

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

JOHNS MANVILLE, a Delaware corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 14-3
	)	(Citizen Suit)
ILLINOIS DEPARTMENT OF	)	
TRANSPORTATION,	)	
	)	
Respondent.	)	

**NOTICE OF FILING AND SERVICE**

To: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today, June 22, 2017, I have filed with the Clerk of the Pollution Control IDOT's Response to Third Party Commonwealth Edison's Motion to Quash or and have served each person listed on the attached service list with a copy of the same.

Respectfully Submitted,

By: s/ Evan J. McGinley  
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**CERTIFICATE OF SERVICE**

***Johns Manville v. Illinois Department of Transportation, PCB 14-3 (Citizens)***

I, EVAN J. MCGINLEY, do hereby certify that, today, June 22, 2017, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of IDOT's Response to Third Party Commonwealth Edison's Motion to Quash on each of the parties listed below:

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TRANSPORTATION,	)	
	)	
Respondent.	)	

**IDOT's RESPONSE TO THIRD PARTY COMMONWEALTH EDISON'S MOTION TO QUASH OR FOR PROTECTIVE ORDER**

NOW COMES Respondent, the ILLINOIS DEPARTMENT OF TRANSPORTATION ("IDOT") who hereby files its response to Third Party Commonwealth Edison's ("Com Ed") Motion to Quash or for a Protective Order in Response to IDOT's May 23, 2017 Subpoena *Duces Tecum*. In support of its Response, IDOT states as follows:

**STATEMENT OF FACTS**

On May 23, 2017, IDOT's counsel served a subpoena *duces tecum* on Commonwealth Edison. (A copy of the Subpoena is attached as Exhibit 1 to Com Ed's Motion.) IDOT's Subpoena sought three categories of documents from Com Ed, all of which generally sought the production of any documents held by Com Ed pertaining to any arrangements between Com Ed and Johns Manville, relative to payments made or to be made by Com Ed related to the Southwestern Site Area, and specifically, Sites 3 and 6.

Twenty-four days later, on June 16, 2017, outside counsel for Com Ed contacted IDOT's counsel to discuss the Subpoena. Later that same day, both parties' counsel held a conference call at which time Com Ed's counsel expressed its client's concerns regarding the possible breadth and duplication of information sought by IDOT through the Subpoena with

other written discovery between IDOT and Johns Manville. At no time during the June 16<sup>th</sup> conference call did Com Ed's counsel raise any issues with IDOT's counsel that the Subpoena sought documents which did not exist, that the geographic scope of documents sought through the Subpoena was too broad, or that the Subpoena sought documents that were covered under any form of privilege.

On June 19, 2017, IDOT's counsel sent Com Ed's counsel an email summarizing the substance of their June 16<sup>th</sup> conference call regarding Com Ed's concerns about the potential time frame for responding to IDOT's Subpoena and emphasizing that IDOT was:

[O]nly seeking documents that are related to your client's obligations under the 2007 Administrative Order on Consent ("AOC") that was entered into between Com Ed, Johns Manville, and USEPA. The documents that we are seeking would therefore have been generated after the AOC became effective (i.e., approximately late May/early June of 2007).

(A copy of this email and the emails referenced below is attached as Exhibit 2 to Com Ed's Motion.)

Later on June 19<sup>th</sup>, Com Ed's counsel responded to IDOT counsel's email, advising IDOT that they would be filing a motion for a protective order, due to Com Ed's apparent concerns that the documents sought through the Subpoena were purportedly "duplicative" of documents which IDOT had already sought production of from Johns Manville.

IDOT's counsel emailed Com Ed's counsel again on June 19<sup>th</sup>, writing: "the categories of documents that we are seeking to obtain from Com Ed are for documents that we have not as yet obtained from Johns Manville." IDOT's counsel also offered to extend the time for responding to the Subpoena. Com Ed's counsel, in turn, advised IDOT's counsel that it would discuss this option with its client.

On June 20, 2017, Com Ed's counsel emailed IDOT's counsel that it would be moving forward with the filing of a motion to quash or for a protective order.

That same day, IDOT's counsel emailed a response to Com Ed's counsel stating that "it was hoped that the subpoena would provide IDOT with additional information beyond what has already been obtained through discovery from Johns Manville." (Emphasis in original.)

On June 20, 2017, Com Ed filed their Motion without any supporting affidavits or verifications.

### **ARGUMENT**

#### **A. Legal Standards Governing Discovery and Motions to Quash**

Section 101.616(a) of the Board's procedural rules, 35 Ill. Adm. Code 101.616(a), provides that parties are entitled to seek discovery of any and all "relevant information and information calculated to lead to relevant information." Section 101.616(a) further notes that documents and other material that would be protected by recognized privileges are not discoverable. The Subpoena which IDOT served on Com Ed was issued for the purpose of obtaining the types of relevant information which the Board's rules permit parties to obtain. Such material - possibly including copies of any agreements that may exist between Johns Manville and Com Ed regarding division or reimbursement of costs between them and which relate to work at Sites 3 and 6 - is highly relevant to the issues which will be addressed by the parties at hearing.

Nothing set forth in Com Ed's Motion provides a valid basis for the company's request to quash the Subpoena, nor for the issuance by the Board of a protective order. As an initial matter, Com Ed has only supported its Motion with bald assertions that the Subpoena is "overbroad and burdensome" (Motion, p.4.) or seeks to impermissibly obtain documents that are covered by privilege. (Id., pp. 8-9.) Such assertions, without more, do not serve to support a motion for a protective order. Indeed, as the Board has recognized, a motion for a protective order needs to do more than simply claim that sought-after discovery is unduly burdensome;

rather, the movant must demonstrate why the discovery unduly burdensome. *KCBX Terminals Co. v. IEPA*, PCB 14-110 (April 8, 2014), \*4.

The relief sought by a motion for protective order with respect to the taking of discovery stands as an exception to the generally accepted notion that a party has liberal rights to obtain discovery. As Illinois courts have recognized, trial courts have the power to fashion protective orders, in order to give the trial court broad authority to “prevent abuses of the liberal discovery afforded under our discovery rules.” *May Centers, Inc. v. S. G. Adams Printing and Stationary Co.*, 153 Ill.App.3d 1018, 1021 (5th Dist. 1987). As further discussed by the court in *May Centers*, such “abuses” occur where requested discovery would lead to “unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.” *Id.* Notably, Com Ed’s motion makes no such allegations regarding the Subpoena. Furthermore, motions such as Com Ed’s Motion that are “unverified, unsubstantiated and conclusory” do not satisfy the burden for obtaining a protective order. *Willeford v. Toys "R" Us-Delaware, Inc.*, 385 Ill. App. 3d 265, 277 (2008).

**B. The Subpoena is Not Wholly Duplicative of Discovery Already Propounded by IDOT TO Johns Manville**

Com Ed alleges that the discovery which IDOT is seeking to obtain “duplicates discovery that has or could have occurred among the parties to this action.” (Motion, p.3.) Simply put, such is not the case. As the Board and the Hearing Officer are well aware, the upcoming hearing in this next phase of the case involves, among other questions, “the amount and reasonableness of JM’s costs for this work.” (Interim Opinion and Order, p. 22.) In line with this portion of the Board’s Order, IDOT has a right to obtain discovery regarding whether any of the costs which Johns Manville has to date incurred may have been offset by any payments to it by Com Ed. After all, Com Ed and Johns Manville are jointly and severally

liable under the AOC for the performance of the site investigation and removal action. (AOC, ¶II(6).) It is entirely possible that Com Ed has unique documents or records that pertain to the issues which will come before the Board at hearing. To date, Johns Manville has not produced any documents that related to this question; that does not mean that such documents do not exist, however. If such documents exist, IDOT has a right to have access to those documents, so that it may better defend itself at hearing and to analyze the claims which Johns Manville will be making for recovery of its costs from IDOT.

**C. IDOT's Subpoena is not an Attempt to Litigate the Issue of its Liability**

In Paragraph 11 of its Motion, Com Ed argues that the scope of the Subpoena represents some attempt to make "Com Ed's potential or actual liability . . . a litigated issue." Simply put, such is not the case. First, it should be noted that at no time prior to filing its Motion, did Com Ed ever raise this issue with IDOT. Had Com Ed raised the issue, IDOT would have advised Com Ed that for purposes of the Subpoena, "liability" simply referred to any possible liability or obligations that Com Ed might have to Johns Manville regarding the conduct of the work to be performed by both parties under the AOC or possible sharing or reimbursement of costs incurred in performing such work.

**D. Prior to Filing its Motion, Com Ed Never Raised any Concerns Regarding the Possible Geographic Scope of IDOT's Subpoena**

In Paragraph 12 of its Motion, Com Ed for the first time raises the issue about the possible breadth related to the geographic scope of IDOT's Subpoena was in its Motion. Had they raised this issue before filing their Motion, IDOT could have worked with Com Ed to address these apparent concerns.

However, Com Ed's concerns about the Subpoena "seek[ing] any 'agreements' between Com Ed and JM regarding cost sharing or reimbursement" (Motion, p.7, para. 12.)

are without merit. Such agreements, if they exist, are an entirely appropriate subject for discovery.

**E. Com Ed's Argument That its Motion Should be Granted to Protect it From Having to Produce Documents which Do Not Exist is Nonsensical**

It is unclear why Com Ed would need a protective order to shield it from having to produce documents which, according to Com Ed, do not exist. (Motion, pp. 7-8, para 13.) If the documents sought by IDOT's Subpoena do not exist, it would be entirely appropriate for Com Ed to simply respond to the Subpoena by saying "no such documents exist."

**F. Com Ed's Claims That its Motion Should be Granted to Protect it From Having to Produce Material Covered Under a Claim of Privilege Does Not Satisfy the Board's Standards for Granting Such Relief**

Com Ed claims that IDOT's Subpoena also compels it to produce material that is covered by various privileges. As the Board has noted when evaluating such claims in the past, "[i]t is well established that the 'mere assertion that a matter is protected by the attorney-client privilege is insufficient to prove the existence of that privilege.'" *KCBX Terminals*, \*6 (citing *Lake County Forest Preserve Dist. v. Neil Ostro*, PCCB 92-80, slip op. at 4-5 (Apr. 22, 1992).) Such claims of privilege must satisfy the seven factors for establishing such claims set forth by the Board in *IEPA v. Celotex Corp.*, PCB 79-145 (Dec. 6, 1984). Com Ed has taken no steps to show how its claims of privilege fit within the standards for such claims outlined in the Board's *Celotex* opinion. Accordingly, there is no basis for Com Ed the relief sought under its Motion, based on any claim of privilege.

**G. Com Ed is Not Entitled to Receive Costs or Fees for Responding to the Subpoena**

Com Ed relies on Section 2-1101 of the Code of Civil Procedure to support its claim that it is entitled to recoup its costs and attorneys' fees. (Motion, p. 9.) As an initial matter,

Section 2-1101 does not provide for attorney fees, only witness fees. 735 ILCS 5/2-1101. Such fees might be obtainable if there were allegations of attorney misconduct, but Com Ed makes no such allegations against IDOT.

The Board's procedural rules also address this issue. Section Rule 101.616(g) of the Board Rules, 35 Ill.Adm.Code 101.616(g), provides for the imposition of sanctions for improper discovery, but once again, Com Ed has not alleged that IDOT issued the Subpoena for an improper purpose.

WHEREFORE, Respondent, the Illinois Department of Transportation, requests that the Hearing Officer:

- 1) Deny Com Ed's Motion in its entirety; and,
- 2) Grant such other relief as the Board may find to be appropriate.

Respectfully Submitted,

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