

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Commonwealth Edison Company,)	
Petitioner)	PCB 04-215
)	Trade Secret Appeal
v.)	
)	
Illinois Environmental Protection Agency,)	
Respondent)	

NOTICE OF FILING

To:	Dorothy Gunn, Clerk	Byron F. Taylor
	Illinois Pollution Control Board	Roshna Balasubramanian
	100 West Randolph	Sidley Austin Brown & Wood LLP
	Suite 11-500	Bank One Plaza
	Chicago, Illinois 60601	10 S. Dearborn
		Chicago, Illinois 60603

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

Please take notice that today we have filed with the Office of the Clerk of the Pollution Control Board Respondent's Memorandum in Opposition to Commonwealth Edison Company's Motion to Extend the Stay of PCB 04-215. A copy is herewith served upon the assigned Hearing Officer and the attorneys for the Petitioner, Commonwealth Edison Company.

Dated: Chicago, Illinois
December 20, 2006

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
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BY: 

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MEMORANDUM IN OPPOSITION TO COMMONWEALTH EDISON'S MOTION TO EXTEND THE STAY OF PCB 04-215

Preliminary Statement

Respondent Illinois Environmental Protection Agency ("IEPA") submits this memorandum in opposition to the motion by Petitioner Commonwealth Edison ("ComEd") to extend the now-expired stay of PCB 04-215. The Board, citing the "strong policy interest" favoring disclosure of environmental compliance information, expressed disinclination in its August decision to further continue the stay "absent especially compelling circumstances." No such circumstances are present here.

Facts

Respondent accepts ComEd's statement of facts solely with respect to the chronology of events set forth in it, and not with respect to any qualitative descriptions of those events.

Argument

In its initial decision granting a stay of these proceedings over Respondent's objection, the Board stated, "The Board is mindful of the strong policy interest, evidenced in the [Illinois Environmental Protection] Act, favoring public disclosure of environmental compliance information, particularly emission data." Commonwealth Edison Co. v. IEPA, PCB 04-215 (April 6, 2006), at 8. The Board nonetheless granted a short-term 3 month stay, on the reasoning that "[t]he risk of prejudice to IEPA from a stay of PCB 04-185 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 process' as Midwest requests." Id.

Prior to expiration of the 3-month stay, IEPA acceded to an agreed motion for a short-term extension of the stay based on new information it had received from USEPA Region 5 that USEPA was likely to issue a final decision within a few months. The Board, in granting the agreed motion, cited its earlier statement that the Act favors public disclosure of environmental compliance information, particularly emission data, and stated, "The Board therefore cautions the parties that, absent especially compelling circumstances, the Board may be disinclined to further extend the stay." Commonwealth Edison Co. v. IEPA, PCB 04-215 (August 17, 2006), at 3.

No such "especially compelling circumstances" have emerged to warrant further continuation of the stay. Notwithstanding its stated expectations at the time of the agreed motion, USEPA has not yet issued a decision on the pending Freedom of Information Act (FOIA) request, nor stated any date certain by which it will do so. In support of its motion, Petitioner cites only the fact that USEPA has, more than two and a half years after receiving the initial FOIA request, "has retained an economic consulting firm as a contractor and is or will be asking the contractor to review ComEd's CBI materials." (Petitioner's memorandum at ¶ 8) USEPA has told ComEd that report from the newly-hired consultant "may be available to USEPA for use in its determination process as early as January 2007," with such determinate process to follow in an unspecified time frame. Id.

These vague statements cannot, by any stretch, be considered "especially compelling circumstances" justifying continuation of the Board's temporary stay. IEPA, in the interest of comity and efficiency, was willing once to give USEPA the opportunity to promptly resolve this

matter and potentially alleviate the need for parallel proceedings. But at this juncture, with no end to USEPA's decisionmaking process in sight, a continued stay would contravene the "strong policy interest . . . favoring public disclosure of environmental compliance information," and perpetrate the prejudice that the Board sought to alleviate by granting a short-term rather than indefinite stay.

Conclusion


For the foregoing reasons, IEPA respectfully requests that ComEd's motion to extend the stay of PCB 04-215 be denied.

Dated: Chicago, Illinois
December 20, 2006

Respectfully submitted,

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental
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CERTIFICATE OF SERVICE

I hereby certify that I did on the 20th day of December, 2006 send by First Class Mail, with postage thereon fully paid and deposited into the possession of the United States Postal Service, a true and correct copy of the following instruments entitled Notice of Filing and Memorandum in Opposition to Commonwealth Edison Company's Motion to Extend the Stay of PCB 04-215, to:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Byron F. Taylor
Roshna Balasubramanian
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