Commonwealth Edison to U.S. Environmental Protection Agency (U.S. EPA) in response to U.S. EPA's issuance of a Clean Air Act Section 114 information request (Section 114 request) dated July 22, 2003. As you may know, U.S. EPA received a Freedom of Information Act request for Commonwealth Edison's documents produced in response to the Section 114 request, and Commonwealth Edison submitted information to substantiate its CBI claims with respect to the documents. U.S. EPA is now in the process of making a confidentiality determination for the documents claimed as CBI by Commonwealth Edison.

This letter is to notify you that U.S. EPA will be disclosing Commonwealth Edison's documents provided in response to the Section 114 information request to its contractor, Industrial Economics, Inc., for the purpose of assisting U.S. EPA in the confidentiality determination. The contract number is EP-w06-065. If you have any comments concerning this disclosure, you must provide your comments in writing to Mark J. Palermo, Associate Regional Counsel (C-14J), U.S. EPA, 77 W. Jackson Blvd., Chicago, Illinois, 60604, no later than 5 days after you receive this letter. If you have any questions, please call me at (312) 886-6082.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "M. J. Palermo".

Mark J. Palermo
Associate Regional Counsel

EXHIBIT

A

cc: Byron F. Taylor, Esq.
Sidley Austin LLP
One South Dearborn
Chicago, Illinois 60603
Certified Mail # 7001 0320 0006 1457 9991

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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 deadline for Board action in the above-captioned matter from March 20, 2008 to September 20, 2008.

Respectfully submitted,

Commonwealth Edison Company

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

Attorneys for Commonwealth Edison Company

October 25, 2007

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have filed electronically with the Illinois Pollution Control Board the Notice of Filing, Joint Motion to Extend Stay of PCB 04-215, Status Report and Waiver of Decision Deadline on this 25th day of October 2007 and have served same by U.S. Mail on this 25th day of October 2007 upon the following persons:

To: Clerk of the Board
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Paula Becker Wheeler
Assistant Attorney General
69 West Washington, Suite 1800
Chicago, Il. 60602

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

A handwritten signature in black ink, appearing to read "PB Wheeler", is written over a horizontal line.