

ILLINOIS POLLUTION CONTROL BOARD  
October 10, 1985

ILLINOIS POWER COMPANY )  
(Wood River Power Plant) )  
500 South 27th Street )  
Decatur, Illinois 62525 )  
 )  
Petitioner, )  
 )  
v. ) PCB 85-84  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board upon an October 3, 1985, motion for reconsideration filed on behalf of the Illinois Power Company (IPC) to which the Illinois Environmental Protection Agency (Agency) responded on October 9, 1985. IPC filed a motion for leave to reply and a reply on October 10, 1985. The motion for leave is hereby granted. IPC requests that the Board reconsider its September 20, 1985 Order denying IPC's September 6, 1985, motion for summary judgment. In that Order the Board based its decision on the hearing requirement for permit appeals pursuant to Section 40(a)(1) of the Environmental Protection Act (Act). IPC characterizes that basis as a "non sequitur". However, though the motion was not particularly clear regarding the relief requested, the Board construed that motion as requesting the Board to order the Agency to issue the permit without the contested conditions. If so, holding a hearing would become a useless act, contrary to the legislative intent expressed in mandating such a hearing.

The motion for reconsideration does not clarify the relief requested. The Board could construe the motion as requesting the Board to simply remand the proceeding to the Agency to issue the permit in whatever form it deems appropriate using proper procedures. However, that course of action appears to be precluded because the Agency then would have been given "the identical options to consider as permit conditions which petitioner originally contested as objectionable," and, therefore, the Board would have failed to adjudicate the controversy. Illinois Power Co. v. IPCB, 426 N.E.2d 1258, 1261 (1981).

At the heart of IPC's request for summary judgment is its concern that the Agency, through its alleged disregard of state and federal law, has deprived IPC of the ability to adequately


prepare for hearing by reason of the Agency's failure to respond to IPC's written comments during the permit review proceeding before the Agency or otherwise to explain its rationale for the contested conditions when the permit was issued. IPC further argues that unless the Board decides those issues now, the Board will be contributing to the due process violations. However, IPC should be able to determine the Agency's position on the substance of the contested conditions through the discovery and prehearing process, thereby avoiding any prejudice at hearing. In its reply IPC indicates that this procedure may somehow shift the burden of proof to it. The Board does not understand this argument. The burden of proof cannot be altered by the discovery process. Thus, the Board does not believe that the issues raised by IPC need be decided at this time and since those issues present questions of both law and fact, they are best decided after hearing.

The Board notes that a decision is due in this matter on October 16, 1985, and that hearing has not been scheduled due to an administrative oversight. Obviously, hearing cannot be properly held in a timely manner, and as of that date IPC will be entitled to an appellate court order pursuant to Sections 40(a)(3) and 41(d) of the Act. The Board regrets that this has occurred. However, the Board will make every effort to reach a final determination in this matter as expeditiously as possible.

The Board hereby affirms its September 20, 1985 Order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10<sup>th</sup> day of October, 1985 by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board