ILLINOIS POLLUTION CONTROL BOARD
July 3, 1990

CITIZENS UTILITIES COMPANY OF ILLINOIS,	)	
Petitioner,	)	
v.	)	PCB 88-151
	)	(Variance)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on an April 10, 1990 Motion for Reconsideration filed by Citizens Utilities Company of Illinois ("Citizens"). On May 18, 1990, the Illinois Environmental Protection Agency ("Agency") filed a Response to Motion for Reconsideration. On June 1, 1990, Citizens filed a Reply to Response to Motion for Reconsideration. On June 13, 1990, the Agency filed its Response to Citizens' Reply. On June 19, 1990, Citizens filed a Motion to Strike Agency Response to Reply and Verification.

The Board will first address the June 13 and June 19, 1990 filings. In its Motion to Strike, Citizens states that the Agency's Response to Citizens' Reply was filed without leave of the Board and that responses to replies are not provided for in 35 Ill. Adm. Code 101.246. The Motion to Strike also contains Citizens' reply to the Agency's Response to Citizens' Reply. At the outset, the Board notes that the Agency's time to respond to Citizens' Motion to Strike has not yet expired, and that the Board's procedural rules state that it will not grant a motion before the expiration of the response period. 35 Ill. Adm. Code 101.241(b). The Board, however, finds that deferring ruling on Citizens' Motion to Strike would result in undue delay, and hereby grants the motion for the reasons cited therein. The Board, however, will not consider Citizens' other assertions in the Motion to Strike in light of the fact that it is striking the Agency's Response to Citizens' Reply.

With regard to the Motion for Reconsideration, Citizens requests the Board to reconsider its March 8, 1990 Opinion and Order denying Citizens' Petition for Variance. Citizens makes numerous arguments to support this motion. The Board will address only some of the arguments in light of the fact that it

has adequately responded to many of the same arguments in its March 8, 1990 Opinion and Order.

First, Citizens continues to argue that, contrary to the Agency's assertions, the Board is treating it differently from other radium variance petitioners. In support of this argument, Citizens cites to numerous radium variance cases where the Board granted relief. First, the Board notes that it is not persuaded by Citizens' attempts to cast the records and Board statements in those cases in such a manner. There are more dissimilarities between this case and the other radium variance cases than there are similarities, and the Agency has done a more accurate job of analyzing those decisions than has Citizens. For example, Citizens' asserts that the Board should give it a 23 month variance because it gave Geneva a 23 month variance in light of the anticipated change in the federal standards for radium. This assertion, however, ignores, among other things, the fact that Geneva asked for relief on the basis of a change in the federal standards, and Citizens never did. (City of Geneva v. IEPA, PCB 89-107, March 22, 1990, p. 6) We also note that Citizens' attempts to compare itself with other entities ignores a very important distinction: waiting to see if a lawsuit over hook-on fees can be won (the Northfield Woods litigation) before activating compliance does not fall within the increments of progress factors that comprise a compliance plan; it simply is a condition precedent. The other cases involve increments of progress factors related to activated compliance plans. The closest comparison to Citizens is the City of Minonk, where the Board specifically disallowed the City's proposal to suspend completion of its compliance plan if it did not get outside funding. (City of Minonk v. IEPA, PCB 89-140, April 26, 1990, p.5) Here, Citizens wants to suspend compliance before it begins. Moreover, Citizens has never even given a hardship rationale as to why the Lake Michigan compliance option has to be contingent on its not having to pay a connection fee. Citizens has failed to enlighten the Board, in specific environmental, technical, or economic terms, why it would incur an arbitrary or unreasonable hardship if up-front time were not given to try to win the Northfield Woods connection fee litigation before instituting actual compliance with the Lake Michigan option. Nor has Citizens explained why Glenview would not agree to remove the litigation issue as a condition precedent from its contract with them so that both the Glenview and Citizens portions of the contract can be implemented. Citizens instead continues to baldly assert that it has no control.

Citizens next states that its compliance plan is firm and gives several arguments in support of this conclusion. Most of these arguments have been raised before and have been considered, or are of insufficient merit to persuade the Board that it has erred in its decision. We do wish, however, to respond to one argument asserting that the Board misread the record. Citizens notes that it has not proposed a third compliance scenario, as stated by the Board in its March 8, 1990 Opinion and Order.

Rather, on page 4 of its Motion for Reconsideration, Citizens states that if the first eighteen months of its compliance schedule pass without resolution of the Northfield Woods litigation but resolution were imminent, Citizens would advise the Board. The Board would then decide whether it wanted Citizens to pursue its compliance plan for obtaining Lake Michigan water. At the outset, we note that this statement underscores the whole speculative nature of Citizens' compliance proposal. We remind Citizens that the Board does not advise on prospective compliance plans but rules on proposed compliance plans that it has before it. It is not up to the Board to express its wishes. Thus, the Board will not be placed in the position of selecting, at a later date, the method of compliance that Citizens should pursue. The burden of choosing a compliance option is squarely on Citizens' shoulders. The burden is also on Citizens to propose an amendment to its compliance plan if it so wishes.

Moreover, we cannot help but note that the above proposal is not the third scenario testified to by Mr. Chardavoyne at hearing. Rather, it is a fourth compliance scenario regarding the imminent resolution of the litigation. Mr. Chardavoyne had stated at the hearing that Citizens would not necessarily drop its legal proceedings at the end of the 18 months but would, even after three more years, when its ion exchange equipment design is essentially complete, commit to having either Lake Michigan water on line (if the litigation is by then successful) or the ion exchange equipment operating at the end of the four and one-half, year period requested in its second scenario. In fact, Citizens statements, on page 5 of its Motion for Reconsideration, confirms that the above proposal is a fourth scenario of its intentions by correctly quoting what Mr. Chardavoyne stated at the hearing regarding the third scenario.

The Board also takes special note of the fact that Citizens now states that it has retained an engineering firm to provide it with a preliminary design of the Lake Michigan water supply facilities. We must first emphasize that the record in this proceeding has been closed for some time and that we have made our decision based on that record. The Board will therefore not act lightly and reopen the proceeding to take notice at this late date of Citizens' unverified assertion except to state that we are at a loss to understand why Citizens is doing now what it consistently said it could not or would not do before.

For the foregoing reasons, the Board grants Citizens' Motion to Strike Agency Response to Reply and Verification and its Motion for Reconsideration. However, the Board declines to grant the relief requested in the Motion for Reconsideration.

IT IS SO ORDERED.

Board Member J. Dumelle concurred.

Board Member R. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 3rd day of July, 1990, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board