

ILLINOIS POLLUTION CONTROL BOARD
December 28, 1983

PEOPLE OF THE STATE OF ILLINOIS)
)
 v.) PCB 83-235
COMMONWEALTH EDISON COMPANY)
(Certification No. 21RA-ILL-WPC-73-14)

Revocation of Tax Certification.

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

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 Illinois Environmental Protection Agency, reviewed their files on tax certification and forwarded relevant information to the Board. Based on this information, the Board, on December 6 1983, adopted Proposals to Revoke Tax Certification for 43 facilities. The facility subject to this Order (the Zion diffuser, Tax Cert. No. 21 RA-ILL-WPC-73-14) was not contained in the information the

Agency forwarded to the Board, nor was it the subject of a Board Proposal to Revoke Tax Certification, perhaps through inadvertence.

Hearings were held on the tax certification matters at the Board offices on December 20, 1983. Commonwealth Edison appeared at the hearings, objecting to the Board Proposal to Revoke Tax Certification for their facilities on procedural and constitutional grounds, while admitting that certain of their facilities fell within the language of Public Act 83-0883. At hearing Commonwealth Edison introduced documentation (Resp. Ex.12) and testimony (R, 56-62) regarding a twelfth facility, the Zion diffuser pipes. Commonwealth Edison admitted that the Zion diffuser fits the language of subparagraph (b) of Public Act 83-0883. The Board accepts Commonwealth Edison's voluntary introduction of evidence that the Zion diffuser falls within the language of Public Act 83-0883 as a waiver of notice regarding decertification and on its own motion the Board hereby opens a docket number on that facility.

Generally, Commonwealth Edison has posed three objections in other certification proceedings that would apply here: (1) inadequate notice of decertification (2) inadequate information to determine the Agency's basis for urging decertification, and (3) constitutional infirmities in Public Act 83-0883. Since Commonwealth Edison has voluntarily brought this information to the Board, the inadequate notice argument fails. Likewise, Commonwealth Edison's admission that the Zion diffuser falls within the language of subparagraph (b) negates any concern over the basis for inclusion within the scope of Public Act 83-0883. That leaves only the constitutional arguments.

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 legis-
lative enactment. The arguments accepted by the Board in
Santa Fe supporting its resolution of a constitutional challenge
to an enactment altering an 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 diffuser to fall within
subparagraph (b) 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. 21-RA-ILL-WPC-73-14 issued to
Commonwealth Edison is hereby revoked.

IT IS SO ORDERED.

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


Christan L. Moffett, Clerk
Illinois Pollution Control Board.