ILLINOIS POLLUTION CONTROL BOARD
March 8, 1990

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

MR. DANIEL KUCERA, CHAPMAN & CUTLER, APPEARED ON BEHALF OF PETITIONER;

MS. BOBELLA GLATZ APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board upon a request for variance filed by Citizens Utilities Company of Illinois ("Citizens"). Citizens seeks variance from 35 Ill. Adm. Code 602.105(a), "Standards For Issuance", and 602.106(b), "Restricted Status", to the extent those rules relate to violation by Citizens' public water supply of the 5 picocuries per liter ("pCi/l") combined radium-226 and radium-228 standard of 35 Ill. Adm. Code 604.301(a). Citizens seeks variance to allow issuance of permits for water main extensions during the period of Citizens' non-compliance with the radium standard rather than a variance from the radium standard itself. The requested term of variance is four and one-half years (54 months) from the date variance is granted.

Based on the record before it, the Board denies Citizens' variance request.

PROCEDURAL HISTORY

The instant matter has antecedents in two prior Board actions. In PCB 82-63, on August 5, 1982 (47 PCB 501), the Board granted Citizens variance from the combined radium standard, with the variance terminating on January 1, 1984. In the second action, PCB 86-185, Citizens sought relief from the same Board regulations as is here requested. In that matter, the Board, on March 24, 1988, issued an Order granting a two-year variance. On May 19, 1988, the Board issued an Order vacating this grant of variance on grounds that the compliance plan was speculative

because it did not provide for ultimate compliance with the radium standard in the event that certain litigation then pending remained unresolved. In response to Citizens' motion for rehearing and reconsideration, the Board, by Order of August 4, 1988, affirmed its May 19, 1988, Order.

The Board hereby incorporates by reference the Opinion and Order in PCB 82-63, dated August 5, 1982, and the Opinions and Orders in PCB 86-185, dated March 24, 1988; May 19, 1988; and August 4, 1988.

Citizens filed its initial Petition for Variance ("Petition") in the instant docket on September 16, 1988. On September 22, 1988, the Board issued an Order finding the Petition to be deficient and discussing at length the apparent difficulty Citizens has had in submitting an acceptable compliance plan. To afford Citizens the opportunity to perfect its variance request, the Board granted Citizens 45 days in which to cure the articulated deficiencies and stated that the Petition would be subject to dismissal if no amended petition was filed within that 45 day period.

On October 18, 1988, Citizens filed a motion requesting the Board to extend the time to file an amended Petition by 30 days. In support of its request, Citizens stated that its personnel, consultants, and counsel had been involved in other pending matters. On October 20, 1988, the Board entered an Order granting Citizens until November 25, 1988, to file its amended Petition. Citizens filed its Amended Petition for Variance ("Amended Petition") on November 10, 1988.

On November 18, 1988, the Illinois Environmental Protection Agency ("Agency") filed a Response to the Amended Petition contending that the petition remained deficient. On November 23, 1988, Citizens filed a Reply to the Agency's Response contending that the Amended Petition eliminated any uncertainty regarding the deficiencies alleged by the Agency and praying that the Board accept its Amended Petition. At its November 29, 1988, Board Meeting, the Board accepted Citizens' Petition and Amended Petition and held them for Agency recommendation.

On December 19, 1988, the Agency filed a Motion for Extension of Time, requesting that it be allowed eight additional days for the filing of its Recommendation. That motion was granted by Board Order of January 5, 1989. The Agency's Recommendation was filed on December 27, 1988.

The Agency recommends denial of variance, contending that any alleged hardship is self-imposed and that Citizens' compliance plan is speculative. Citizens, however, states that the compliance plan is not speculative and emphasizes that it will achieve compliance either by using Lake Michigan water or by

installing ion exchange equipment, in the event that Lake Michigan water is not available 18 months after the start of the variance. As to the issue of hardship, Citizens contends that immediate compliance with the applicable regulations would impose an arbitrary and unreasonable hardship, since immediate compliance would require installation of radium removal equipment which would subsequently not be used should compliance be achieved through the use of Lake Michigan water.

Hearing was held on July 17, 1989; no members of the public were present. Subsequent to hearing, Citizens and the Agency filed briefs.

OUTSTANDING MOTIONS

On September 15, 1989, Citizens filed an appeal to reverse the Hearing Officer's Order of September 12, 1989. In that order, the Hearing Officer denied the filing of the affidavit of Jeffrey Randall. The Hearing Officer gave his reasons as follows:

(1) The submission of the affidavit is outside the limited purpose for which the proofs were left open at hearing;

(2) The information contained in the affidavit is not rebuttal to Respondent's evidence or exhibits;

(3) The material in the affidavit, to the extent that it is not merely argumentative, is duplicative of testimony of David Chardavoyne to the extent that it lacks significant probative value.

Citizens states that on August 18, 1989, the Hearing Officer granted the Agency leave to file a late exhibit. That exhibit consists of a copy of a Chancery Court docket sheet and a notice which indicates that on March 24, 1988, Village of Glenview v. Northfield Woods Water and Utility Company, 87 CH 02577, Circuit Court of Cook County, was dismissed for want of prosecution*. Citizens believes that Mr. Randall's testimony is necessary to rebut information in that docket sheet and explain the circumstances surrounding the dismissal.

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* On June 9, 1989, Citizens filed supplemental information which indicates that the Northfield Woods litigation, which was apparently reinstated, was decided in favor of Glenview on March 29, 1989 on a motion for summary judgment. An October 10, 1989, supplement indicates that Northfield Woods' petition for rehearing and reconsideration was denied by the Circuit Court on August 14, 1989. Citizens brief indicates that the decision is currently pending review by the Appellate Court.

The record indicates that during hearing, Citizens sought to question its witness, David Chardavoyne, regarding responsibility for alleged delays in the Northfield Woods proceeding. The Agency objected to this line of questioning. (R. at 113-117). The Hearing Officer allowed the Agency leave to file the complete court docket sheets from the Northfield Woods proceeding to rebut the testimony of Mr. Chardavoyne. (R. at 123). Citizens did not object to the filing of such an exhibit at that time, and had itself also introduced copies of portions of the docket sheets.

The Agency's prehearing discovery regarding the Glenview proceeding was limited by the Hearing Officer to matters of public record. Although the docket sheets were sought to be entered in rebuttal to Mr. Chardavoyne's testimony concerning delay in the Northfield Woods proceeding, he did not actually testify regarding such delay since his testimony was barred by the Hearing Officer as opinion testimony which was not of public record. (R. at 128-130). Such testimony was later contained in an offer of proof.

It is apparent that what is sought by the entry of the exhibit and affidavit in this proceeding is to show that there was delay in the Northfield Woods proceeding, and that the delay either was or was not the "fault" of Citizens. One need only look at the Board's docket sheet in this proceeding and note the number of filings to draw the conclusion that the proceeding has been protracted. From review of the record, however, the Board notes that its Hearing Officer, in allowing the Agency to file the complete docket sheet rather than Citizens' exerpts, was attempting to keep the record complete. Citizens had no objection to this at hearing. The Board therefore upholds the Hearing Officer's ruling regarding the entry of the Agency's exhibit. Citizens' motion that the Board reverse the ruling of its Hearing Officer is hereby denied. As stated earlier, however, the Board questions the value of such evidence to the resolution of the main issues in this proceeding.

On September 28, 1989, the Agency filed a motion for sanctions and dismissal in this proceeding. Citizens filed its response on October 10, 1989, after being granted leave to file its response instanter by the Hearing Officer. In its motion, the Agency claims that it has discovered information which Citizens failed to provide in answer to the Agency's prehearing interrogatories 1, 16, and 20. The Agency claims that it has been prejudiced by this failure, and that the failure is to such an extent that further sanctions, including dismissal, should be considered by the Board.

On June 22, 1989, the Board ruled upon the motions by the Agency concerning Citizens alleged failure to answer certain interrogatories. In its Order, the Board found, among other things, that the Agency had not demonstrated that Citizens had

withheld responsive documents in relation to interrogatories 1 and 16, and allowed the Agency to renew its motion for sanctions should responsive documents be subsequently discovered. No allegations regarding interrogatory 20 were raised at that time.

In light of the principles of discovery, as explained in its June 22, 1989, Order, the Board will review the particular interrogatories.*

Interrogatory 1

Interrogatory 1 requested information on any emergency interconnection between Citizens and Glenview:

> 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.

The Agency claims that it has found a document which Citizens did not identify. The document is the March 1, 1984, "Water System Connection Agreement between the Village of

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* The Board, in its June 22, 1989, Order, sanctioned Citizens for its failure to provide a complete response to the Agency's Interrogatory 12. Specifically, Citizens failed to provide all of the documents relating to the estimated costs of designing a new ion exchange facility for Citizens. As a result, the Board concluded that Citizens' response was "patently unresponsive" and barred Citizens from introducing any evidence at hearing concerning such costs for the "purpose of demonstrating that denial of variance would or might impose an arbitrary or unreasonable hardship". It should be noted, at this point, that the Board's ruling continues to be in effect and will be followed in this Opinion. We will therefore disregard any of the forgoing information for purposes of this decision.

Glenview, Cook County, Illinois and Citizens Utilities Company of Illinois" (the "Agreement") which concerns an emergency interconnection between Citizens and Glenview. Citizens does not deny the existence of the document. Rather, Citizens states that the document does exist, but that it is not relevant to the instant proceeding, that it is a document of public record, that the Agency failed to avail itself of Rule 201(k), and that the Agency's motion is untimely because it was filed two months after hearing.

The document-as-a-public-record and 201(k) arguments were raised by Citizens and ruled upon by the Board in its June 22, 1989, Order. In that Order, the Board found Citizens arguments without merit. The Board sees no reason to change its previous position. As to the timeliness of the Agency's motion, the Board specifically gave the Agency leave to renew its motion for sanctions should it discover the additional documents as alleged. The Board did not give a cut-off time for the renewal of such a motion. Although the Board does not expect to allow the renewal of the Agency's motion in perpetuity, the Board finds the Agency's motion filed two months after hearing to be timely. Since a responsive document does exist which Citizens failed to identify as requested under interrogatory 1, the Board finds that Citizens failed to comply with prehearing discovery and its actions are sanctionable. Citizens actions, however, are not so unconscionable as to warrant dismissal. Rather, the Board finds that the appropriate sanction is for the Board not to consider information or issues pertaining to the type of information sought by the interrogatory that may be favorable to Citizens.

Interrogatory 16

With regard to interrogatory 16, the Agency sought information about obtaining water from Mt. Prospect:

> State and explain in detail all reasons why and all bases for the statement in Paragraph 3, p. 14, as follows: "In the early 1980's, Citizens investigated the possibility of obtaining a supply by connection to a main of Mt. Prospect, but such a connection was determined to be not feasible." Identify all documents relating to these reasons and bases.

In response to interrogatory 16, Citizens provided a letter from Mr. Chardavoyne to Mt. Prospect. The Agency alleges that certain testimony indicates that there were calculation studies, in addition to the Chardavoyne letter, which Citizens failed to identify as requested.

The record indicates that Mr. Chardavoyne performed engineering calculation studies regarding acquisition of water from Mt. Prospect. (R. at 269, 273). Citizens states that these studies no longer exist, however, noting in its response to the Agency's motion:

> Citizens often performs informal, preliminary in-house engineering and cost calculations which are not retained by the Company, especially if the proposed project is determined to be infeasible at a very early stage, as was the case with the proposed interconnection with Mt. Prospect. Such preliminary calculations are discarded as a matter of course. The documents which [the Agency] claims Citizens failed to produce no longer existed at the time [the Agency] propounded its Interrogatory Number 16 and have not existed for a long time.
>
> (Response at 10)

The Board finds that since these studies did not exist at the time that the Agency propounded its interrogatories, Citizens did not fail to identify responsive documents as requested in interrogatory 16. The Agency's motion regarding interrogatory 16 is therefore denied.

Interrogatory 20

In interrogatory 20, the Agency sought the following:

> Identify all documents relating to Citizens' first knowledge of the existence of a contract between Glenview and Northfield Woods which required a connection fee to be paid to Northfield Woods under certain specified conditions.

In response, Citizens provided a copy of a letter from Mr. Chardavoyne to the Village Manager of the Village of Glenview, dated March 24, 1983.

The Agency argues that Mr. Chardavoyne identified certain notes, dated July 15, 1982, at hearing, that relate the existence of a contract between Glenview and Northfield Woods which required a $350.00 charge per customer. The Agency argues that since these notes predate the March 24, 1983, letter, Citizens failed to fully respond to interrogatory 20. (Resp. Ex. 2, R. at 249-251).

Citizens claims that the Agency's allegations regarding interrogatory 20 are beyond the scope of the Board's June 22, 1989, Order and should be stricken. Although allegations regarding interrogatory 20 were not made in the Agency's prior motion for sanctions, the Board declines to strike the Agency's claims.

Citizens does not deny the existence of the document, but questions its relevance to this proceeding, an objection it also made at hearing. Citizens also states that the Agency did not claim surprise or prejudice by Citizens not producing the document. Citizens claims that this is especially true because the Agency had the document in its possession and cross-examined the witness regarding the document.

The Board finds that a document did exist which predates the document identified by Citizens in its answer to interrogatory 20. The Board therefore finds that Citizens failed to fully respond to interrogatory 20. The Board also finds that Citizens' action is sanctionable. Citizen's actions, however, are not so unconscionable as to warrant dismissal. Rather, the Board finds that the appropriate sanction is for the Board to disregard information on issues pertaining to the type of information sought by the interrogatory that may be favorable to Citizens.

BACKGROUND

Citizens provides public utility water service to approximately 23,000 customers, and sanitary sewer service to approximately 22,000 customers, in the metropolitan Chicago area under certificates of public convenience and necessity granted by the Illinois Commerce Commission. Citizens is an Illinois corporation and a public utility within the meaning of the Illinois Public Utilities Act.

One of Citizens' certificated service areas, referred to as "Chicago Suburban", comprises portions of the Village of Mt. Prospect, the City of Prospect Heights, and unincorporated areas in Wheeling Township, Cook County, Illinois. In the Chicago Suburban service area, Citizens provides both water and sanitary sewer service. As of July, 1989, there were approximately 7,200 residential and commercial units connected to the Chicago Suburban water system, comprised of a mixture of single-family residences, multifamily units, and commercial units. (R. at 24).

To provide public utility water service in the Chicago Suburban service area, Citizens owns, operates, and maintains an integrated water supply and distribution system comprised of four deep wells and one shallow well, chlorination equipment, two storage tanks, 500 fire hydrants, and 244,000 feet of water main. (R. at 25; Petition, par. 4). Treatment processes to remove radium are not presently part of the system. (Id.).

The five wells from which Citizens' currently draws water have the following characteristics:

Well No.	Depth	Placed in Operation	Capacity
1	213 feet	1960	135 gpm
2	1468 feet	1960	1000 gpm
4	1323 feet	1966	1000 gpm
5	1320 feet	1970	1000 gpm
6	1323 feet	1871	1000 gpm

(Petition, Exhibit B)

During calendar year 1987, wells #2 and #4 collectively accounted for 85% of the total pumpage. (Petition, par. 5).

Citizens initially employed a private laboratory, Eberline, to sample wells #2, 4, and 6 in October, 1979. All of the wells showed radium in excess of the combined radium standard, with values ranging from 6.9 to 8.0 pCi/l. These samples were the basis for the earlier variance granted in PCB 82-63.

On December 8, 1985, the Agency notified Citizens that a composite of samples of its distribution system, taken between November, 1980, and July, 1981, and analyzed by the United States Environmental Protection Agency, showed a combined radium level of 9.3 pCi/l. Based on these results, Citizens was placed on restricted status in April, 1986. Notice of the restricted status appeared in the Board's April 24, 1986, Environmental Register and thereafter as listings were received by the Board from the Agency.

The Board notes that at no time between January 1, 1984, when the PCB 82-63 variance terminated, and April, 1986, did the Agency place Citizens on its restricted status list; in fact, Citizens was given a Certificate of Commendation by the Agency for compliance with all water quality standards in 1982, 1983, and 1984. Nor did Citizens request further variance relief or demonstrate that it had come into compliance with the combined radium standard during that time.

Subsequent to the initial Eberline analyses, Citizens has had various samples of its distribution system analyzed for combined radium, with the following results:

Collection Date	Combined Radium (pCi/l)
1/21/86	8.4
3/31/86	1.46
5/29/86	3.8
1/12/87	14.2
2/28/87	7.4
4/6/87	7.3
7/9/87	5.9
10/14/87	6.6
1/12/88	6.0
4/13/88	1.1
7/13/88	6.5

(PCB 86-185, March 24, 1988, p. 3; Petition, Ex. C)

REGULATORY FRAMEWORK

In recognition of a variety of possible health effects occasioned by exposure to radioactivity, the U.S. Environmental Protection Agency ("USEPA") has promulgated maximum concentration limits for drinking water of 5 pCi/l of combined radium-226 and radium-228. Illinois subsequently adopted the same limit as the maximum allowable concentration under Illinois law.

The action that Citizens requests here is not variance from these two maximum allowable concentrations. Regardless of the action taken by the Board in the instant matter, these standards will remain applicable to Citizens. Rather, the action Citizens requests is the temporary lifting of prohibitions imposed pursuant to 35 Ill. Adm. Code 602.105 and 602.106. In pertinent part, these sections read:

Section 602.105 Standards for Issuance

a) The Agency shall not grant any construction or operating permit required by this Part unless the applicant submits adequate proof that the public water supply will be constructed, modified or operated so as not to cause a violation of the Environmental Protection Act (Ill. Rev. Stat. 1981, ch. 111½, pars. 1001 et seq.) (Act), or of this Chapter.

Section 602.106 Restricted Status

a) Restricted status shall be defined by the Agency determination pursuant to Section 39(a) of the Act and Section 602.105, that a public water supply facility may no longer be issued a construction permit without causing a violation of the Act or this Chapter.

b) The Agency shall publish and make available to the public, at intervals of not more than six months, a comprehensive and up-to-date list of supplies subject to restrictive status and the reasons why.

c) The Agency shall notify the owners or official custodians of supplies when the supply is initially placed on restricted status by the Agency.

Illinois regulations provide that communities are prohibited from extending water service, by virtue of not being able to obtain the requisite permits, if their water fails to meet any of the several standards for finished water supplies. This provision is a feature of Illinois regulations not found in federal law. It is this prohibition which Citizens requests be lifted.

In consideration of any variance, the Board is required to determine whether the petitioner would suffer an arbitrary or unreasonable hardship if required to comply with the Board's regulations at issue. Ill.Rev.Stat.1987, ch. 111½, par. 1035(a). It is normally not difficult to make a showing that compliance with regulations involves some hardship because compliance with regulations usually requires some effort and expenditure. Demonstration of such simple hardship alone is insufficient, however, to allow the Board to find for a petitioner. Rather, a petitioner must demonstrate that the hardship resulting from denial of variance would outweigh the injury of the public from a grant of the petition Caterpillar Tractor Co. v. IPCB 48 Ill. App. 3d 655, 363 N.E. 2d 419 (1977). Only with such showing can hardship rise to the level of arbitrary or unreasonable hardship.

Moreover, a variance by its nature is a temporary reprieve from compliance with the Board's regulations and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter. Monsanto Co. v. IPCB 67 Ill. 2d 276, 367 N.E.2d 684 (1977). Accordingly, a variance petitioner is required, as a condition to a grant of variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance.

COMPLIANCE PROGRAM

Citizens proposes to achieve compliance by replacing its present well-based water supply with a water supply drawn from Lake Michigan. Since Lake Michigan water does not contain radium in amounts in excess of the 5.0 pCi/l standard, replacement of the water supply should eliminate violations of the combined radium standard. The Board notes that no one disputes the desirability of Citizens changing from well water to Lake Michigan water supply.

Citizens has received a Lake Michigan water allocation from the Illinois Department of Transportation since 1980. (Petition, Ex. D). The allocation amounts increase from 2.0 million gallons per day in 1987 to 2.477 million gallons per day in 2020.

Citizens proposes to have its water allocation transmitted to its service area through connection with the water supply systems of nearby communities. Specifically, Citizens proposes to connect to the supply system of the adjacent Village of Glenview ("Glenview") which, in turn, will receive water from the primary supplier, the Village of Wilmette ("Wilmette"). Both links in this transmission program, the Wilmette-Glenview link and the Glenview-Citizens link, are controlled by contractual arrangements.

The most recent contractual arrangement between Wilmette and Glenview was entered into on March 3, 1987. It provides that Wilmette will supply Glenview with Lake Michigan water sufficient for all the requirements of Glenview, including water for resale by Glenview to Citizens. (Petition, par. 12). Citizens and Glenview, in turn, have entered into an Agreement wherein Glenview will cause to be constructed a transmission main and pumping facilities and will provide a Lake Michigan water supply to Citizens. (Petition, Ex. E). The Illinois Commerce Commission approved the Citizens-Glenview Agreement by Order of October 28, 1987. (Petition, Ex. F).

According to Citizens, all but one of the conditions precedent under its Agreement with Glenview have been satisfied: the award of a declaratory judgment by a court, and affirmation if appeal is taken, that a certain prior agreement between Glenview and Northfield Woods Water & Utility Co. Inc. ("Northfield Woods") does not require a connection fee to be paid to Northfield Woods if Citizens connects to Glenview. Glenview commenced such a declaratory judgment action on March 18, 1987.

Citizens contends that neither it nor Glenview can proceed with the design and construction of the facilities necessary to transmit the Lake Michigan water supply until the litigation between Glenview and Northfield Woods is resolved. Citizens further notes that the conduct and timing of the litigation are not within its control. This not withstanding Citizens proposed "primary scenario" compliance schedule wherein the initial eighteen months of the variance term are reserved for resolution of the Northfield Woods litigation. This "primary scenario" is as follows:

	Event	Month of Variance
1)	If declaratory judgment condition precedent is satisfied, Citizens	18th month

	and Glenview initiate design of facilities for Lake Michigan water supply	
2)	Citizens and Glenview complete design work for Lake Michigan water supply	24th month
3)	Citizens and Glenview receive necessary permits and easements, bonding, complete advertisement, bid, and award contracts	30th month
4)	Glenview and Citizens start construction of facilities for Lake Michigan water supply	30th month
5)	Complete construction and begin Lake Michigan water supply from Glenview	42nd month

Citizens contends that all of the allotted times for intermediate steps in this schedule are maximum times and that this schedule will be accelerated if any of the steps are completed ahead of schedule. (Amended Petition, par. 11). This proviso presumably includes resolution of the Glenview/Northfield Woods litigation within less than the allotted eighteen months.

In the event that the Glenview/Northfield Woods litigation is not resolved within the allotted eighteen months, Citizens proposes a different compliance program. This "alternate scenario" consists of installation of an ion exchange treatment facility to remove radium, according to the following schedule:

	Event	Month of Variance
1)	If the declaratory judgment condition precedent is not satisfied, Citizens applies to Illinois Commerce Commission for approval for installation of ion exchange treatment facilities to remove radium.	18th month
2)	Illinois Commerce Commission approval of ion exchange treatment, and rescission of prior approval of Glenview Lake Michigan water supply agreement is received.	30th month

3)	Citizens begins design of ion exchange treatment facilities.	30th month
4)	Citizens completes design of ion exchange equipment.	36th month
5)	Citizens receives necessary permits, complete advertisement, bid and award contract.	42nd month
6)	Citizens begins construction of ion exchange treatment facilities.	42nd month
7)	Citizens completes construction of ion exchange treatment facilities.	54th month

HARDSHIP

Citizens specifically names two reasons why a requirement to come into immediate compliance would impose an arbitrary or unreasonable hardship. First, Citizens notes that by virtue of its inability to obtain permits for water main extensions, any economic growth that is dependent on those water main extensions would not be allowed.

An essential consideration in any request for variance relief is the degree of hardship justifying delayed compliance with the standards themselves as well as the proposed timing of the compliance plan. When the variance relief sought is from restricted status, any special hardship justification that may be made for being allowed to deliver noncomplying water in the interim to new customers must identify the hardship with some degree of particularity. While postponement of enforcement for Citizens' noncompliance with the radium standards may be an indirect benefit if the variance is viewed by the USEPA as the equivalent of an enforcement order, the direct relief Citizens would get is its ability to extend its water lines prior to coming into compliance.

Citizens has been on restricted status for four years. At no time has Citizens ever identified, much less particularized, the nature of any hardship, economic or otherwise, that it or any individual, business, or development has experienced or would experience if it could not get permits to extend its water lines until it came into compliance.

Rather, Citizens has only made the generic statement that its hardship is its inability to extend lines to developers and potential customers. This statement is simply a restatement of

the effects of restricted status. At hearing, Citizens did allude to the inability of the company to respond to an inquiry from a nearby "water system municipality" about acquiring their system or portions thereof, but Citizens does not explain how these other potential customers (who presumably already have water), Citizens, or Citizens' present customers would be incurring a hardship. Even if one were to hypothesize that Citizens' business interests might be beneficially served by initiating the contacts that might eventually culminate in purchasing part or all of another water supply, Citizens has given no explanation as to why it needs variance now as opposed to why its "firm" commitment to come into compliance would not suffice. (R. 188, 189; Citizens' Brief at 4, 17; Reply Brief at 9).

Second, Citizens alleges that an arbitrary and unreasonable hardship would result from the immediate installation of costly radium removal equipment because it would soon become unnecessary once Lake Michigan water is obtained (Petition, par. 20). As Citizens noted:

> If Citizens were required to install radium removal treatment now, the equipment would be rendered unnecessary and useless where Citizens achieves a Lake Michigan water supply from Glenview... This equipment has an estimated cost of $1,400,000.... Customers in the Chicago Suburban service area would have to bear in rates the revenue requirements resulting from the cost of such equipment. However, they would receive no benefit.
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> (Citizens' Brief at 17, R. at 185-188)

It is worth noting that the record indicates that Citizens' customers may not bear the cost of installation of radium removal equipment, as such action would have to be approved by the Illinois Commerce Commission. (R. at 186-188). Therefore, any hardship that would arguably ensue from the installation of equipment that would later be abandoned upon receipt of Lake Michigan water may be borne by either Citizens, its customers, or both.

During the course of this proceeding, the Agency has made it clear that it believes that Citizens' first priority has not been to achieve compliance by any reasonable method available to it. The Agency points to the long history of prior variance proceedings which date back to 1982, as evidence that Citizens' hardship is self-imposed. The Agency also alleges that certain delays in the Northfield Woods litigation, such as the failure to file suit until 1987, rather than after the 1984 execution of the

initial Citizens/Glenview agreement, is further evidence that Citizens' hardship is self-imposed. (Agency Brief at 1-2).

As to the timing of the institution of the Northfield Woods litagation, Citizens asserts that because the most recent agreement between Wilmette and Glenview was executed in 1987, it would have been premature to file a declaratory action prior to that time. Citizens also asserts that there should be no finding of self-imposed hardship because of its failure to take timely action to get Lake Michigan water between the time that its variance in PCB 82-63 expired on January 1, 1984, and December 8, 1985, the date that it received the Agency test results that showed a radium violation. (Reply, Brief at 11).*

At this point, the Board can only state that it shares many of the Agency's concerns over whether Citizens is committed to achieve compliance. Moreover, the Board believes that any possible hardship that Citizens will experience from this denial of variance is largely self-imposed.

First, with regard to Citizens' assertion that there should be no finding of self-imposed hardship for its failure to take timely action to obtain Lake Michigan water between January 1,

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* Citizens also asserts that the pending City of Geneva variance petition, PCB 89-107, presents circumstances similar to Citizens, but that the Agency has been inconsistent in recommending grant of variance to Geneva but denial of variance to Citizens. (Reply Brief at 3,4). Citizens also focuses on the pending new USEPA radium standards (see below), anticipated in September, 1990, as well as the USEPA's and the Agency's willingness to entertain delays in compliance schedules for communities which have committed to compliance and who have reasonable construction schedules. The Board can only note that any review of the factors involved and the determinations made (including variance conditions) in the past and present proceedings of Geneva and Citizens show considerable dissimilarities, not the least of which involve dissimilarities in compliance commitments, the reasonableness of the construction schedules, and the nature of the hardship shown. Specifically, the Board notes that it ordered Geneva, in its PCB 88-11 Opinion and Order, to proceed with its compliance plan irrespective of whether or not it could obtain financing; that Geneva has already spent or approved over $5,520,000 in improvements to its water supply system (see Petition at 5 in PCB 89-107); and that Geneva premised its compliance schedule upon a June, 1990, proposal date and a December, 1991, promulgation date (see Exhibit B to Petitioner's Response in PCB 89-107). Finally, we also reject the notion that a relaxation by USEPA of its constraints on the allowable length of a variance somehow cures the deficiencies in Citizens' variance request.

1984, and December 8, 1985, we remind Citizens that it was its failure to achieve compliance on the timetable given in PCB 82-63 (see below) that first caused Citizens to be placed on restricted status. It was also the impetus for the institution of PCB 86-185. Although the issue in PCB 86-185 was whether Citizens should be denied variance because it violated three conditions of the variance granted in PCB 82-63, the Board gave Citizens the benefit of the doubt and determined not to deny the variance, because of certain Agency actions during the period between January, 1984, and December, 1985. We also remind Citizens that the reason the Board subsequently vacated the PCB 86-185 variance was because Citizens made it clear that it did not intend to undertake any engineering design initiative for the first year after grant of that variance due to the Northfield Woods litigation. (See PCB 86-185, Supplemental Opinion and Order, May 19, 1988). While hindsight causes the Board to question the wisdom of its initial decision to give Citizens the benefit of the doubt for its violations of the PCB 82-63 variance conditions, the fact is that, even if one were not to consider the time frame as a fully self-imposed hardship, it would not be significant enough to cause the Board to ignore Citizens' long history of untimely delay in coming to compliance.

With regards to Citizens' compliance plan, the Board believes that the two scenarios proposed by Citizens are untimely and unacceptably speculative. Although Citizens purports to cure the deficiencies in its earlier compliance plan that it presented in PCB 86-185, it does not.

As previously stated, the reason the Board vacated its grant of the prior PCB 86-185 variance, a variance we note that was first filed on October 23, 1986, was because Citizens subsequently made it clear that it did not intend to undertake any engineering design initiative for the first year after grant of that variance, choosing instead to wait for a successful outcome in the Northfield Woods litigation that was instituted in 1987. Now, three years after the litigation was instituted, Citizens is again asking for an additional one and one half years hiatus after the Board grants variance before instituting facility design. The Board notes that Citizens continues to argue in favor of this "no risk" pattern regardless of the fact that the court actions on the litigation have so far run in its favor. Moreover, since Citizens filed this variance petition a year and one half ago, Citizens has actually leveraged its "waiting" time to three years from the filing of this variance, and four and one half years from the start of the Northfield Woods litigation. The Board notes that part of the delay in this proceeding was due to Citizens' sanctioned recalcitrance in responding to the Agency's discovery requests.

Citizens asserts that it is firmly committed, after a one and one half years waiting period, to provide ion exchange

treatment for its existing water supply source as opposed to getting lake Michigan water. It, however, has set aside yet another year before beginning engineering design in order to obtain ICC rate approval for the ion exchange treatment, and recission of ICC's prior approval for the Lake Michigan water agreement. Citizens, perhaps inadvertently, has made a persuasive argument as to the speculative nature of getting ICC rate approval for the ion exchange treatment. Citizens emphasizes that, when the ICC earlier approved Citizens' rate request to get Lake Michigan water, the ICC took specific notice of both citizen complaints about the quality of the existing water supply and of the desirability of getting Lake Michigan water. (R. at 49; Pet. Ex. F at 5; Citizens' Brief at 8, 12). Citizens also asserts that the ion exchange option is undesirable. (R. at 45). The foregoing arguments underlie Citizens' claims of arbitrary or unreasonable hardship and for waiting again to see whether the litigation can be successfully concluded in its favor so as to get Lake Michigan water.

While Citizens has continued to argue that it is committed to the first scenario and, after 18 months, to the second scenario if the litigation is unresolved or unsuccessful, Citizens has stated its intent to pursue a "third" scenario. Citizens testified that it 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. The first query we would make is, if Citizens thinks it can get Lake Michigan Water on line in one and one half years under this "third" scenario (including time to reinstate the prior Glenview agreement approval), why is Citizens asking for two years in the first scenario to do the same thing (42 months minus 18 months)? (R. at 197-201, Reply Brief at 6,7).

Citizens still has a speculative compliance plan. It still relies on the pace of the litigation, which this Board has already found unacceptably speculative, to drive its commitment to its compliance proposal. Also, Citizens' increments of progress for facility design and installation in its first scenario are patently too slow if its testimony about its timetable to achieve compliance after "changing horses" in its "third" scenario is to be believed. Regarding its second scenario, even if the Board were to accept Citizens' unwillingness to start design before it obtains ICC approval, the scenario is unacceptable because it too is speculative. If the Glenview contract falls and if the ICC does not approve Citizens' ion exchange treatment rate request (which is a distinct possibility given this record), there is nothing left. Even if the ICC were to give its approval, it would have to do so in one

year if Citizens is to stay on its timetable for achieving compliance.

Citizens can continue to argue that it has no control over the pace of the litigation or the ICC's actions. Essentially, that argument begs the question. Citizens has had control over the speed with which it could have come into compliance.

Citizens has, over the years, made decisions about which compliance options it would or would not consider. It was Citizens that refused to sign a formal Agreement tendered by JAWA in 1981. It was Citizens that chose to condition the viability of the 1984 Glenview contract on not having to pay the connection fee. The Northfield Woods litigation was not commenced until 1987, and the Board is not persuaded that Citizens, although it did not have standing to initiate the action, could not have caused it to start after it received the Agency's test results. Glenview and Northfield were in discovery and negotiations from March, 1987, until May, 1988, and the Board is hardly persuaded that Citizens did not contribute to the delay.

Finally, it was Citizens that decided not to take the speculative risk of starting any facility designs until its compliance plan was firm. As early as May 6, 1982, Citizens acknowledged that compliance could be achieved by installation of ion exchange treatment facilities. Citizens also had said at that time that it could get Lake Michigan water by November, 1983, or by July, 1984, depending upon which regional system Citizens would contract with. (PCB 82-63). Since that time Citizens has relied on the "cat chasing its tail" argument that it needed time to get Lake Michigan water so as not to burden its customers with paying for the impliedly short term use of ion exchange treatment, but, on the other hand it needed time to see whether the Lake Michigan water option could become viable at all. Now, eight years later, Citizens argues that it still needs time to determine whether the Lake Michigan Water option can be made viable but "commits" to installing ion exchange treatment thereafter if necessary, while still arguing that its customers should not be burdened with paying for the impliedly short term use of ion exchange treatment. The "short term" argument suggests, of course, that Citizens would install ion exchange treatment even if the ICC did not honor Citizens' rate request (something Citizens has never suggested it would or could do), and that Citizens would seek Lake water even after the ion exchange treatment is installed (which Citizens has not said it would do).*

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* We emphasize here that at no time has the Agency or the Board stated that ion exchange treatment was unacceptable; it was simply not preferred.

Meanwhile, Citizens resisted identifying an existing connection with Glenview for emergency purposes and has frustrated the Agency efforts to assess whether this connection might, by blending, achieve compliance or at least reduce the excess radium in its water. Citizens' refusal to present this option for Agency review is unacceptable.

As noted earlier in its sanctions considerations, the Board will not give weight to any hardship argument regarding costs that is favorable to Citizens. Although the record does not contain a reasonable comparison of costs, Citizens has primarily argued that any economic hardship would fall on its customers because they have to pay for the short term use of ion exchange treatment. As discussed above, the premise that ion exchange would be a short term solution is speculative, and the assertion that the costs would fall on Citizens' customers is not necessarily valid.

PUBLIC INJURY

Although Citizens has not undertaken a formal assessment of the environmental effect of its variance request, it contends that a grant of variance will not cause any significant harm to the environment or to the people served by the potential watermain extensions for the limited time of the requested variance. (Petition, par. 18). The Agency does not rebut this, stating that while radiation at any level creates some risk, the risk associated with Citizens' water is low (Agency Rec. at par. 25). In support of these contentions, Citizens and the Agency reference testimony presented by Richard E. Toohey, Ph.D. and James Stebbins, Ph.D., both of Argonne National Laboratory, at the hearings held on July 30 and August 2, 1985, in R85-14, Proposed Amendments to Public Water Supply Regulations, 35 Ill. Adm. Code at 602.105 and 602.106.

The Board agrees that there ordinarily would be little risk during the term of the variance to persons newly receiving Citizens' noncomplying water. This assumes, however, that compliance would occur during the term of the variance, an assumption that cannot be relied upon because of the speculative nature of the compliance plan. We also agree that grant of a variance from restricted status per se does not provide direct relief to persons presently served by the water supply, except insofar as grant of variance by its conditions may hasten compliance. (see City of Joliet v. Illinois Environmental Protection Agency, PCB 86-121, November 6, 1986 at 6). We donot believe, however, that grant of variance in this case would hasten compliance. Citizens' proposed compliance plan again makes it clear that Citizens intends to continue to delay taking any engineering action to remedy the continuing exposure of those in its service area until it is certain that it would not incur any economic hardship. In any event, the lack of any significant

hardship showing that is not self-imposed in this case leaves little to consider in relation to our environmental impact concerns.*

ANTICIPATED FEDERAL STANDARD REVISION

The federal standard for radium has been under review for some time. In anticipation of a federal revision of the radium standard, the Illinois Environmental Protection Act has been amended at Section 17.6 to provide that any new federal radium standard immediately supersedes the current Illinois standard. Nevertheless, it remains uncertain as to when and how the radium standard will actually be modified.

The issue was raised in the briefs regarding what effect a new radium standard would have on Citizens. The Agency notes an apparent change in USEPA policy by which USEPA may not object to a variance beyond September 30, 1993, if a supply is making good faith, expedient efforts toward compliance (Agency Brief, Ex. A). The Agency questions whether USEPA will view the "18 month waiting period" contained in Citizens' compliance plan as progressing toward compliance. (Agency Brief at 5).

The Board is denying Citizens' variance because it has not committed to a firm, much less expeditious compliance effort; thus, any questions related to federal policy in this area are not relevant.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

For the foregoing reasons the request for variance by Citizens Utilities Company of Illinois is denied.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 1/2 par. 1041, provides for appeal of final

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* We note that Citizens quotes a portion of a Board PCB 88-11 Opinion (regarding a Geneva variance) that finds that a delay in economic development would cause even a slight hardship to be arbitrary or unreasonable. (Reply Brief at 10). It must be noted that this statement must be read in the context of the various Geneva variance proceedings; nevertheless, the language should have been, but was inadvertently not, rephrased prior to Board adoption so as to accurately reflect consistent Board holdings to the contrary. In any event, Citizens does not identify a hardship due to a delay in economic development, as had Geneva. Citizens also fails to note that Geneva has been subject to a stringent compliance plan (see also PCB 86-225).

Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Members J. D. Dumelle, J. T. Meyer and B. Forcade concurred.

Board Member R. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 5th day of March, 1990, by a vote of 4-1.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board