

ILLINOIS POLLUTION CONTROL BOARD
May 19, 1988

CITIZENS UTILITIES COMPANY)
OF ILLINOIS,)
)
Petitioner,)
)
v.) PCB 86-185
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on an April 27, 1988 motion by Citizens Utilities Company of Illinois (Citizens) for modification of the Board's March 24, 1988 Opinion and Order. In that Opinion and Order, the Board granted a two year variance, rather than the three years requested by Citizens, from restricted status imposed for violations of the Board's radium standards in Citizens well water supplies.

The motion also requests rehearing, although Citizens believes that the record as it now stands supports the full request. (Citizens motion p. 4). Attached to the Citizens' motion is an affidavit of a vice-president of Citizens containing additional testimony that would be offered were rehearing to be granted.

On May 9, 1988, the Illinois Environmental Protection Agency (Agency) filed a response in opposition. On May 13, 1988, Citizens filed a reply to the Agency's response.

Citizens motion for rehearing is denied. Citizens motion for modification is granted; upon reconsideration the Board vacates its March 24, 1988 Opinion and Order granting variance and denies Citizens petition for variance for the reasons expressed below. Citizens is, of course, free to file a new petition for variance.

The fundamental reason for the Board's denial is that Citizens' motion makes clear for the first time in this 1 1/2 year proceeding the answer to a threshold issue in this matter: whether Citizens was in fact committing to achieve compliance by a definable date certain. It is now absolutely clear that Citizens intends to take no further compliance steps unless and until certain litigation is concluded in Citizens favor and all

opportunities for appellate review of any decisions in that litigation are exhausted. There is no longer factual basis for the Board to reach a conclusion that compliance can be reached in two years, three years, five years or any other number of years. Citizens' compliance plan is too speculative to support grant of variance, an assertion consistently made by the Agency.

In order to better clarify the Board's action , the Board will repeat verbatim information from the Board's prior variance opinion, and from the instant motion.

The time-frame at issue is embodied in the first 12 months of Citizens' proposed compliance schedule. The compliance plan submitted prior to entry of the Board's March 24 Opinion and Order provided:

<u>Event</u>	<u>Total Elapsed Time From Date of Board Order Granting Petition Request</u>
1. Satisfying conditions precedent to the Glenview Lake Michigan water supply agreement including ICC approval of agreement and associated tariff revisions	12th month
2. Citizens and Glenview initiate design of facilities for Glenview supply.	12th month
3. Citizens and Glenview complete design of facilities for Glenview supply.	18th month
4. Citizens and Glenview receive necessary permits and easements, bonding, complete advertisement, bid and aware construction contract.	24th month
5. Start of construction of facilities for Glenview supply.	24th month
6. Complete construction and begin supply from Glenview.	36th month

In its instant April 27 motion, Citizens appears to be proposing the same compliance plan, except that it would apply for permits in 21 months, but with no date set for receipt of permits. In its March 24 ruling, the Board disallowed the first

12 months, since the record indicated that Citizens' had already initiated facility design.

The variance petition was originally submitted on October 23, 1986. The compliance plan was first proposed as one of three options in a second amended petition on April 2, 1987, and included a request for expedited consideration. The same compliance plan, with the same time-frame, was submitted on January 20, 1988, with Citizens committing to the single compliance plan. However, Citizens also then stated that "this revised compliance schedule, assuming timely action by the regulatory authorities and absent delays due to causes beyond Citizens' reasonable control, allows for completion of a Lake Michigan water supply from Glenview within three years of the date of the Board's order granting the requested variance". Board Opinion, p. 7-8, citations omitted, emphasis added.

The Agency insisted throughout this proceeding that the compliance plan proposed by Citizens was unacceptably speculative, focusing particularly on the conditions precedent in the agreement with Glenview. By December, 1987, only one condition precedent remained, as ICC approval was obtained in November, 1987. The remaining condition precedent is as follows:

The only condition still unresolved is in Article V, Section I-Conditions Precedent, #3:

The awarding of a declaratory judgment by a court of competent jurisdiction, and affirmation of that declaration by a court of last recourse if an appeal is taken, that the June 6, 1977 purchase agreement between Northfield Woods Water and Utility Co., Inc. (Northfield Woods) and Glenview does not require a connection fee to be paid to Northfield Woods if a connection is made at either of the following transmission connection point locations:

- a. The intersection of Robin Lane and West Lake Avenue.
- b. The intersection of Joy Lane and East Lake Avenue.

Glenview will seek the declaratory judgment on behalf of Citizens. Citizens will pay all expenses associated therewith and select the attorney. A declaratory judgment action will not be required if Northfield Woods agrees, in writing, that a connection fee is not required at either of the transmission connection point locations.

(Pet. post hearing submittals of January 22, 1987, Board Opinion, p. 6, emphasis added)

Citizens states that the status of this case is as follows:

The village of Glenview commenced the declaratory judgment action referred by the Agency on March 18, 1987, in the case entitled Village of Glenview, v. Northfield Woods Water and Utility Co., Inc., Case No. 87 CH 02577, Circuit Court of Cook County, Illinois. Discovery has been in progress, and Glenview is expected to seek summary judgment or an expedited trial.

(Pet. Resp., January 20, 1988, p. 5, Board Opinion, p. 6)

Regarding the present status of the March 18, 1987 litigation, Citizens states:

"Realistically, Citizens needs to have the first 12 months of its time table, as proposed, to complete efforts already under way to satisfy this condition. This is because the remedies being sought, either summary judgment or expedited trial, require that additional time. The parties also have engaged in ongoing settlement discussions, which have not been successful as of this date." (Citizens Motion, April 27, 1988, p. 3).

Citizens was quite unclear in the variance proceeding concerning the litigation in relation to the compliance schedule. However, since Citizens insisted that its compliance schedule was not speculative, and had committed in the same first year to initiate facility design, and the record indicated that facility design had been initiated, the Board gave Citizens the benefit of the doubt, stating:

"The Board believes that this remaining condition need not cause the Board to reject the compliance plan as too speculative. While it is true that this condition precedent could arguably cause the whole compliance plan to unravel, it is unclear in this record whether this result would inevitably occur where there to be an adverse court decision. No costs of the connection fees were included in this record; the ICC Order does not indicate whether recovery of such fees has been factored into Citizens' approved compensation for the incremental costs of providing Lake water; and

Citizens has not made clear whether this condition precedent is an essential element of its proposed timetable." (Board Opinion, p. 8,9.)

Having said this, the Board also cautioned Citizens regarding the condition precedent:

"However, while the Board may hypothesize as to why Citizens does not wish to state precisely at this time, regarding the condition precedent, its course of action should the Court decision be adverse to Citizens, the Board cautions Citizens that any subsequent petition to lengthen or alter its compliance plan will be carefully reviewed." (Board Opinion, p. 8)

Having made this leap of faith, the Board then addressed its understanding from the record concerning the initiation of engineering design:

"The Board will grant variance, but only for two, not three years. The Board is not persuaded that Citizens still needs the one year lead time to initiate engineering design. In the amended compliance plan on p. 7 of this Opinion, when first filed last April 2, 1987, Citizens asserted that it needed one year to initiate design following Board action, for which it requested expedited consideration. (Second Amend. Pet. p. 4,6) The Board notes that at the earlier January 13, 1987 hearing Citizens testified that it would initiate design and construct the facilities following the ICC approval of the Wilmette/Glenview contract, which approval occurred in November, 1987. Citizens also testified at hearing, however, that it and Glenview had already contracted with an engineering firm to do the design work. (R. 28,150,151). In addition, the compliance plan proposes initiation of design to run concurrently with seeking ICC approval. Finally, Citizens again proposed the same one year lead time in its January 20, 1988 response.

Given the less than precise record concerning the status of Citizens' engineering design efforts, the Board will assume that Citizens does not need the one year lead time to initiate design. The Board notes that it has not shortened the six months Citizens requested to complete facility design."

It is apparent from the instant motion that Citizens intended something quite different. David E. Chardavayne, Vice

President of Citizens, stated in part in a sworn affidavit attached as Exhibit A to the instant motion:

"However, Citizens cannot initiate substantive engineering design work on the interconnection facilities until the Northfield Woods litigation condition precedent is satisfied. The major portion of the interconnection mains and pumping facilities required for a Lake Michigan water supply are to be designed and constructed by Glenview. This work by Glenview will not proceed until the condition precedent is satisfied. Citizens cannot commit Glenview to proceed with Glenview's work unless the condition is satisfied. It would not be reasonable for Citizens to proceed with design and construction of its minor portion of the interconnect mains until Glenview also proceeds with work on its portion.

The full first twelve months of the thirty-six months is estimated to be required to satisfy this condition. This is because the matter involves court proceedings, including summary judgment proceedings and/or trial, the timing over which Citizens has no control. (emphasis added).

Given this record, no rational person can now conclude other than that Citizens' compliance schedule is driven by the condition precedent, which on its face is not only open ended, but unresolvable should there be a court decision adverse to Citizens.

The information in the variance proceeding given to this Board by Citizens regarding the effect of the pending litigation on Citizens' intent to initiate and complete design of the facilities was vague and contradictory. Citizens gave the Board little information on this subject, and what it did give was misleading. The compliance schedule itself is most misleading of all. By its terms Citizens committed to initiating engineering design during the first year. Citizens testified at hearing on January 13, 1987, well over a year ago, that it had contracted for design work, and that it would proceed to design and construct facilities following ICC approval. During the second and third year, the compliance schedule committed to construct its facilities and hook-on to Lake water, without any mention of the condition precedent. It was not unreasonable of the Board to focus on the compliance plan and conclude that facility design would proceed, and appeared to have already been initiated apart from the litigation. Had the litigation and initiation of design been framed in explicit sequential increments of time, as they should have been, and had Citizens not made misstatements in its

testimony, the speculative nature of Citizens compliance plan would have left no room for doubt.

Now, of course, Citizens is stating that the start-up of design and the whole compliance plan are inextricably linked to the litigation concerning connection fees; that the first year was set aside solely to accommodate the time estimated to resolve the litigation; that the condition precedent is clearly open-ended in terms of time, and that it appears unresolvable if Citizens gets an adverse decision (although Citizens still has not addressed this facet of the condition precedent.)

The Board also notes that Citizens still is pushing its same compliance plan, except that now, according to the affidavit, no time is set aside in the first year to initiate facility design.

It is clear that Citizens has a right to pursue its own interests, and that it intends to do so. It is just as clear, however, that Citizens is not committing, and cannot commit, to either a two year, or a three year, or any year compliance schedule until the litigation is resolved, and resolved in Citizens favor. The compliance plan is completely speculative as long as the connection fee issue both remains a condition precedent and as an essential element of the timing of the compliance plan.

The Board appreciates that Citizens would like to be removed from restricted status. However, the Board also wishes to emphasize that it agrees with the Agency that Citizens has been less than clear about its intentions. The Board notes that it gave Citizens the benefit of the doubt about noncompliance with its first variance (PCB 82-63), and again had given Citizens the benefit of the doubt about the nature of its commitment to a compliance plan in this variance proceeding. The Board cautions Citizens that it will not look with favor on any new variance petition on information that is as unenlightening as has occurred throughout this proceeding.

This Supplemental Opinion and Order contains the Board's supplemental findings of fact and conclusions of law in this matter.

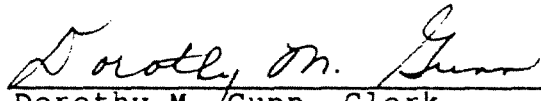
ORDER

The Board's Opinion and Order of March 24, 1988 in this matter are hereby vacated. Variance is hereby denied.

IT IS SO ORDERED.

J. D. Dumelle and B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion and Order was adopted on the 19~~th~~ day of May, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board