

ILLINOIS POLLUTION CONTROL BOARD  
October 29, 1987

IN THE MATTER OF: )  
 )  
PROPOSED SITE SPECIFIC WATER )  
POLLUTION RULES AND REGULATIONS ) R81-19  
APPLICABLE TO CITIZENS UTILITIES )

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a motion to issue subpoena duces tecum, filed October 22, 1987, by the Illinois Environmental Protection Agency (Agency). On October 23, 1987, petitioner Citizens Utilities Company of Illinois (Citizens) filed objections to the motion and an alternative motion to quash. The Agency seeks to subpoena Thomas Stack, Assistant Chief of the Rate Design Section of the Illinois Commerce Commission (ICC), to speak to the issue of apportioning the burden of rate increases over given service areas. The motion for subpoena is directed to the Hearing Officer, but asks that it be forwarded to the Board if necessary. The Hearing Officer has referred the motion to the Board.

The instant petition for site-specific water pollution regulations was filed on June 12, 1981. Since that time, numerous hearings have been held, and the case has been appealed to the Appellate Court, which remanded the proceeding. In order to avoid any further appeal before the conclusion of this rulemaking, the Board wishes to respond to the arguments raised by Citizens in opposition to the issuance of the requested subpoena.

Citizens first objects to the issuance of the subpoena on the grounds that the Hearing Officer does not have authority to issue the subpoena. Citizens contends that because 35 Ill. Adm. Code 103.163(a) states that subpoenas are to be issued "upon timely motion to the Board", all motions by parties must be directed to the Board and not to the Hearing Officer. However, Section 103.163(a) applies to enforcement proceedings. Regulatory proceedings such as the instant case are governed by 35 Ill. Adm. Code 102.140, which provides that the Board or the Hearing Officer may issue subpoenas which conform to the requirements of Section 103.163(b) and (c). These subsections deal with the form of a subpoena and the authority to quash or modify a subpoena. The Board feels that Sections 102.140 and 103.163(b) and (c) give the Hearing Officer authority to issue subpoenas and that motions for issuance of subpoena may be directed to the Hearing Officer. The Board emphasizes, however, that it will issue the subpoena in the instant case pursuant to

its own authority, not through the Hearing Officer's power. Ill. Rev. Stat. 1985, ch. 111<sup>1/2</sup>, par. 1005(e).

Citizens also argues that: (1) the motion is untimely and foreclosed because the Agency has not sought to subpoena Mr. Stack at previous hearings; and (2) the motion for subpoena is irrelevant because any deficiency in the record on economic impact can only be satisfied by additional study by the Department of Energy and Natural Resources (DENR), not by evidence presented by the Agency. The Board finds that these arguments were rejected in the Board's April 10, 1986 Order granting the Agency's motion for interrogatories. In that Order, the Board concluded that the entire burden of proof as to economic impact is not on DENR. The Board also noted that the record is as inadequate today as it was prior to the Appellate Court's remand. The Board finds that the conclusions of the April 10, 1986 Order are equally applicable to the instant proceedings.

Finally, Citizens contends that the motion for subpoena is improper. Citizens asserts that: (1) Mr. Stack, a staff member of the ICC, cannot speak for the ICC; (2) it is improper to call as a witness another regulatory agency having jurisdiction over Citizens; and (3) to require Mr. Stack to testify on rate matters currently pending before the ICC could prejudice Citizens. The Board agrees that Mr. Stack cannot testify to any future actions of the ICC, or to his opinion on any such future actions. However, the Board feels that past practices of the ICC in apportioning rate increases are relevant to this proceeding, and that Mr. Stack is competent to testify to these matters.

For these reasons, the Clerk of the Board is directed to issue the requested subpoena.

IT IS SO ORDERED.

R. Flemal abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 30th day of October, 1987, by a vote of 6-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board