

ILLINOIS POLLUTION CONTROL BOARD
December 28, 1983

PEOPLE OF THE STATE OF ILLINOIS)
)
 v.) PCB 83-224
)
 COMMONWEALTH EDISON COMPANY)
 (Certification No. 511-600)

Revocation of Tax Certification.

OPINION AND ORDER OF THE BOARD (by B. Forcade)

This matter comes before the Board upon a Proposal to Revoke Tax Certification adopted by the Board on December 6, 1983. Hearing was held on December 20, 1983.

Recently enacted Public Act (P.A.) 83-0883, which became effective on September 9, 1983, amends the definition of "Pollution Control Facility" as contained in Section 21a-2 of the Illinois Revenue Act of 1939 (Ill. Rev. Stat. Ch. 120, par. 502a-2) in the following manner:

"For purposes of assessments made after January 1, 1983, "pollution control facilities" shall not include, however, a) any system, method, construction, device or appliance appurtenant thereto, designed, constructed, installed or operated for the primary purpose of (i) eliminating, containing, preventing or reducing radioactive contaminants or energy, or (ii) treating wastewater produced by the nuclear generation of electric power; b) any large diameter pipes or piping systems used to remove and disperse heat from water involved in the nuclear generation of electric power; or c) any equipment, construction, device or appliance appurtenant thereto, operated by any person other than a unit of government, whether within or outside of the territorial boundaries of a unit of local government, for sewage disposal or treatment.

The Pollution Control Board shall revoke any prior certification in conflict with this amendatory act of 1983 before January 1, 1984."

Pursuant to this statutory directive, the Board reviewed Pollution Control Facility Certifications and Applications for Certification which were referred to the Board by the Illinois Environmental Protection Agency for decertification under this language. At hearing, Commonwealth Edison stipulated that they are not a unit of government and that facilities at Zion, Dresden, Byron and LaSalle are nuclear fueled electric generating facilities (R. 47). Further, Commonwealth Edison stated that the facility subject to this proceeding falls within the language of Public Act 83-0883 (R. 52), while reserving its objections to decertification based on procedural infirmities and constitutional violations (Commonwealth Edison Brief, pp. 3-10).

For procedural infirmities, Commonwealth Edison claims that the Board's December 6, 1983, Proposal to Revoke Tax Certification, which it received on December 11, 1983, left inadequate time to properly prepare for a December 20, 1983, hearing. Further, Commonwealth Edison asserts that the Proposals lack documentation regarding the Agency's position on decertification and reasons for that position. Since Commonwealth Edison admits that these facilities fall within the language of Public Act 83-0338, and is presumed to know the law was enacted on September 9, 1983, it is unclear what due process advantage would have been gained by longer notice or an explanation of the Agency's deliberative process. The Board notes that Commonwealth Edison did not request that Agency personnel be deposed nor call them as witnesses at hearing.

The threshold question before the Board is whether it should adjudicate these constitutional claims. The Board considered that question in People v. Santa Fe Park Enterprises, PCB 76-84, September 23, 1983. That case involved the constitutionality of P.A. 82-654, amending Section 25 of the Environmental Protection Act, Ill. Rev. Stat. ch. 111½, par. 1025. The Board noted that it has generally become a matter of hornbook law that "we do not commit to administrative agencies that power to determine constitutionality of legislation," citing Davis, Administrative Law Treatise, sec. 20.04, and n.1, although there is no authority in Illinois supporting the proposition that the Board either lacks or holds such authority. However, the Board held that it was

"persuaded by the Attorney General's argument that the Board is necessarily empowered to consider constitutional issues, and that, in appropriate cases, such issues should be addressed by the Board in the interests of efficient adjudication of the entire controversy before it. Given the constitutional underpinnings of the (Environmental Protection) Act as explained below, the Board

finds the general, administrative agency "no authority" rule inapplicable to its unique statutory role (as established in the Environmental Protection Act)." (slip op. at 5, emphasis added).

The Board does not find this to be an appropriate case for adjudication by the Board of the constitutionality of this legislative enactment. The arguments accepted by the Board in Santa Fe supporting its resolution of a constitutional challenge to an enactment altering the enforcement mechanism of the Environmental Protection Act are inapplicable here. They do not persuade the Board that it should enter the arena of taxation law to consider the constitutionality of a tax benefit provision of the Revenue Act.

The Board therefore finds the Zion excess structure to fall within subparagraph (a)(i) of paragraph 502 a-2 of the Illinois Revenue Act of 1939, as amended and the subject certification will be revoked.

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

ORDER

Tax Certification No. 21RA-ILL-WPC-511-600 issued to Commonwealth Edison Company is hereby revoked.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 28th day of December, 1983 by a vote of 7-0.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board