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STATE OF ILLINOIS
Pollution Control Board

PCB No. 04-215
(Trade Secret Appeal)

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

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

herewith served upon you.



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CIII 4342370v 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF 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 for the Illinois Pollution Control Board's consideration this Motion to Stay PCB 04-215. The parties have entered into settlement discussions and at this time are endeavoring to resolve this dispute without the continued intervention of the Board. For this reason, and as more fully set forth below, the parties respectfully request a three-month stay of this matter.

1. This matter arose from 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, constitute trade secrets and should not be released to the public under the Illinois Freedom of Information Act ("FOIA"), 5 ILCS § 140 et seq.

2. Contemporaneously with this Board 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.

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3. The state and federal proceedings involve the same documents and substantially similar legal and factual issues. Recognizing the duplicative nature of these simultaneous proceedings and in the interests of parity and judicial economy, the Board ordered a stay of its 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. In October 2007, ComEd was advised that USEPA submitted the CPR and GADS excerpt to an independent contractor for review in connection with its FOIA determination. The parties so advised the Board, and in light of the developments in the USEPA proceeding, and the Board granted the parties' joint motion to stay the matter until April 5, 2008.

5. Currently, the parties are exchanging settlement ideas and are evaluating the possibilities for a resolution of this dispute. In light of the parties' mutual interest in reaching a negotiated settlement and the belief that settlement efforts will continue, the parties hereby request a stay of three months. Both ComEd and IEPA are mindful of the Board's direction that further stays of this proceeding should be requested judiciously. The Board has held previously that settlement efforts constitute a compelling justification for a time-limited stay. *See, e.g., Stephan Co. v. IEPA*, No. PCB 01-72, 2001 WL 118403 (Jan. 4, 2001); *People v. Old World Industries et al.*, No. PCB 97-168, 1997 WL 796642 (Dec. 18, 1997).

6. A stay would enable the parties to focus on settlement without simultaneously conducting supplemental discovery and preparing for a hearing. In so doing, the resources of the parties and the Board are conserved, and a good-faith attempt at settlement can receive the parties' full attention.

7. Additionally, a stay of PCB 04-215 is appropriate for the previously adopted reasons 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.

8. The factors supporting the Board's prior issuance of a stay remain true today. The parties are poised to engage in expensive and time-consuming motion practice as the hearing in this matter approaches.

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 three months from the date on which the Board issues such an Order. ComEd hereby incorporates by reference, as if fully set forth herein, its Waiver of Decision Deadline for Board Action, filed on May 23, 2008, which extends the statutory decision deadline for Board action in the above-captioned matter to March 19, 2009.

Dated: July 16, 2008

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Paula B. Wheeler
Asst. Atty. Gen.

COMMONWEALTH EDISON COMPANY

By: [Signature]

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STATE OF ILLINOIS
Pollution Control Board

Commonwealth Edison Company,)
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Respondent.)
)

PCB No. 04-215
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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")

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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. In October 2007, USEPA notified ComEd that ComEd's confidential articles have been submitted to an independent contractor for review (*see* Ex. A). The parties jointly sought a stay of the proceeding. The Board granted a stay until April 5, 2008.

15. Pursuant to the Hearing Officer's Scheduling Order, the parties engaged in fact discovery and conducted depositions of three IEPA witnesses. Additionally, the parties exchanged pre-hearing disclosures. Currently, the parties are expected to prepare an agreed scheduling order for the completion of supplemental discovery, including the submission of any expert witness reports.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 

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Attorneys for Commonwealth Edison
Company

July 16, 2008

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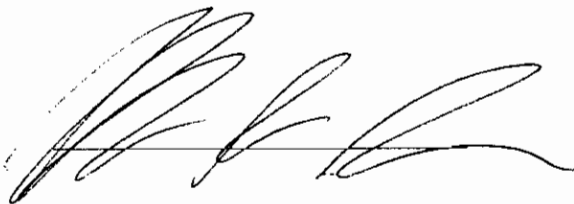
CERTIFICATE OF SERVICE

I, the undersigned, certify that I have filed with the Illinois Pollution Control Board the Notice of Filing, Joint Motion to Stay PCB 04-215, and Status Report on this 16th day of July 2008 and have served same by U.S. Mail on this 16th day of July 2008 upon the following persons:

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

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
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A handwritten signature in black ink, appearing to read "Paula Becker Wheeler", written over a horizontal line.

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