ILLINOIS POLLUTION CONTROL BOARD
June 22, 1989

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

ORDER OF THE BOARD (by B. Forcade):

On May 18, 1989, the Illinois Environmental Protection Agency ("Agency") filed with the Board a motion for sanctions pursuant to 35 Ill. Adm. Code 107.101. In general, the Agency's motion alleges Citizens Utilities Company of Illinois ("Citizens") has abused the discovery process in this proceeding by either failing to give responses or rendering incomplete responses to five of its 29 interrogatories. On June 6, 1989, the Agency filed a supplement to this motion relating specific alleged deficiencies involving answers to interrogatory 12. On May 23, 1989, Citizens responded to the Agency's motion, claiming that it inadvertently failed to answer one of the interrogatories in question, to which it has since responded (May 19, 1989) in writing to the Agency. Citizens further claims as to the other four that "[the Agency] does not like Citizens' answers to four of the other interrogatories." On June 7, 1989, Citizens filed a supplement to the objections and motion to strike. On June 20, 1989, the Agency filed a supplement to motion for sanctions and motion to clarify. On June 20, 1989, Citizens filed a motion for leave to file instanter; motion to strike, and alternative reply to IEPA's objection to Citizens' application for non-disclosure and protective order; and supplement to Citizens' application for non-disclosure and for protective order. On June 21, 1989, Citizens filed a motion to strike, and alternative reply to, IEPA's second supplement to motion for sanctions and motion to clarify. All documents have been accepted and evaluated by the Board.

On May 25, 1989, the Board noted that the record before it was insufficient for it to adequately determine the issues presented in the motion. Specifically, the Board noted that certain supplemental responses were apparently sent by Citizens to the Agency, but were not filed with the Board. The Board further stated its desire to have additional input from its

hearing officer. The Board then issued an Order directing the hearing officer to review his oral and written rulings on the interrogatories in question, and advise the Board as to whether a refusal or failure to answer interrogatories has occurred; and if so, whether such failure or refusal was without sufficient justification. The Board further ordered Citizens to file its supplemental responses with the Board. The hearing officer filed his statement on May 31, 1989. On June 1, 1989, Citizens filed its supplemental responses with the Board accompanied by an application for non-disclosure.

The Board will first address the application for non-disclosure. Citizens claims that the supplemental answers filed June 1, 1989, should not be disclosed to the public because the answers contain "information privileged against introduction in judicial proceedings", as provided in Section 101.107 of the Board's procedural rules. (These answers were previously not subject to disclosure by Interim Hearing Officer Order which expired May 11, 1989.) The court proceeding involved is Village of Glenview v. Northfield Woods Water & Utility Co., Inc., case No. 87 CH 02577, Circuit Court of Cook County, Illinois. Citizens states that although on April 24, 1989, the court granted Glenview's motion for summary judgment, "Northfield Woods purportedly has filed a petition for rehearing and reconsideration which now is pending before the court." Citizens further states:

> [t]he attached supplemental responses relate to subject matter involved in these court proceedings and to the subject matter of discovery which the court has denied. If these materials are not treated as confidential, Citizens believes that the court proceedings may be adversely affected, and the court's rulings circumvented.

Citizens' further elaborates:

> As Citizens' application states, it seeks protection, from disclosure by IEPA or from public disclosure, of confidential materials contained in Citizens' supplemental responses to IEPA's interrogatories. These materials relate to the subject matter of the court proceedings involving the Village of Glenview and Northfield Woods Water & Utility Co., Inc. ("Northfield Woods"). They also relate to the subject matter of discovery which the court has denied. If these materials are not treated as confidential, Citizens will be disadvantaged and the court's rulings will be circumvented. For example, the court has

denied Northfield Woods' discovery attempts to obtain material of the type which Citizens has produced to IEPA herein.

The Agency filed an objection to the application for Protective Order on June 16, 1989. The Agency notes (p. 1) that Citizens does not indicate "the particular category into which the material falls in accordance with Section 101.107(c)(2)." The Agency further suggests that it appears that the circuit court did not rule that any materials was privileged or confidential (pp. 1-2). Finally, the Agency suggests that the material provided by Citizens is not "information privileged against introduction in judicial proceedings," as asserted by Citizens.

The Board agrees that there is no apparent doctor-patient, attorney-client or other privilege which would relate to the material involved. The Board also agrees that Citizens has not shown any judicial ruling that certain material is confidential or privileged. At most, Citizens has asserted that discovery was denied. Such a broad assertion will not support the requested protective order. The Board will, however, temporarily provide confidential treatment to these materials, and will allow Citizens until June 29, 1989 to provide the Board and Agency with a detailed explanation of its theory of non-disclosure. The Agency will have until July 7, 1989, to provide any needed supplement to its present position. The Board will determine the disclosure status at its July 13, 1989 Board meeting.

The Board will now proceed to the merits of the Agency's motion. To do so, it is important to review the present status of the discovery in question. The Agency initially propounded its discovery on February 23, 1989. Eight days later, on March 3, Citizens filed certain objections to the discovery request. Fifteen days after the discovery request was filed, on March 8, the hearing officer held a pre-hearing conference devoted exclusively to rulings on discovery. The hearing officer stated he would entertain a motion for a protective order that Citizens wanted and ordered that discovery responses be filed by a date certain (ultimately March 29).

Thirty-four days after the discovery request was filed, on March 29, Citizens responded to certain interrogatories, but refused to answer four questions until entry of a protective order, a copy of which was enclosed. On April 19, the hearing officer entered an interim protective order and directed Citizens to provide the remaining discovery material "forthwith". On May 8, seventy-five days after the discovery request and nineteen days after the hearing officer order to provide discovery "forthwith", Citizens filed responses to all discovery except question number 12. On May 19, eighty-five days after the discovery request and three days after the motion for sanctions, Citizens filed a response to question number 12.

Upon examination of the answers given and facts to date, the hearing officer stated that:

> I am of the opinion that providing responses on May 8 was not a compliance with my April 19 order directing answers to be provided to IEPA "forthwith." I am also disturbed that Citizens withheld certain answers on the basis that it needed a protective order, but that it apparently never sought to make my interim protective order permanent and apparently allowed it to expire by taking no action that I know of. I also believe that Citizens has tended to be grudging in its responses to discovery, has raised many objections, not all of which were reasonably taken, and has attempted to disclose as little information as possible without positively violating discovery procedures and orders.
>
> To the extent that Citizens asserts that it has no more information to give in response to certain questions, and that "IEPA" just "does not like" certain answers, it is not possible to positively gainsay Citizens statement that it has provided all the documentation it possesses. I am left with a feeling of uncertainty on this, however, since a major utility project generally leaves more of a paper trail than Citizens has shown here. No doubt it is for this reason that IEPA asserts that responses have been incomplete.
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> Hearing Officer Statement at 3.

For the Board to evaluate whether sanctions are appropriate, the position of each party must be evaluated. The Agency has asserted a primarily factual argument as it pertains to each question. Citizens has not provided a response to the motion for sanctions that is referenced to the particular interrogatory. Rather, Citizens asserts that the answers are complete, the Agency failed to pursue negotiations with Citizens on the completion of discovery, and that several legal theories do not favor sanctions.

To the extent that Citizens raises issues against the discovery request, the most striking aspect is that of timing. Citizens discusses discovery as if the process could go on for months, if not years. That simply is not the case before this Board. The Act establishes a 120-day decision clock for proceedings such as this. To meet that schedule, any discovery

and the hearing must be completed within 60-90 days. If the Agency is not able to force responses to discovery within that limited timeframe, then their ability to acquire information will exist at the whim of those petitioners who are willing to extend the deadline for decision. We believe the Act creates a more level playing field in that it requires both parties to fully and completely respond to discovery when ordered to do so by the hearing officer.

Citizens' arguments that the Agency must now negotiate with Citizens are misplaced. When the timeframes for discovery are so short, the Board is unwilling to mandate initial negotiations between the parties to resolve discovery conflicts prior to hearing officer orders to compel discovery being requested and provided. In any event, that is not the factual scenario here. The hearing officer had already provided a written order, on March 8, that Citizens provide discovery. When that order was not complied with, the hearing officer provided another order, on April 19, that discovery be provided "forthwith". The time for negotiations had long since passed. The issue now is whether Citizens has complied with the two orders. To the extent the Agency has failed to demonstrate that the answers to interrogatories are incomplete, the Agency may not prevail on sanctions. That leaves the legal issues Citizens raises.

Citizens asserts that no discovery can be required of documents of public record. Interestingly, the very authority Citizens cites, 27 C.J.S. Discovery, Section 71(7), claims that such discovery is not favored except in special circumstances; examples of such special circumstances include a public utility involved in contested case proceedings before an administrative agency. Also, the Agency did not request that Citizens reproduce these documents (with the associated reproduction costs), but simply list them. In these circumstances, the Board believes Citizens objections are not well founded.

This Board has not adopted the discovery rules that apply to judicial civil litigation in Illinois. While many of the principles are well founded, the language does not apply easily to a system where one party "controls the clock" (i.e., can either demand a final decision within 120 days or unilaterally waive the decision date to suit its purposes). Since the Board does not control the decision deadline, the Board cannot automatically extend the hearing date to cure any tactical disadvantage caused by delayed compliance with discovery.

Discovery is an important part of Board proceedings and the short timeframes require the Board to be particularly sensitive to claims of misuse, factors which also affect the courts:

> [C]ourts have an interest in promoting the unimpeded flow of litigation, which requires

> that careful attention be paid to the prompt and orderly handling of discovery. "Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances." (Buehler v. Whalen (1978), 70 Ill.2d 51, 67, 15 Ill.Dec. 852, 374 N.E.2d 460.) By serving notice that discovery is a serious phase of litigation and not an exercise in tactics, sanctions promote the flow of litigation and preserve the court's role in expediting that flow. (See also Savitch v. Allman (1975), 25 Ill.App.3d 864, 868, 323 N.E.2d 435.) We must emphasize at this point that the discovery process is subject to the authority of the trial court precisely because it is such an integral part of judicial proceedings. (See generally Payne v. Coates-Miller, Inc. (1979), 68 Ill.App.3d 601, 606, 25 Ill.Dec. 127, 386 N.E.2d 398.) For this reason, any attempt by counsel to use discovery for strategic delay or calculated misinformation corrupts the truth-seeking process and must be sternly rebuked.
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> Fine Arts Distributors v. Hilton Hotel Corp., 45 Ill.Dec. 257, 89 Ill.App.3d 881, 412 N.E.2d 608, at 611 (1980).

With those principles in mind, the Board must now evaluate the particular interrogatories.

Interrogatory No. 1

Interrogatory No. 1 requested information on any emergency interconnection between Citizens and Glenview:

> INTERROGATORY NO. 1: "State whether any emergency interconnection between Citizens Utility Company of Illinois and Glenview was made pursuant to Construction Permit dated April 23, 1984 attached as Exhibit A hereto. State whether any other interconnection between your supply and Glenview was made within the past ten years. State the date on which each interconnection was made, the diameter of the water mains which are connected, identify all documents relating to such interconnection and identify all persons with knowledge of said interconnection. For purposes of this interrogatory interconnection

> is defined as construction of any water main and/or meter vault and for any other equipment or appurtenances which would join any water main of Glenview, Illinois with any water main of Citizens Utilities."
>
> RESPONSE:
>
> [The June 1, 1989 response to Interrogatory No. 1 has been found TEMPORARILY NOT SUBJECT TO DISCLOSURE.]

In its motion for sanctions, the Agency argues the response is deficient:

> In Interrogatory No. 1, Petitioner refused to identify persons having knowledge of the interconnection, stating that these are "too numerous to mention."
>
> Also, Respondent requested all documents related to the Glenview emergency interconnection. It is inconceivable that the only documents which CUCI possesses are permit applications and the drawings and specifications submitted to the Agency with the permits. There are no letters to or from Glenview? There are no studies, no memos, no anything other than permits? What about vouchers or communications with the construction company? CUCI has not been candid here.

After reviewing the non-disclosable response, the Board must agree with the Agency that it is difficult to believe that Citizens would have no more paper documentation. However, the Agency has not demonstrated that more paper does exist. Therefore, the Agency request for sanctions regarding the documents must be denied. If the Agency subsequently discovers documents which have been withheld, they are free to renew the motion for sanctions on this point.

Regarding the identity of persons having knowledge, the issue is more clouded. Citizens' response is not in fact an answer, but more of an objection. Yet, Citizens did not mention that the answer would be too numerous to enumerate in its March 3, 1989 Objection to Interrogatory No. 1. The Board will reluctantly accept Citizens late filed objection and order Citizens to provide a list, not to exceed 10 names, of individuals in Citizens' employ or representatives of Glenview,

who Citizens believes would be most knowledgeable of the specific events. That list must be filed by June 29, 1989.

Interrogatory No. 2

Interrogatory No. 2 requested information regarding interconnections with Mt. Prospect:

> "State whether any emergency interconnection between Citizens Utility Company of Illinois and Mt. Prospect was made pursuant to the Construction permit dated September 10, 1980. State whether any emergency or other interconnection between your supply and Mt. Prospect was made within the past ten years. State the date on which each interconnection was made, and the diameter of the water mains which are connected. Identify all documents relating to such interconnection and identify all persons with knowledge of said interconnection. For purposes of this interrogatory, interconnection is defined as construction of any water main, meter, meter pit, meter vault which would join any water main of Mt. Prospect, Illinois with any water main of Citizens Utilities."

Response

No emergency interconnection was made pursuant to the IEPA construction permit dated September 10, 1980. Mt. Prospect refused to give approval for its construction. An emergency connection agreement with Mt. Prospect was never made.

However, an interconnection with the Mt. Prospect system presently exists at the Maplecrest Concominium (sic) Complex, at the intersection of Highland Avenue and Maple Avenue. Prior to year 1981, this condominium complex was not connected to Citizens' Chicago Suburban system, being located in excess of 500 feet from the nearest main of that system. Citizens purchased water from Mt. Prospect for resale to the condominium complex via a connection to Mt. Prospect's water main located adjacent to the condominium complex. An application for Construction Permit, dated November 3, 1980, was filed with IEPA to install approximately 525 feet of 6-inch diameter main to connect the condominium

> complex to Citizens' main distribution system. Construction Permit No. 0534-FY1981 was issued by IEPA on December 3, 1980. Construction was completed on April 9, 1981, and Operating Permit No. 0534-FY1981/82 was issued by IEPA on July 7, 1981.

In its motion for sanctions, the Agency asserts:

> Again in Interrogatory 2, Petitioner refused to identify persons with knowledge. However, this time no reason was given.
>
> Again we also find no documents whatsoever other than permit applications possessed by the Agency with respect to the interconnection between Mt. Prospect and CUCI.

As with Interrogatory No. 1, the Board finds it unusual that the only documents would be permit related, but the Agency has failed to show non-compliance with the document request. The Agency is free to reassert its claim if it discovers documents which should have been listed.

Regarding the request to identify persons with knowledge, Citizens has failed to respond at all, failed to object, and failed to explain why. In its March 3, 1989 objection to this interrogatory, Citizens raised no issue relating to the identification of persons. Therefore, Citizens has failed to answer without sufficient justification and sanctions are appropriate. The Board discusses the appropriate sanction under Interrogatory 19.

Interrogatory No. 12

Regarding Agency Interrogatory No. 12, the Agency requested information relating to costs of design for new facilities for Glenview and for Citizens Utilities. Specifically, the Agency proposed three separate component questions as follows:

> Interrogatory No. 12
>
> "State specifically all costs related to the design of the required new facilities for Glenview and for Citizens Utilities. Identify separately all engineering costs and other costs related to the design. Identify all documents relating to the estimated costs of design."

Alleging the need for protection, Citizens responded on March 29 as follows:

> <u>Response</u>
>
> Citizens will respond to Interrogatory No. 12 upon the entry by the Hearing Officer of an appropriate Protective Order.

As noted previously, the hearing officer issued his order of March 8, 1989 and an Interim Protective Order on April 19, 1989, expiring May 11, 1989. When Citizens filed its supplemental responses on May 8, 1989, such responses omitted any response to Interrogatory No. 12. In its May 23, 1989 response to the Agency's motion for sanctions, Citizens states that it inadvertently failed to answer this interrogatory, but that it had since responded (on May 19, 1989). That response consisted solely of the following:

> <u>Response to IEPA Interrogatory No. 12</u>
>
> [The June 1, 1989, response to Interrogatory No. 12 has been found TEMPORARILY NOT SUBJECT TO DISCLOSURE.]

On June 1, 1989, Citizens filed its application for non-disclosure and for protective order, including as attachments Citizens' supplemental responses of May 8 and 19, 1989. The latter concerns Agency Interrogatory No. 12. On June 6, 1989, the Agency filed a Supplement to Motion for Sanctions in which counsel for the Agency acknowledged receipt of the response to Interrogatory No. 12 on May 22, 1989, but suggested that the response "may not have been a full and complete response." Specifically, the Agency identified two documents (Ex. J & K) previously filed by Citizens with the Illinois Commerce Commission in connection with that agency's Docket No. 87-0168, the rate case which deals with the planned Glenview-Citizens interconnection which is the subject of Interrogatory No. 12. The Agency also suggested that a reference in Citizens' Annual Report for 1986 to "Study Lake Water to Glenview" may refer to costs related to engineering as requested in the Agency's Interrogatory No. 12. The Agency also notes that portions of the stenographic transcript of the Illinois Commerce Commission's hearing of June 4, 1987 appear germane to its request.

On June 7, 1989, Citizens filed a Supplement to Citizens' Objections to, and Motion to Strike, IEPA's Motion for Sanctions. With regard to Interrogatory No. 12, Citizens asserts that (1) no discovery can be required of documents of public record and (2) discovery cannot be required where the information sought is already known or the requesting party has in its possession or control the means of acquiring the information. As

noted above, the Board cannot accept Citizens' reasoning in this regard. The Board notes in passing that Citizens provides no factual support for its conjecture, in paragraph 14, to the effect that "IEPA may already have had these materials when it served its interrogatories" (p. 4). Such conjecture does not excuse Citizens of its obligations under the Hearing Officer's Orders of March 8 and April 19, 1989, to adequately respond to Interrogatory No. 12.

The Board has reviewed the tardy (and non-disclosable) response to Interrogatory No. 12. We are compelled to conclude that the response is, in fact, patently unresponsive, consisting solely of a table of figures devoid of reference either to the three distinct components of Interrogatory No. 12 or to the sources and justification of the data provided. Devoid of context and support, Citizens' response is manifestly inadequate. Further, the Agency has provided documents that Citizens should have listed.

We also cannot accept Citizens' argument that Supreme Court Rule 201(k) essentially stands for the proposition that this inadequate response can serve as the basis for sanctions only after the Agency has demonstrably attempted and failed to achieve a satisfactory response. The time for negotiating and honing discovery requests has passed with the issuance of the Hearing Officer's Orders of March 8 and April 19, 1989. The obligation thereafter is upon the parties to conform to the requirements of that Order; Citizens' attempt to shift the burden for its non-compliance to the Agency must therefore fail. See also Hawkins v. Wiggins, 92 Ill.App.3d 278, 415 N.E.2d 1179 (1980).

As to the appropriate form of sanction, the Board is persuaded that the record of this proceeding does not support either the imposition of no sanction or the imposition of the extreme sanction of dismissal with prejudice. However, given the protracted pattern of less-than-adequate responses to informal discovery requests as well as the formal orders of the hearing officer, the appropriate sanction is clearly closer to the latter than the former.

In this case, Citizens at first failed to respond to Question No. 12 as directed by the hearing officer, then filed a tardy response which utterly failed to satisfactorily address the questions propounded by the Agency. Even now, Citizens declines to provide a forthright response, choosing instead to argue whether the Agency has properly timed and presented its reaction to the deficiencies of the tardy submittal. The Board believes that an appropriate sanction in this case should be limited to the general subject matter of Interrogatory No. 12, namely, the costs related to the design of the required new facilities for Glenview and for Citizens Utilities, including engineering costs, and such documents related thereto. As such matters have

> cost-effective." (See letter from David E. Chardavoyne P.E. to Terrance L. Burghard, Village Manager.)
>
> It is inconceivable that no other documents relating to lack of cost-effectiveness exist. Are there no cost estimates, no memos, no studies, no documents stating what additions would be required? And, where are the documents supporting CUCI's statement in its response that the Mt. Prospect system does not have adequate pressure to supply the Chicago Suburban system?

Again, the Agency has failed to demonstrate that more documents exist. Sanctions are denied with leave to refile should such documents be discovered.

Interrogatory No. 19

Interrogatory No. 19 requested information on expert testimony:

> "Identify all expert witnesses you intend to introduce at trial and state the opinions which each will present at hearing in the matter."
>
> Response
>
> William P. Brink. All aspects of the variance petition.

In its motion for sanction, the Agency asserts:

> Response to Interrogatory No. 19 is deficient. Respondent is entitled under Rule 21 of the Rules of Civil Procedure to full response with regard to the opinions which will be expressed by any named expert witnesses.

The Board finds that Citizens did not object to that portion of the question which requested the opinions of the witness, did not respond to that portion of the question, and did not explain why. Citizens' failure to respond is without sufficient justification. Therefore, sanctions are warranted.

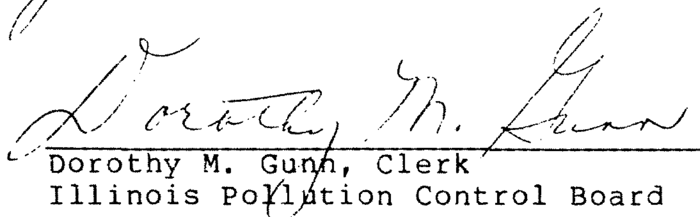
In determining what sanction is appropriate, with respect to Interrogatories Nos. 2 and 19, for withholding information on the eve of hearing, the Board finds support in the philosophy expressed in Bailey v. Twin City Barge & Towing Co., 70 Ill.App.3d 763, 388 N.E.2d 789, at 791-792 (1979):

interrogatory number 2, and the opinions of Mr. Brink required by interrogatory number 19. If Citizens does not fully and completely comply within 7 days, by serving a response on the Agency, the hearing officer and the Board not later than 5:00 p.m., June 29, 1989, this proceeding will be dismissed with prejudice.

Nothing in this Order shall prohibit the Agency from objecting to the introduction of information at hearing due to surprise or inability to prepare because of Citizens late filed discovery.

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 22nd day of June, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board