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JUN 22 2016

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

June 22, 2016

JOHNS MANVILLE,)	
)	
Petitioner,)	
)	
v.)	PCB 14-13
)	(Enforcement)
ILLINOIS DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Respondent.)	

HEARING OFFICER ORDER



ORIGINAL

On June 15, 2016, the Illinois Department of Transportation (IDOT) filed two notifications of service for subpoenas of Johns Manville's (JM) witnesses Dr. Tatsuji Ebihara and Mr. Douglas Dorgan (IDOT Supboena). The subpoenas require Dr. Ebihara and Mr. Dorgan appear at the above-captioned hearing on June 23, 2016. *Id.* JM filed a motion to quash subpoenas on June 17, 2016. (Mot. to Quash). On June 20, 2016, IDOT filed its response to JM's motion to quash (IDOT Resp.).

This order first summarizes each filing and provides a ruling on the motion.

Summary of JM's Motion

JM argues first that IDOT improperly served the subpoenas on JM's counsel instead of Dr. Ebihara and Mr. Dorgan. Mot. to Quash 2. JM also contends that service occurred on June 15, 2016, for a hearing set to resume on June 23, 2016, contrary to the mandatory 10 days or greater service to appearance time frame. *Id.*

The second argument made by JM regards Mr. Dorgan's subpoena only. Allowing the subpoena to stand would be an abuse of discretion and prejudicial to JM if Mr. Dorgan were to appear at the June 23, 2016 hearing because Mr. Dorgan was not disclosed on IDOT's witness list and has already been cross-examined by IDOT during JM's case-in-chief. *Id.* at 3-4. JM asserts that IDOT's subpoena of Mr. Dorgan contravenes the Hearing Officer's May 5, 2016, order that all witnesses were to be identified by May 17, 2016. *Id.* at 3.

Lastly, JM maintains that allowing IDOT to call Dr. Ebihara and Mr. Dorgan would unduly delay the proceeding and add only cumulative testimony to the record. *Id.* at 4. JM argues that both witnesses have been cross-examined and that the subpoenas are an attempt by IDOT to "co-opt" the witnesses for its counsel's use. *Id.* Additionally, JM characterizes Dr. Ebihara as a fact witness and had not planned for him to be present when the hearing resumes on June 23 because of the limited nature of his testimony. *Id.* at 4-5.

Summary of IDOT's Response

IDOT responds that it needs to call Mr. Ebihara and Mr. Dorgan because JM reneged on certain exhibit stipulations. IDOT Resp. 1-2. IDOT claims the stipulations were designed to promote efficiency and that in reliance on them IDOT did not object to JM's use of stipulated exhibits during its case-in-chief. *Id.* at 2. Because of JM's change of position, IDOT continues, IDOT is forced to elicit testimony to move even stipulated exhibits into evidence. *Id.* at 3. Consequently, IDOT seeks to subpoena Mr. Dorgan because it intends to rely on documents used in Mr. Dorgan's expert report. *Id.* Similarly, IDOT asserts that Mr. Ebihara must be called so he may provide a foundation for the admission of certain environmental reports prepared on behalf of JM. *Id.* IDOT asserts that any delay in the proceedings is attributable to JM's reversal on the nature of the exhibit stipulations. *Id.* at 4.

Discussion and Ruling

Given the parties' apparent misunderstanding about the scope of the exhibit stipulations and the time constraints in this matter, I find that service of the subpoenas on JM's counsel rather than Mr. Dorgan and Dr. Ebihara, while arguably misdirected and untimely, is not grounds for barring IDOT from calling Mr. Dorgan and Dr. Ebihara for the limited purpose of moving exhibits into evidence. Further, JM did not object to IDOT's service of subpoenas on these two witnesses before the hearing commenced in May 2016. I decline to quash the subpoenas as improperly served and untimely.

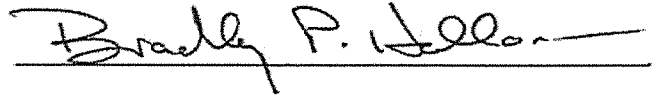
Nor do I find the subpoenas otherwise improper. The hearing in this matter was continued on record at the close of hearing on May 25, 2016 to June 23, 2016. At that time, an issue arose regarding the prior stipulations between the parties regarding exhibits. I issued an order on June 21, 2016, addressing those issues and in part, requiring IDOT to call or recall witnesses as necessary to offer certain exhibits into evidence. Order at 6-7. Under these circumstances, IDOT must be permitted to call Mr. Dorgan and Dr. Ebihara, for the narrow purpose of moving exhibits into evidence.

As noted in my June 21, 2016, order, any additional witnesses, including recalling witnesses and re-opening direct and cross-examination, will be for the limited purpose of admitting exhibits into the record; further examination on other subjects—whether previously raised with the witnesses or not—will not be permitted. I also stated that this hearing will regardless close no later than June 24, 2016. Order at 7.

JM's motion to quash is denied.

The parties will note that the hearing on June 23, 2016, will commence in room 9-31 at the James R. Thompson Center, 100 W. Randolph Street, Chicago, Illinois, 60601. If needed, the hearing will be continued on record at the close of the hearing on June 23, 2016, and commenced on June 24, 2016 in Room 2-25 at the James R. Thompson Center, 100 W. Randolph, Chicago, Illinois 60601.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

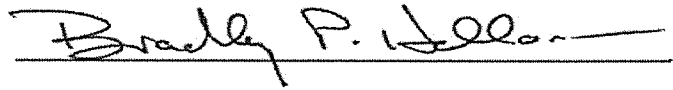
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed and mailed, first class, on June 22, 2016, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on June 22, 2016:

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
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Chicago, Illinois 60601

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran
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@ Consents to electronic service

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