ILLINOIS POLLUTION CONTROL BOARD
October 12, 1984

ILLINOIS POWER COMPANY (VERMILLION UNITS 1 AND 2), Petitioner,	)	
v.	)	PCB 84-89
	)	PCB 84-90
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(Consolidated)

SHELDON A ZABEL (SCHIFF, HARDIN AND WAITE) APPEARED ON BEHALF OF PETITIONER;

GREG R. SEIDOR APPEARED ON BEHALF OF RESPONDENT.

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

On July 13, 1984, the petitioner, Illinois Power Company (IPC), filed a petition captioned "Petition to Appeal Conditions of Air Operating Permit" and another petition captioned "Petition to Appeal Denial of Air Operating Permit." These petitions were accepted and consolidated for hearing on July 19, 1984. On August 9, 1984, the Agency filed the record of its decision in these cases with the Clerk of the Board.

A hearing was held on October 3, 1983, at which time, IPC entered what it characterized as a "special appearance" for the purpose of objecting to the holding of the hearing as "illegal and without effect." (R. 5.) The 40 page transcript of this hearing contains the arguments of IPC and the respondent, the Illinois Environmental Protection Agency (Agency), as to the effect of a deficiency in the notice of hearing in a permit appeal. Beyond this transcript, the record in this proceeding contains only the original petitions and the Agency's record of decision. Both parties declined to file briefs. (R. 35-39.)

Given the unusual posture of this proceeding, the Board cannot reach the substance of these appeals without first addressing the procedural issue raised by the petitioner. First, the position taken by IPC at hearing requires the Board to consider whether there was a deficiency in the notice of the hearing and, if so, what effect this deficiency has on the proceeding. Second, the Board must decide who carries the burden of proof in the absence of any argument or evidence on the merits at hearing.

I. Deficiency in the Notice of Hearing

A. Was There a Deficiency in the Notice of Hearing?

IPC argues that both Section 40 of the Illinois Environmental Protection Act (Act) and Section 105.102(a)(5) of the Board's Procedural Rules require that notice of hearing in a permit appeal be given at least 21 days prior to the date of hearing. In this case, an error in the Board's Clerk's Office resulted in the Board only becoming aware that a hearing had not been scheduled on September 21, 1984. Knowing that a decision was due by October 15, 1984* pursuant to the 90 day limitation in Section 40 of the Act, the Board immediately appointed a Hearing Officer and instructed him to schedule a hearing and inform the parties of the date. The Hearing Officer's order setting this matter for hearing was issued on September 28, 1984 and the Hearing was held on October 3, 1984. The 21 day notice requirement, if applicable, was not met.

The Agency points out, and IPC admits, that the notice prescribed in Section 40 of the Act is notice directed to any person in the county where the facility in question is located who has requested to be placed on a notice list and to members of the General Assembly.** IPC also admits that it had actual notice of the hearing on September 28, 1984. IPC, nonetheless, contends that it is the right of the parties in a permit appeal to rely on this 21 day notice of hearing to the public. The Board disagrees. Contrary to IPC's contention, the statutory language clearly intended this notice for the benefit of the interested public who might wish to attend and participate in the hearing pursuant to Section 32 of the Act. IPC lacks standing to raise this issue as it alleges no "injury in fact," the test for standing required by both Illinois and Federal Courts. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). Also see Davis, Administrative Law Text, §§22.05 (1972). In a case involving a challenge to an administrative requirement asserted to be unauthorized by statute, the U.S. Supreme Court ruled:

> "Respondents to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of law." Perkin's v. Lukens Steel Co., 306 U.S. 118, at 137-38 (1937).

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*This date is the 90th day after the filing of the petition calculated pursuant to 35 Ill. Adm. Code 101.105.

**There are no persons who have requested to be placed on a notice list for this proceeding.

Failure to comply with these provisions may be raised by members of the public whose legally protected interest is at stake. However, no member of the public has raised this issue, and IPC is not purporting to represent the public interest by doing so. This provision cannot be relied upon as legal notice to a party who had actual notice of the hearing. In a permit appeal, the petitioner initiates the proceeding and thus has constructive knowledge from day one that a hearing will be held within 90 days. The petitioner here also received a hand-delivered notice of the hearing date 6 days in advance of hearing.

On the other hand, Section 105.102(a)(5) references the Part 103 "Notice of Hearing" provision, Section 103.125, which specifically requires the Hearing Officer to give notice of the hearing to the parties at least 21 days before the hearing. The Board agrees that the notice of the date of the hearing in this case did not comply with Section 103.125(c) of the Board's Procedural Rules.

B. What is the Effect of a Deficiency in the Notice of Hearing?

Although the notice of the date of the hearing did not comply with Section 103.125(c), it does not necessarily follow that the hearing was "illegal and without effect" as IPC argues. In fact, subsection (e) of that same Procedural Rule explicitly addresses the effect of a failure to comply with the notice of hearing provisions and prescribes a remedy for persons who can demonstrate that they were prejudiced by non-compliance with the rule, i.e. the Hearing Officer is authorized to postpone the hearing.

In this case, the Hearing Officer repeatedly asked IPC to explain how it had been prejudiced by this deficiency in the notice. (R. 11, 14, 16.) IPC consistently refused to cite any actual prejudice. Instead, IPC relied on the arguments, alternatively, that the question of prejucice is "irrelevant" and that prejudice must be presumed from the failure of the notice to comply with the rule. In regard to this first argument, a showing of prejudice is clearly relevant. Both the explicit language of the rule on which IPC relies and the dictates of common sense require that some actual harm or disadvantage resulting from a procedural error be shown before the government and the parties are put to the expense of additional hearings. IPC's alternative argument, i.e. that prejudice must be presumed, also disregards the language of the rule itself. Section 103.125(e) makes it clear that technical errors in the notice of hearing in and of themselves, are not intended to be dispositive of the case. Rather, upon a showing of prejudice, such errors may warrant the scheduling of an additional hearing.

In a case involving a similar question, the Third District Appellate Court upheld the validity of a permit appeal hearing

despite a deficiency in the Environmental Protection Act notice requirements. In Mathers v. Illinois Pollution Control Board, 438 N.E. 2d 213 (1982), the Court said:

> "The Board found, and we agree, that any deficiency in notice of the November hearing was cured during the rehearing process" at p.218

In Mathers, the rehearing took place after the 90 day period had elapsed and it was members of the public and the General Assembly who argued that the public notice procedures were defective; yet even in these more prejudicial circumstances the Court rejected the argument that the cure was defective. Although the facts in Mathers are somewhat different, this ruling indicates an appreciation by the Court that where a procedural defect can be remedied, we need not reach the extreme result of irremediably invalidating the hearing.

In this case, any error to the detriment of the petitioner was correctable. The Hearing Officer hypothetically offered the option of postponing the hearing. IPC replied that this would either be ineffective because the 90 days would expire, or alternatively, it would require IPC to waive its right to a decision in 90 days. (R. 29-30.) The Board notes that the hearing could have been postponed for as much as a week, if IPC had so requested, without jeopardizing the 90 day decision deadline. Thus, the postponement of the hearing could have provided an effective remedy to any actual prejudice in regard to preparation time; yet IPC chose not to take up the Hearing Officer's offer on this point.

The shortening of a notice period, whether purposeful or inadvertant, can be prejudicial error in certain cases. However, that question is not presented here. Rather, IPC's position on this point has forced the Board to confront this question in its baldest form: i.e. Does administrative error resulting in a failure to comply with the precise language of the procedural rules, require an irremediable invalidation of the hearing regardless of any indication of prejudice to the public or parties? An affirmative answer to this question would encourage legal gamesmanship and frustrate the Board's ability to provide the permit review envisioned by the Act in numerous cases. Furthermore, in a situation such as this where a party seeks to rely on a procedural error to obtain a permit by operation of law, the substantive reasons for rejecting IPC's highly technical argument are all the more forceful.

There is no support in the legislative history of the Act for the position that non-prejudical procedural error can be relied upon to trigger the default issuance of a permit. Rather, as the 5th District Appellate Court noted in Illinois Power Company v. Illinois Pollution Control Board 112 Ill. App. 3d 457

(1983), "the 90 day requirement in Section 40(a) evinces legislative concern with bureaucratic delay. It was not the intent of the General Assembly to create a license to pollute." The Board's actions in this case in scheduling a hearing and being prepared to make its decision within 90 days demonstrate that this is not a case of "bureaucratic delay." Rather, it is simply a case of the rare administrative error that will inevitably occur when an agency handles a large volume of cases.

This situation is clearly distinguishable from the "90-day" situations previously reviewed by the Appellate Courts. In Marquette Cement Manufacturing Company v. Illinois Pollution Control Board, 84 Ill. App. 3d 434 (1980) the petitioner was denied its statutory right in a hearing within the 90 day statutory period. The Court found that the petitioner had a right to both a hearing and a decision within 90 days by statute, and could not be forced to waive the decision period in order to get a hearing. The lack of a hearing was clearly prejudicial to the petitioner. In contrast this case does not involve an attempt to circumvent either the hearing, the decision period, or any other statutory right of the petitioner. In fact, upon discovering that an administrative error had occurred in scheduling the hearing, the Board did everything within its power to accomplish the purposes of the Act while preserving the rights of the petitioner by making an effective remedy available consistent with the statute and the Procedural Rules. Petitioner has rejected this remedy.

Illinois Power Company v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, 112 Ill. App. 3d 457 (1983) also presented a different fact situation. In that case, the Board failed to make a decision within 90 days on an NPDES permit because it interpreted the statutory decision period as being inapplicable to these permits which comply with the federal Clean Water Act. The Court disagreed with the Board on this interpretation and found that the failure to act within 90 days had triggered default permit issuance. This case does not involve a failure to act within 90 days and thus the Illinois Power decision has no bearing on it.

II. Who Bears the Burden of Proof?

The Board's substantive record in this case consists solely of the Petition and the record of the Agency's decision. This places the Board in the position of having to review the questions posed in the Petition with very little guidance from the parties as to the nature of the factual and legal dispute and with no probing of the allegations. This is something the Board has neither the staff nor the authority to do. Nor would this be fair to the parties. These cases involve the review of Agency decisions, not the remaking of the decisions on the basis of a "cold" and unprobed record.

To determine how to proceed in this situation reference must be made to the statutory framework for Board review of permit appeals as prescribed in Section 40(a) of the Act. Section 40(a)(1) states that the Agency is to appear as a respondent at the hearing and that the burden of proof is on the petitioner. The question presented is what is IPC's burden of proof and has it carried it in this proceeding. The Agency argues that it has not, stating that IPC bears the "burden of going forward" and demonstrating why the permit decisions made by the Agency were invalid. (R. 37.)

Although involving a significantly different procedural posture, Marquette Cement (supra) offers some guidance on the burden of proof in permit appeals. That case involved a question of the sufficiency of the petition under what was then Section 502(a)(2)(iv) of the Board's Procedural Rules (35 Ill. Adm. Code 105.102(a)(2)(D)). The Court found that the Petition contained supporting material sufficient to satisfy Marquette's initial burden of production. However, once the Agency had submitted additional information indicating possible violations, the burden shifted back to the Petitioner to challenge the accuracy and reliability of that information. The rule that the burden shifts back to the petitioner once the respondent has submitted its initial case is supported by both the case law and legal authorities. Mathews v. Christoff, 162 N.E. 2d 587 (1959); Arrington v. Walter E. Heller Intern. Corp., 333 N.E. 2d 50 (1975); Jones On Evidence, Gard (1972), Section 5.2. In the Marquette Cement case, the Petitioner did not have an opportunity for a hearing to carry its ultimate burden (within the 90 days), and, thus, the Court found the Board could not properly rule on the merits.

In this case an opportunity for hearing was provided within 90 days and the petitioner appeared at that hearing. But, purporting to appear specially*, the petitioner declined to present any argument or evidence on the merits. In contrast, the Agency submitted its record of decision, consisting of facts and figures which demonstrate the possibility that violations may occur. Following the reasoning in Marquette Cement, the Board must

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*The Board finds that a special appearance was not available to the petitioner who itself initiated the proceeding before the Board by the filing of the petition and therefore is not in a position to object to the jurisdiction of the Board. Section 2-301(a) of the Illinois Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 2-301) provides that a special appearance may be made only prior to filing any other pleading or motion and only to object to the jurisdiction of the court. It also provides that every appearance not in compliance with the requirements of a special appearance is a general appearance. The Board has no other mechanism for allowing special appearances.

conclude that while IPC may have carried its initial burden of production, it failed to carry its ultimate burden of demonstrating the invalidity of the Agency's decision. Therefore, the Agency's determinations on both permits must stand.

This Opinion constitutes the Board's findings of fact and conclusions of law in this proceeding.

ORDER

1. The Illinois Environmental Protection Agency's June 8, 1984 denial of Permit Application No. 73020063 for IPC's Vermillion Stations - Unit No. 2 is hereby affirmed. (PCB 84-90.)

2. The Illinois Environmental Protection Agency's June 8, 1984 grant of Permit No. 183814AAA with conditions for IPC's Vermillion Power Plant - Unit No. 1 is hereby affirmed. (PCB 84-89.)

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 12th day of October, 1984 by a vote of 4-2, Board Members J. Anderson and B. Forcade dissenting.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board