

ILLINOIS POLLUTION CONTROL BOARD

February 15, 1996

ESG WATTS, INC., an Iowa corporation,)	PCB 94-243
)	94-306
Petitioner,)	94-307
)	94-308
v.)	94-309
)	95-133
ILLINOIS ENVIRONMENTAL)	95-134
PROTECTION AGENCY,)	(Permit Appeals - Land)
)	(Consolidated)
Respondent.)	

ORDER OF THE BOARD (by G.T. Girard):

On February 2, 1996, the petitioner filed a motion to exclude respondent's brief. On February 7, 1996, the Board received a response to that motion and a motion to file the post-hearing brief of respondent instanter. Petitioner directed its motion to the hearing officer in this proceeding. On February 13, 1996, the Board received a response to the motion to file instanter and a motion for additional sanctions. Even though the motions at issue were originally addressed to the hearing officer, the Board will today rule on these motions.

Petitioner argues that the brief of the respondent should be excluded because the brief was not timely filed. The petitioner states that the hearing officer's order setting the briefing schedule directed that the petitioner's brief be at the Board's office on January 12, 1996; the respondent's brief be at the Board's office on January 26; and any reply be at the Board's office on February 9, 1996. Both parties agreed to the briefing schedule. Petitioner argues that to allow the late filing of the brief prejudices petitioner in at least two ways. First, petitioner proceeded diligently, despite work load constraints, to submit its brief consistent with the hearing officer's briefing schedule. Second, petitioner's asserts that the time for its reply has been shortened significantly by the late filing of respondent's brief.

In its motion for additional sanctions, petitioner maintains that that it is appropriate to require respondent to pay petitioner's reasonable attorney's fees in filing its motion to seal and the motion for additional sanctions. Petitioner maintains that if respondent had not "attempted to file a copy of its untimely brief with the Board", petitioner would not have had to prepare the additional motions.

The respondent agrees that the brief was not filed on the due date and asks for leave to file the brief instanter. Respondent maintains that due to "unforeseen circumstances" respondent was unable to comply with the hearing officer's briefing schedule. The circumstances which respondent is referring to included an office move for the attorney assigned to this case; computer problems resulting from the move; and a new case assignment. Further, respondent asserts that

the attorney assigned, Dan Merriman, has “occasioned unusually long work-hours” since receipt of petitioner’s brief.

The respondent argues that the Board should consider certain factors in determining the amount of actual prejudice, if any. Those factors include that petitioner “is afforded *two* opportunities to address and impress the Board with its argument” and is in charge of the decision deadline. Further, the respondent “has absolutely no objection to” petitioner taking additional time to file the reply. And finally, respondent argues that no prejudice will occur because petitioner is continuing to operate under the existing permits while this appeal proceeds.

Petitioner responds to the motion to file *instanter* by arguing that the office move and problems with the computers could have been foreseen. Further, petitioner questions the availability of other attorneys who appeared at the hearing in this matter, if Dan Merriman was unavailable. Petitioner also points out that the sequence of briefing is set by rule, which allows for a brief and reply by petitioner and is not unique to this case.

The Board is unpersuaded that the circumstances cited by respondent rise to the level of “unforeseen” circumstances in prudent office management practices. The consequences of an office move, computer problems arising from that move, and a new case assignment could all be “foreseen”. The unusually long working hours, which appear almost unbelievable¹, may show unwise case management, but those long hours do not in themselves constitute “unforeseen” circumstances. The Board is also dismayed that there was no effort, at anytime, to contact the hearing officer or the Board to request an extension in a more timely fashion. Instead, the brief was only filed five days after petitioner filed a motion to exclude the brief, and two days before the hearing officer’s due date for petitioner’s reply. Further, the Board does believe that the petitioner was prejudiced by the respondent’s disregard of the hearing officer’s briefing schedule. Respondent had additional time to prepare arguments which the petitioner did not have. The actual filing of the respondent’s brief on February 7, 1996 allowed petitioner little to no opportunity for a timely reply under the current decision deadline. In addition, petitioner has sustained additional legal costs rising from respondent’s untimely behavior.

However, the Board does not believe that the exclusion of the Agency’s brief is the proper avenue to sanction the Agency. The issues in this permit appeal are of first impression and involve government decisions that may be essential to the protection of human health and the Illinois environment. The Board needs full briefing in this case to render an appropriate decision in such a short time frame. Therefore, the Board denies the motion to exclude and grants the motion to file *instanter*. The Board will grant to the petitioner additional time to file the reply brief. Such reply brief shall be received in the Board’s office by Friday February 23, 1996.

Additionally, the Board finds that petitioner has incurred unnecessary expenses in this action because of the Agency’s untimely behavior. The Board will therefore award to petitioner

¹ For example, the respondent’s motion to file *instanter* states that during the ninety-six hours from Monday January 29, 1996 to Thursday February 1, 1996, the attorney assigned to this proceeding worked ninety of those hours. (Resp. Mot. at 5.)

the reasonable costs incurred in the preparation of the motion to exclude, the motion for sanctions, and the response to the motion to file instanter. Petitioner shall file these costs with the Board at the same time the reply brief is due, which is Friday, February 23, 1996.

IT IS SO ORDERED.

Board Members J.Theodore Meyer and Joseph Yi dissent.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 15th day of February, 1996, by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board