

ILLINOIS POLLUTION CONTROL BOARD  
August 4, 1988

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

ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on a June 22, 1988 motion by Citizens Utilities Company of Illinois ("Citizens") for rehearing and modification of the Board's Supplemental Order of May 19, 1988. On July 20, 1988, the Illinois Environmental Protection Agency ("Agency") filed a motion to file instanter, which is granted, and a response in opposition to Citizen's motion. On July 29, 1988, Citizens filed a request to defer ruling on its June 22, 1988 motion in order to file in three weeks a third amended petition requesting a five year variance - three years to hook on to a Lake Michigan water supply, or an extra two years beyond that to provide treatment such as ion exchange. Citizens also filed a reply to the Agency's July 20, 1988 response.

Citizens' request to defer ruling is denied.\*

Citizens' second motion for rehearing and modification is denied. Citizens' arguments are in large measure repetitious and are unpersuasive.

The instant motion should be viewed in the context of this long proceeding. Citizens initially filed its petition for variance on October 23, 1986. The petition seeks variance from restricted status imposed for violations of the Board's radium standards in Citizens' well water supplies at its Chicago Suburban service area.

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\* Citizens is free to file a new petition for variance, but the Board again cautions Citizens that it will not look with favor on information "that is as unenlightening as has occurred throughout this proceeding" (See Supplemental Opinion, p. 7, May 19, 1988).

The excess radium was first found in 1979, nine years ago; Citizens was granted an earlier variance in 1982, which terminated in 1984 (PCB 82-63). In this present proceeding, after retreating from two alternate scenarios, Citizens submitted the three year compliance plan at issue here, to secure Lake Michigan water from Glenview, on April 2, 1987 in its second amended petition as well as in its January 20, 1988 response.

On March 24, 1988, the Board adopted its initial Opinion and Order, granting a two-year variance rather than the three years requested by Citizens. On April 27, 1988, Citizens had filed a motion for rehearing and modification of that Order, requesting that the variance be granted for three, rather than two years. It was in response to that first motion that the Board adopted its May 19, 1988 Supplemental Opinion and Order, which vacated the Board's March 24, 1988 Opinion and Order and denied the variance. For clarity, Citizens' April 27, 1988 motion will be designated as the first motion and Citizens' instant June 22, 1988 motion will be designated as the second motion.

The Agency, in its July 20, 1988 response, has persuasively rebutted Citizen's arguments. There are, however, certain aspects of Citizens' arguments to which the Board will respond in greater detail.

Citizens asserts that the Board misunderstood the intent of the proposed compliance schedule insofar as the schedule states that compliance actions in the first 12 months would commence after the date of the Board Order, not before. The Board did not fail to see that portion of the schedule, and the compliance schedule still is misleading. Almost a year earlier, on April 2, 1987, Citizens first proposed the same twelve-month compliance actions regarding the conditions precedent in the Glenview agreement and initiation of engineering design. At that time, Citizens moved for expedited Board decision which motion was withdrawn at Citizens' request.

In its January 20, 1988 response, Citizens was still proposing that the same first year compliance actions commence after the Board Order. However, Citizens meanwhile had provided information showing that the Illinois Commerce Commission (ICC) approval, the only expressly stated condition precedent in the compliance schedule, had already occurred prior to its January response, and thus prior to the Board's March 24, 1988 grant of variance. In like manner, Citizens own sworn testimony as far back as January 1987 suggested that the initiation of engineering design steps may also have been satisfied, even though that provision, too, remained in the compliance schedule. As is evident in its March 24, 1988 Opinion, the Board was concerned about the terms of the Northfield Woods connection fee litigation, the only remaining condition precedent. However, vague and contradictory as the record was, it could be construed

that the connection fee litigation was no bar to initiation of design, that design had already been initiated and thus completion of design and construction would timely follow. In any event, this "before or after" issue skirts the fundamental problem.

Not until Citizens filed its first motion, with its attached affidavit, was it ever explicitly made clear that Citizens had no intention of ever initiating the design of the facilities until the condition precedent regarding the Northfield Woods connection fee litigation was resolved, including any appeals, and even then only if Citizens won the litigation. The compliance plan never mentioned the Northfield Woods litigation specifically, as it did ICC approval. And the compliance plan gives no indication of this sequential linkage; in fact, the compliance plan on its face indicates otherwise. And the Glenview agreement did not preclude Citizen's from initiating engineering design before the connection fee issue was resolved. For Citizens to suggest that, because the content of its first year compliance schedule remained unchanged since its second amended petition of April 2, 1987, Citizens has not been confusing or misleading in its intent is disingenuous and totally unacceptable.\* The facts contained in the affidavit constitute the only evidence that is not confusing or misleading about this point, except insofar as the affidavit states, the compliance plan notwithstanding, that the first year is set aside solely to resolve the litigation. Had these explicit facts been made part of the record prior to the Board's March 24, 1988 decision, the Board would have gleaned Citizens' true intent earlier, and the result would have been that the Board would have denied the variance at the outset for being unacceptably speculative.

The fundamental issue is not whether or not the Board was correct in its assumption that engineering design had been initiated, or whether or not the Board was correct in its construction of the record concerning the linkage. The issue is when compliance with the Board's radium standard will be achieved. Citizens in essence does not agree to invest in designing and constructing the delivery system before Citizens is certain that it will not have to pay the cost of the ultimate hook-on. Citizens, albeit belatedly, specifies that its Northfield Woods litigation is one of those occurrences that are out of its control, but has yet to explain why. Citizens has yet to explain how the condition precedent is to be satisfied if

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\* Contrary to Citizens assertions, Citizens changed one aspect of its proposed compliance schedule in its April 27, 1988 motion and then changed back again in its June 22, 1988 motion regarding permits. See the schedules attached to Citizens' first and second motions and the Board's May 19, 1988 Supplemental Opinion, p. 2 noting the initial change.

Citizens loses the connection fee dispute. Citizens has yet to give evidence from Glenview that Glenview will not, and explain why Citizens cannot, initiate engineering design promptly. These questions were posed earlier by the Agency. Citizens has not responded to the Board's conclusions that "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 number of years." (Supplemental Opinion, p. 2,3)

The Board agrees with the Agency that:

the new facts to be presented by the Company at the requested rehearing, even if true, provide reasons to deny the variance, not to extend it. These facts were provided as Exhibit A to the Company's first Motion for Rehearing." (Agency Rec., p. 18)

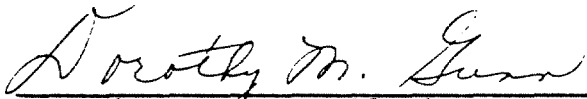
The Board again states:

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. (Supplemental Opinion, p. 7, May 19, 1988)

In conclusion, it is for all of the foregoing reasons that Citizens second motion for rehearing and modification is hereby denied.

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 4<sup>th</sup> day of August, 1988, by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board