

ILLINOIS POLLUTION CONTROL BOARD
August 30, 1990

REED-CUSTER COMMUNITY UNIT)
SCHOOL DISTRICT NO. 255-U)
)
Petitioner,)
)
v.) PCB 87-209
) (Tax Certification)
)
COMMONWEALTH EDISON COMPANY)
and THE ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

MR. FREDERIC LANE, MS. PATRICIA HATAMYAR, AND MR. STUART WHITT
APPEARED ON BEHALF OF THE PETITIONER;

MR. DOUGLAS SPESIA, MR. NEIL GOLTERMANN, AND MR. ALAN BIELAWSKI
APPEARED ON BEHALF OF THE RESPONDENT COMMONWEALTH EDISON COMPANY;

MR. JOSE GONZALEZ, JR. APPEARED ON BEHALF OF RESPONDENT ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY.

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

This matter comes before the Board on a petition to revoke certification of pollution control facility No. 21RA-ILL-WPC-85-15 filed on December 31, 1987 by the Reed-Custer Community Unit School District No. 255-U (Reed-Custer). The Illinois Environmental Protection Agency issued the certification to Commonwealth Edison (ComEd) on April 10, 1986. The certificate finds the cooling pond at the Braidwood Nuclear Power Station to be a pollution control facility.

The Board's authority to certify pollution control facilities for real property tax purposes is separate from any authority granted to the Board in the Environmental Protection Act. Certification of pollution control facilities for real property tax purposes is governed by the Illinois Revenue Act of 1939, found at Ill. Rev. Stat. 1989, ch. 120, pars. 502a-1 to 502a-6. Pursuant to these sections, certification results in the removal of the pollution control facility from the local tax rolls for real property assessment. Reed-Custer seeks a revocation of the April 1986 certification under section 502a-6(A) of the Revenue Act which allows revocation whenever a certificate was obtained by fraud or misrepresentation.

Hearings in this matter were held on September 8 and 9,

1988. Three witnesses appeared for the petitioner, Reed-Custer, and three witnesses appeared for ComEd. A total of thirty-one exhibits were admitted into the record. Reed-Custer submitted a post hearing brief on November 1, 1988. ComEd submitted its corrected post hearing brief on December 20, 1988 and Reed-Custer submitted a reply brief on December 23, 1988. Based on the record before it, the Board finds that petitioner's request for revocation must be denied.

BACKGROUND

ComEd's Braidwood Nuclear Power Station (Braidwood Station) and cooling pond is located in Reed Township of Will County, in the Reed-Custer School District. (R. at 29). Braidwood Station is designed to generate electricity using nuclear power and three self-contained "loops" of water. A description of the generating system is found in Reed-Custer's Exhibit 13, the Environmental Report; Operating License Stage prepared by ComEd, at page 3.2-1. (This document was submitted at hearing and was not a part of the Agency's file.) This description was similarly stated at hearing by Gregory C. Minor, a witness for Reed-Custer. As stated in Exhibit 13 at 3.2-1:

The reactor (or primary loop) water in a [pressurized water reactor] is kept under pressure and acquires heat from the fuel in the reactor core. This heat is transferred outside of the core by the reactor water to a steam generator. There, water in a secondary loop, which extracts heat from the primary loop, boils to form steam to drive the turbine. The primary loop water is recirculated through the reactor. The turbines drive the generators to produce electricity. The steam is condensed after its passage through the turbines through absorption of the heat by the circulating water system [third loop]. The condensate is then returned to the steam generators. At the Braidwood Station, the circulating water is returned to the cooling pond.

The circulating water system, or third loop, takes cool water from one side of the cooling pond at the Braidwood Station, uses that water to cool the steam in the condensers of the secondary loop, and releases the now heated water into the other side of the cooling pond. When the heated water is released into the pond, a series of internal dikes channels the water around the pond over a period of several days. During the circuitous route around the pond, the heated water cools to a temperature suitable for recirculating back through the condensers and suitable for release into the waters of the State of Illinois. The cooling pond covers 2,537 acres of the total 4,454 acres of the station.

PROCEDURAL HISTORY

ComEd first submitted an application for certification to the Agency in April 1985. The Agency denied Edison's application for certification in May 1985 because of an amendment to Section 502a-2 of the Revenue Act of 1939 which the Agency interpreted as rendering the Braidwood cooling pond ineligible for certification. (Pet. Exh. 22).

As a result of litigation involving the interpretation of the amendments to Section 502a-2 (specifically subsections 502a-2(a)(i), and (ii)), the Board recertified various other cooling ponds and cooling towers as pollution control facilities in October 1985. (See, People v. Commonwealth Edison Co., PCB 83-215 (Dresden Cooling Pond); PCB 83-217 (Byron Cooling Tower #1); PCB 83-218 (Byron cooling Tower #2); PCB 83-221 (LaSalle Cooling Pond), (collectively referred to herein as the Dresden case)). Following that decision ComEd asked the Agency to reactivate its Braidwood cooling pond application for certification in a November 1985 letter. Upon review of ComEd's reactivated original application, the Agency issued a tax certification for the Braidwood Station's cooling pond on April 1, 1986.

After receiving Reed-Custer's December 1987 petition to revoke, the Board issued an Order requesting additional information. Reed-Custer filed a brief in response to the Board Order on January 26, 1988. On that same date, ComEd filed a motion to strike and dismiss. ComEd filed a reply memorandum in opposition to the petition to revoke on February 1, 1988. Both the motion to strike and dismiss and the reply memorandum argued that the Board lacked authority to entertain a third-party petition to revoke certification.

After briefing by Reed-Custer and ComEd on the issue of the Board's authority to entertain the petition to revoke certification, the Board accepted Reed-Custer's third-party petition in an Order of February 25, 1988. That Order affirmed the Board's authority to accept third-party petitions in tax certification revocation proceedings and the issue will not be reconsidered here.

THE REVENUE ACT

The Revenue Act states that the Pollution Control Board is responsible for certifying pollution control facilities for tax purposes (Section 502a-4) and for establishing the application procedures (Section 502a-5). The authority to issue or deny a certificate of pollution control facility is delegated to "the Pollution Control Board, acting through its Chairman or his specifically authorized delegate." (Section 502a-5.) The Revenue Act also states, in Section 502a-6, that "the Board may on its own initiative revoke or modify a pollution control certificate . . . whenever any of the following appears:

- (A) The certificate was obtained by fraud or misrepresentation:
- (B) The holder of the certificate has failed substantially to proceed with the construction, reconstruction, installation, or acquisition of pollution control facilities . . .;
- (C) The pollution control facility to which the certificate relates has ceased to be used for the primary purpose of pollution control and is being used for a different purpose."

On January 11, 1982, the Chairman of the Board delegated to the Illinois Environmental Protection Agency (Agency) the authority to issue or deny, but not to revoke, tax certifications. Over a year later, on June 10, 1983, the Chairman of the Board delegated to the Agency the additional authority "to revoke certifications under the circumstances set forth in Section [502]a-6(C) or where revocation of the certificate is requested by the taxpayer for the pollution control facility." However, the Board retained the authority to revoke certificates pursuant to Section 502a-6 (A), which is the basis for this case.

THE ENVIRONMENTAL PROTECTION ACT

Although the Revenue Act is the sole source of authority for certification of pollution control facilities, the Environmental Protection Act (Act), Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1001 et seq., has a limited applicability to the certification process. Section 502a-2 states that the definitions for "water pollution" and "air pollution" contained in the Act are the definitions of those terms to be used in the certification process.

The Environmental Protection Act also affects this case in a more indirect manner. The Act grants to the Board the authority to adopt rules and regulations which "determine, define and implement the environmental control standards applicable in the State of Illinois." Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1005(b). Section 13 of the Act allows the Board to adopt water quality standards which regulate among other things, the temperature of waters in the State, and to prescribe effluent standards governing, among other things, the thermal nature of contaminants discharged into waters in the State.

Pursuant to Section 13 of the Act, the Board has promulgated water quality standards in 35 Ill. Adm. Code Subtitle C, Chapter

I. The Board's regulations governing temperature are found at 35 Ill. Adm. Code 302.211. These standards must be met to avoid violating the Act.

DISCUSSION

We emphasize that, pursuant to Section 502a-6(A) of the Revenue Act, the sole basis for considering revocation in this case is whether or not ComEd's certificate of pollution control facility was obtained by fraud or misrepresentation. Therefore, the focus of the Board's review is restricted to the accuracy of ComEd's application, not the correctness of the Agency's determination. In other words, the Revenue Act does not authorize a third party to seek to have the Board reverse the Agency's determination to issue the certificate on a claim that the Agency's action was in error based on the record; rather, it authorizes the third party to seek to have the Board revoke the certificate on a claim that ComEd's actions were unacceptable based on fraud or misrepresentation in its application.

Reed-Custer claims that ComEd's application to the Agency for certification of a pollution control facility¹ contained inaccurate information. In its pleadings and at hearing, Reed-Custer alleged that ComEd made fraudulent and misrepresentative statements to the Agency concerning the primary purpose of the cooling pond, the value of the cooling pond, the outcome of the Dresden case, and the piping associated with the cooling pond. The Board will review the accuracy of these statements to determine if ComEd's application was based upon fraud or misrepresentation. If a statement is deemed inaccurate, then it must be evaluated to ascertain if the inaccuracies attain the level of fraud or misrepresentation, thus leading to revocation. Of course, if the statements are found to be accurate, then the certificate was obtained without deceit and there is no grounds for revocation.

Definition of a pollution control facility.

In order to determine whether ComEd's statements were accurate we will first address the question of what is a "pollution control facility" in the tax certification context. The statutory definition of a pollution control facility for real property assessment purposes is provided at Section 502a-2 of the Revenue Act. Subparagraphs of this definition were at issue in the Board's Dresden case. A shortened version of the definition in Section 502a-2 is used in the Retailers' Occupation Tax Act (ROTA) and the Use Tax Act (UTA).² The parties in this case

¹ The Board construes the application for a pollution control facility to include all documents filed with the Agency pertaining to the request for certification.

² The first paragraph of the "definition of a pollution control facilities," found in the Revenue Act of 1939 (Ill. Rev. Stat. 1989, ch. 120, sec. 502a-2), is identical to the "definitions

cited several cases where the courts of Illinois have interpreted the definition of pollution control facility and of primary purpose under the ROTA and the UTA.

As noted, the statutory definition of a pollution control facility which is applicable in this case is the Revenue Act, Section 502a-2, which states as amended:

21a-2. Definition of pollution control facilities. "Pollution control facilities" means any system, method, construction, device or appliance appurtenant thereto, designed, constructed, installed or operated for the primary purpose of eliminating, preventing, or reducing air and water pollution as the term "air pollution" or "water pollution" is defined in the "Environmental Protection Act", enacted by the 76th General Assembly, or for the primary purpose of treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which if released without such treatment, pretreatment, modification or disposal might be harmful, detrimental, or offensive to human, plant or animal life, or to property, or any portion of any building or equipment designed, constructed, installed or operated for such primary purpose.

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 waste water 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. (Emphasis added);

Three portions of this definition have been further elaborated, defined, and interpreted by statute, the Board and by the courts. The first of these portions is the incorporation by

of pollution control facilities" found in the Use Tax Act (Ill. Rev. Stat. 1989, ch. 120, sec. 439.2a), and in the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1989, ch. 120, sec. 440a).

reference within Section 502a-2 to the Environmental Protection Act. The definition of water pollution (air pollution is not at issue) is found at Section 3.55 which states:

"Water Pollution" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

Water pollution is further defined by the definition of the term waters as it is used in Section 3.55. "Waters" is described in Section 3.56 of the Environmental Protection Act which states:

"Waters" means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

The second portion which has been further defined is subparagraphs (a)(i) and (a)(ii) of Section 502a-2. In People of the State of Illinois v. Commonwealth Edison Company, PCB 83-215, October 24, 1985, the Board, on remand from the Circuit Court of Cook County, reversed its prior decertification of the Dresden cooling pond. Originally, the Board had viewed Section 502a-2(a)(i)'s exclusion of systems which were "eliminating, containing, preventing or reducing radioactive contaminants or energy" as applying to all types of energy, not just radioactive energy. Therefore, the Board had decertified the cooling pond because heat is thermal energy. On remand, the Board reconsidered its interpretation of the statement to agree with common grammatical structure and the legislative intent that the adjective "radioactive" applied to both contaminant and energy.

The Board had also originally found that subparagraph (a)(ii) required decertification of the cooling pond because thermally polluted water constituted "waste water." Upon remand, the Board found that "waste water" constitutes water polluted by substances (i.e., a gas, liquid or solid). Since heat is a manifestation of energy, not substance, thermally polluted water is not wastewater unless a substance is also in the water.

The third portion of Section 502a-2 which has been further interpreted by the courts of Illinois is the use of the phrase "primary purpose." The Illinois courts have developed a primary purpose test in their review of cases involving the definition of pollution control facility in ROTA and UTA. The "primary

purpose" test determines the function and ultimate objective of the equipment alleged to be exempt, with only those facilities directly involved in the pollution abatement process granted exempt status. (Central Illinois Public Service Company v. Department of Revenue, 158 Ill.App.3d 763, 511 N.E.2d 222 (Ill.App.4 Dist. 1987); Columbia Quarry Co. v. Dept. of Revenue, 154 Ill.App.3d 129, 506 N.E.2d 795 (Ill.App.5 Dist. 1987); Central Illinois Light Co. v. Dept. of Revenue, 117 Ill.App.3d 911, 453 N.E.2d 1167 (Ill.App.3 Dist. 1983); Shell Oil Co. v. Dept. of Revenue, 117 Ill.App.3d 1049, 453 N.E.2d 125 (Ill.App.4 Dist. 1983); Du-Mont Ventilating Co. v. Dept. of Revenue, 73 Ill.2d 243, 383 N.E.2d 197, (Ill. 1978); Illinois Cereal Mills v. Dept of Revenue, 37 Ill.App.3d 379, 346 N.E.2d 69 (Ill.App.4 Dist. 1976).) It is important to this case to note that the court cases are distinguishable from the present case in two ways. First, as previously mentioned, all but one of these cases was not decided pursuant to Section 502a of the Revenue Act. Secondly, all but one of these cases involved air pollution, not water pollution.

Primary purpose.

Reed-Custer cites three statements, one contained in the Agency's application form and two in the accompanying letter, which it claims falsely describe the primary purpose of the cooling pond. The first statement, in the application form, is the response to Section D of the form requesting a narrative description of the pollution control facility. ComEd's response to Section D stated:

The Braidwood Cooling Pond receives water from the station condensers and allows waste heat to dissipate into the atmosphere prior to the recycling or discharging of this cooling water into the Kankakee River. The pond was designed to meet thermal discharge limitations contained in the Illinois Pollution Control Board Rules and Regulations, Chapter 3: Water Pollution, Section 203(i).

The two statements in the accompanying letter to the application stated:

2. Please see attached drawings. Note that neither the cooling pond or its associated facilities are related to manufacturing of any kind.

8. Because this facility deals solely with the thermal pollution in regards to cooling the circulating water from the station, no contaminants are removed or disposed of by this operation."

We will discuss Section D and (2) first.

Reed-Custer argues that Section D is false or ambiguous and

misleading because the primary purpose of the cooling pond is to supply water to cool the condensers. At hearing, Reed-Custer introduced evidence showing that the volume of water discharged to the Kankakee River is very small (43 cubic feet per second) compared to the total volume which is recycled through the Braidwood Station (3,250 cubic feet per second). In addition, testimony and evidence show that the Braidwood Station could not operate year round by using water from the Kankakee River as cooling water. Reed-Custer argued that these two factors establish that the primary purpose of the cooling pond is to supply cooling water to the Station. According to Reed-Custer, the function of reducing thermal pollution so that the water could be released into the Kankakee River is secondary to the function of supplying water for operation.

Reed-Custer claims the statement in (2) is false because the cooling pond is directly related to manufacturing. As described in the previous paragraph, Reed-Custer asserts that the cooling pond's primary purpose is to supply water for the year-round operation of the Braidwood Station. Also, Reed-Custer asserts that the drawings submitted by ComEd do not detail the function of the cooling pond or how it connects to the plant.

The Board does not find Reed-Custer's arguments to be persuasive with regard to the primary purpose of the cooling pond. The argument that the cooling pond's primary purpose is to supply cooling water to the condensers ignores two important points. First, unlike that in the cited case law, the disputed facility in this case is a body of water which falls within the definition of "waters" in the Environmental Protection Act. As a "water" of this State, the disputed facility is protected and governed by the Act and the water pollution regulations of the Board. As a consequence of being within the jurisdiction of the Act and the Board, no person is allowed to cause or threaten to cause water pollution, which includes thermal pollution. To do so would subject the violator to an enforcement action which could result in penalties and an order to cease the activities which cause or allow the violations.

The second point ignored by Reed-Custer's argument, is that nothing in the Revenue Act or the Board's regulations prohibits the owner of a pollution control facility from choosing other uses and purposes for the facility, so long as they are compatible with the pollution control purpose. The issue is, when a conflict arises between the pollution control purpose and any other purpose chosen for the facility, which purpose prevails. For example, if during a drought and absent a variance, a cooling pond had reached a point where it could not achieve both the desired level of electricity production and compliance with the thermal regulations, the issue becomes which purpose, the business purpose or the pollution control purpose, would predominate. This is the question of law before the Board in this case.

The Board does not accept Reed-Custer's proposition, which would in essence allow ComEd, absent special relief from the Board, to continue to operate the Braidwood Station even if that continued operation violated the Board's thermal regulations. The Board finds that the requirements of the Act and the Board regulations supersede the interest of continued operation of the Braidwood Station; use of the cooling pond for water pollution control takes precedence over use for supplying water for the condensers, and is the primary purpose of the cooling pond.

The Board finds that the statements made by ComEd in Section D and (2) are not inaccurate. The statements in Section D that the cooling pond "allows waste heat to dissipate into the atmosphere" is an accurate description of how the thermal pollution is eliminated, reduced, or prevented. The statement that the cooling pond was designed to meet thermal discharge limitations is also accurate. With regards to the use of the cooling pond, (2) is accurate because the cooling pond's function to dissipate the condenser's thermal energy is not related to the manufacturing process as that term is used in this context. The Board also finds that the drawings accurately depicted the stated method of heat dissipation in the cooling pond.

Reed-Custer objects to the description in (8) of the function and purpose of the cooling pond as dealing "solely with the thermal pollution". At hearing, Reed-Custer produced evidence that, aside from supplying water to cool the condensers, the cooling pond additionally functions as a safety device, and a cooling system for the water discharged into the Kankakee River. The Board does not find (8) to be false or inaccurate. First, as noted above, the Revenue Act does not prohibit a pollution control facility from having more than one function; it must simply have pollution control as its primary purpose. Second, the Board finds that the phrase is accurate when examined in the context of the complete sentence. As stated in (8), the cooling pond is a system which controls thermal pollution. Reed-Custer provides no evidence that, in contradiction to ComEd's statement in (8), the cooling pond handles any other contaminant or pollutant.

The value of the cooling pond.

Section E of the application form asks about the pollutants produced by the manufacturing operation and requests accounting data pertaining to the pollution control facility. ComEd stated that the cooling pond had no productive gross or net annual income and no net salvage value. [Pet. Exh. 22, Section E(5)(c), (e), and (f).] In addition, ComEd did not answer Section E(5)(g) which requests the percentage the cooling pond bears to the value of the Braidwood Station as a whole. [Pet. Exh. 22, Section E(5)(g).] Reed-Custer asserts that the representations made in Section E by ComEd are false. In support, Reed-Custer claims

that its appraiser estimated the value of the cooling pond structures and improvements at the Braidwood station of over \$42 million.

The Board does not find this a persuasive argument for revoking ComEd's certification. Reed-Custer does not supply the Board with cost estimates of the productive gross or net annual income or net salvage value of the cooling pond. Therefore, the Board cannot find these answers inaccurate. Neither does Reed-Custer provide a percentage that the cooling pond bears to the value of the Braidwood Station as a whole. Although ComEd did not answer this one directly, simple arithmetic demands that if the other values are zero, so is the percentage. As for Reed-Custer's appraisal estimate which covered the cooling pond structures and improvements at the Braidwood station, ComEd did provide a cost assessment of equipment and related work to the cooling pond in the letter accompanying the application form. The Board believes these estimates are similar in nature and amount (in fact, ComEd's estimate is higher). The Board does not find any inaccuracies in Section E.

The Dresden case.

As previously discussed, the Dresden case was a remand from the Circuit Court of Cook County, to review a Board decision to decertify the Dresden cooling pond. After the Board decided that case, ComEd sent a letter to the Agency which stated:

"As you know, the litigation involving decertification of cooling lakes and towers has now been completed and all such PCF's are still certified."

Reed-Custer asserts that this statement is false because the litigation in Dresden involved a different type of power station cooling pond than Braidwood Station.

The Board does not find that ComEd's statement evidences inaccuracies. It is a fact that there were a number of similar cases being decided at that time. ComEd's use of the word "still" indicates that it is those cases which are being referred to, not to pending cases where facilities were not previously certified.

Large diameter pipes.

Reed-Custer also claims that the Braidwood Station cooling pond cannot be certified because it falls within 502a-2(b) which provides that pollution control facilities shall not include "any large diameter pipes or piping systems used to remove and disperse heat from water involved in the nuclear generation of electric power." Reed-Custer states that the 16 foot diameter pipes which transport the water between the station and the cooling pond and the 4 foot diameter pipes which transport water

between the cooling pond and the Kankakee River comprise a piping system used to remove heat or disperse heat.

The Board does not find Reed-Custer's argument to be persuasive. Reed-Custer is challenging the Agency's determination, not the issue of whether ComEd made inaccurate or misleading statements. Such a challenge is beyond the scope of Board review. Even if Reed-Custer could challenge the Agency's determination before the Board, the Board notes that, in accord with the previous interpretations of the statute in the Dresden case, the piping systems mentioned in the Revenue Act must remove heat and disperse heat from water. The pipes that Reed-Custer objects to merely move water from one place to another; they are not heat dissipation devices.

The Board finds that ComEd's statements to the Agency are not inaccurate. Thus, ComEd did not obtain the certificate by fraud or misrepresentation, and the Board so finds. The Board therefore dismisses Reed-Custer's petition to revoke certification of pollution control facility.

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

ORDER


The petition of Reed-Custer Community Unit School District No. 255-U to revoke Commonwealth Edison Company's certification for pollution control facility No. 21RA-Ill-WPC-85-15 is denied.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Member B. Forcade 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 August, 1990, by a vote of 6-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board