

ILLINOIS POLLUTION CONTROL BOARD
February 11, 1988

IN THE MATTER OF:)
)
PROPOSED AMENDMENT TO)
35 ILL. ADM. CODE 212.209,) R 86-41
VILLAGE OF WINNETKA)
GENERATING STATION)

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

This matter is before the Board on a February 1, 1988 motion to reconsider leave to submit evidence deposition or to continue merit hearing, filed by John H. Leslie. Mr. Leslie is a citizen who objects to the proposed amendment to 35 Ill. Adm. Code 212.209. On February 8, 1988 the Village of Winnetka filed its response in opposition to the motion. There was discussion about the motion at the February 2, 1988 merit hearing in this matter. (Feb. 2, 1988 transcript, pp. 9-20.)

The instant motion arises from a January 27, 1988 Hearing Officer order which denied Mr. Leslie's January 25, 1988 motion for leave to submit the evidence deposition of Dr. Walter Lyons as evidence in this proceeding. That motion stated that Dr. Lyons, whose services as an expert witness have been obtained by Mr. Leslie, was unable to attend the February 2 merit hearing. Thus, Mr. Leslie asked that the transcript of an evidence deposition of Dr. Lyons taken January 29, 1988 in Denver, Colorado, be allowed as evidence. The Hearing Officer denied that motion on January 27, 1988, noting that: 1) the Board's procedural rules governing regulatory proceedings make no provision for depositions; (2) the deposition, to take place in Denver, Colorado, was noticed only four days before it was to take place; and 3) since the date of the February 2 hearing was agreed upon by all participants on December 9, 1987, but not officially noticed until December 17, 1987, there was sufficient time to determine whether Dr. Lyons was available for the February 2 hearing. In sum, the Hearing Officer found that the circumstances surrounding the request did not protect the rights of the participants and the public to cross-examine Dr. Lyons, and denied the motion. That order did note that Dr. Lyons is free to submit post-hearing written comments during the comment period.

The instant motion asks that the Hearing Officer's order be reconsidered, or in the alternative, that an additional merit hearing be held to permit the direct testimony of Dr. Lyons. The motion contends that Dr. Lyons' testimony is very important to the record in this proceeding, because that testimony

demonstrates that Winnetka's modeling study may be seriously flawed. The Village of Winnetka objects to the instant motion, stating that full and fair opportunities for live testimony have been granted. Winnetka also notes that expert evidence may be submitted into the record during the written comment period.

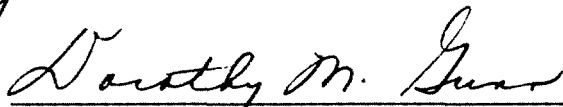
The Board will deny the motion. It is clear that allowing the submission of the evidence deposition into the record as evidence would not protect the right of the participants and the public to question Dr. Lyons, as is contemplated by the Environmental Protection Act and the Board's procedural rules. Mr. Leslie's request for a third merit hearing is also denied. The February 2 hearing (the second hearing in this matter) was scheduled by agreement of all participants, and there was sufficient opportunity for Mr. Leslie to determine whether Dr. Lyons was available on that date. Mr. Leslie's argument that Dr. Lyons was contractually obligated to be elsewhere on February 2 does not change the fact that there was an opportunity to check the availability of the hearing date with Dr. Lyons before the hearing was officially noticed. It should be pointed out that the Board's funds for regulatory and enforcement hearings have been exhausted for this fiscal year, and any further hearing in this case probably could not be held until July. Counsel for Mr. Leslie was aware of this situation when the February 2 hearing was scheduled. The Board will not delay this proceeding. It is noted that if this proposal proceeds to first notice, the Administrative Procedure Act provides for a hearing during the first notice comment period, upon request.

In denying this motion, the Board wishes to emphasize that Dr. Lyons' views need not remain outside the record. Dr. Lyons is free to submit written comments during the comment period which will be established by Hearing Officer order.

IT IS SO ORDERED.

R. Flemal was not present.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 11th day of February, 1988, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board