

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>In the Matter Of:</b>	)	
	)	
<b>JOHNS MANVILLE,</b>	)	
	)	
<b>Complainant,</b>	)	<b>PCB No. 14-3</b>
	)	<b>(Citizens Enforcement)</b>
<b>v.</b>	)	
	)	
<b>ILLINOIS DEPARTMENT OF</b>	)	<b>Hearing Officer Halloran</b>
<b>TRANSPORTATION,</b>	)	
	)	
<b>Respondent.</b>	)	

**THIRD PARTY COMMONWEALTH EDISON COMPANY'S  
REPLY BRIEF IN SUPPORT OF ITS *IN CAMERA*  
APPLICATION FOR NON-DISCLOSURE AND PROTECTIVE ORDER  
REGARDING CONFIDENTIAL AND PRIVILEGED INFORMATION**

To: See Attached Service List

Please take note that today, October 6, 2017, I filed **Third Party Commonwealth Edison Company's Reply Brief In Support Of Its *In Camera* Application For Non-Disclosure and for Protective Order** in the above-referenced matter with the Clerk of the Illinois Pollution Control Board, a copy of which is attached hereto and which is hereby served upon you.

/s/ Gabrielle Sigel  
Gabrielle Sigel, ARDC #6186108  
Alexander J. Bandza, ARDC # 6312301  
JENNER & BLOCK LLP  
353 N. Clark Street  
Chicago, IL 60654  
Telephone: (312) 222-9350  
Facsimile: (312) 840-7758  
[gsigel@jenner.com](mailto:gsigel@jenner.com)  
[abandza@jenner.com](mailto:abandza@jenner.com)

**CERTIFICATE OF SERVICE**

I, GABRIELLE SIGEL, do hereby certify that on October 6, 2017, I caused to be served this **Notice of Filing** and its attached **Third Party Commonwealth Edison Company's Reply Brief In Support Of Its *In Camera* Application For Non-Disclosure and for Protective Order** by sending the documents via email to all persons listed below, addressed to each person's email address.

/s/ Gabrielle Sigel

Gabrielle Sigel

Evan J. McGinley  
Office of the Illinois Attorney General  
69 West Washington Street, Suite 1800  
Chicago, IL 60602  
E-mail: [emcginley@atg.state.il.us](mailto:emcginley@atg.state.il.us)

Matthew D. Dougherty  
Assistant Chief Counsel  
Illinois Department of Transportation  
Office of the Chief Counsel, Room 313  
2300 South Dirksen Parkway  
Springfield, IL 62764  
E-mail: [Matthew.Dougherty@illinois.gov](mailto:Matthew.Dougherty@illinois.gov)

Ellen O'Laughlin  
Office of Illinois Attorney General  
69 West Washington Street, Suite 1800  
Chicago, IL 60602  
E-mail: [eolaughlin@atg.state.il.us](mailto:eolaughlin@atg.state.il.us)

Illinois Pollution Control Board  
Brad Halloran, Hearing Officer  
James R. Thompson Center  
100 W. Randolph, Suite 11-500  
Chicago, IL 60601  
E-mail: [Brad.Halloran@illinois.gov](mailto:Brad.Halloran@illinois.gov)

Illinois Pollution Control Board  
Don Brown, Clerk of the Board  
James R. Thompson Center  
100 W. Randolph, Suite 11-500  
Chicago, IL 60601  
E-mail: [Don.Brown@illinois.gov](mailto:Don.Brown@illinois.gov)

Susan Brice  
Lauren J. Caisman  
161 North Clark Street, Suite 4300  
Chicago, Illinois 60601  
(312) 602-5079  
Email: [Susan.brice@bryancave.com](mailto:Susan.brice@bryancave.com)  
[Lauren.caisman@bryancave.com](mailto:Lauren.caisman@bryancave.com)

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>In the Matter of:</b>	)	
	)	
<b>JOHNS MANVILLE, a Delaware corporation,</b>	)	
	)	
<b>Complainant,</b>	)	<b>PCB No. 14-3</b>
	)	<b>(Citizens Enforcement)</b>
<b>v.</b>	)	
	)	
<b>ILLINOIS DEPARTMENT OF TRANSPORTATION</b>	)	<b>Hearing Officer Halloran</b>
	)	
<b>Respondent.</b>	)	

**THIRD PARTY COMMONWEALTH EDISON COMPANY'S  
REPLY BRIEF IN SUPPORT OF ITS *IN CAMERA*  
APPLICATION FOR NON-DISCLOSURE AND PROTECTIVE ORDER  
REGARDING CONFIDENTIAL AND PRIVILEGED INFORMATION**

On August 24, 2017, Commonwealth Edison Company (“ComEd”) filed its *In Camera* Application for Non-Disclosure and for Protective Order (“ComEd’s Application”). To clarify the procedural record as described in the Response filed by the Illinois Department of Transportation (“IDOT”), the procedures that ComEd used for submitting its Application for Board review were discussed with the parties and disclosed to the Hearing Officer before ComEd’s Application was filed. ComEd submitted its Application for *in camera* review pursuant to and based upon Section 7 of the Illinois Environmental Protection Act (“the Act”), Sections 101.614, 101.616(a), 101.616(d), and 101.622(d) of the General Rules of the Illinois Pollution Control Board (“the Board”) (35 Ill. Adm. Code 101.614, 101.616(a), 101.616(d) and 101.622(d)), Sections 130.400, *et seq.* of the Board’s rules regarding Identification And Protection Of Trade Secrets And Other Non-Disclosable Information (35 Ill. Adm. Code 130.400, *et seq.*) (the “Non-Disclosure Rules”), Illinois Supreme Court Rules, and Illinois common law. Particularly due to the nature of the materials for which protection from disclosure

was sought, ComEd's Application was submitted for *in camera* review by the Board. As acknowledged by IDOT, the procedures were set forth in the July 18, 2017 email between the parties (Exhibit 4 to ComEd's Application). (IDOT Response, p. 2.) ComEd's Application also was submitted pursuant to the Hearing Officer's July 24, 2017 Order.

ComEd notes that IDOT's Response largely relies on court decisions from jurisdictions outside of Illinois for its positions regarding the scope and applicability of the attorney-client privilege, attorney work product protection, and the joint defense/common interest privilege and protection. These cases do not support IDOT's position. For example, IDOT relied on the bankruptcy court's decision in *In re Megan-Racine Associates, Inc.*, 189 B.R. 562 (Bankr. N.D.N.Y. 1995), for its argument that the "joint defense/common interest privilege" cannot apply here. (IDOT Response, pp. 8-9.) However, the bankruptcy court clearly states that it is interpreting and applying *New York state law* in the context of the particular issues that must be addressed in the *bankruptcy process*. 189 B.R. at 570-71. In any case, the bankruptcy court recognized that the joint defense privilege applied and held that the joint defense privilege also extended to attorney work product materials. *Id.* at 573-75. Moreover, the bankruptcy court further held that, under New York law, attorney work product material in one litigation would be protected in a second litigation, as long as the two litigations are "*closely related* in parties or subject matter." *Id.* at 575 (emphasis in original). Thus, IDOT's reliance on the *In re Megan-Racine* decision does not undermine any claim for joint defense/common interest or attorney work product protections in this case, where the "close relationship" clearly exists.

Even IDOT's reliance on Illinois decisions is unavailing. IDOT cites *Janousek v. Slotky*, 2012 IL App (1st) 113432 (2012), ¶ 24, for the proposition that ComEd may not rely on an assertion of attorney-client privilege. (See IDOT Response, p. 7.) However, *Janousek* is not a

case interpreting the scope of attorney-client privilege with respect to an unrelated third party, as IDOT is here. Instead, in *Janousek*, the court determined that a former member of an LLC, who had a right to inspect records pursuant to the terms of the LLC, could not be precluded from obtaining those records. *Id.* at ¶¶ 24-25. The *Janousek* decision is clearly inapposite to IDOT's attempt to invade the attorney-client privilege when IDOT does not have any pre-existing right to documents, as the plaintiff did in *Janousek*.

The legal and factual bases for ComEd's Application are stated in that document and its attachments. ComEd agrees with IDOT that the Board's decision with respect to ComEd's Application, *i.e.*, whether ComEd need produce any of the Agreed Scope Documents (as defined in Exhibit 4 to the ComEd Application) will resolve ComEd's Motion to Quash or for Protective Order in Response to Subpoena *Duces Tecum* (filed on June 20, 2017), as well as any other request for documents or information from ComEd made by IDOT.

Therefore, for all the reasons set forth in ComEd's Application and above, ComEd respectfully requests that its *In Camera* Application for Non-Disclosure and Protective Order regarding Confidential and Privileged Information be granted.

Dated: October 6, 2017

Respectfully submitted,  
COMMONWEALTH EDISON COMPANY

By:           /s/ Gabrielle Sigel            
One of its attorneys

Gabrielle Sigel, ARDC #6186108  
Alexander J. Bandza, ARDC # 6312301  
Jenner & Block LLP  
353 North Clark Street  
Chicago, IL 60654  
Telephone: 312-222-9350  
Facsimile: 312-840-7758  
[gsigel@jenner.com](mailto:gsigel@jenner.com)  
[abandza@jenner.com](mailto:abandza@jenner.com)