

ILLINOIS POLLUTION CONTROL BOARD
December 28, 1983

| | | |
|----------------------------------|---|----------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | PCB 83-187 |
| |) | PCB 83-188 |
| CITIZENS UTILITIES COMPANY |) | PCB 83-189 |
| OF ILLINOIS, |) | PCB 83-201 |
| |) | PCB 83-202 |
| Respondent. |) | |
| |) | |
| |) | |
| PEOPLE OF THE STATE OF ILLINOIS |) | PCB 83-206 |
| |) | PCB 83-207 |
| Petitioner, |) | (Consolidated) |
| |) | |
| v. |) | |
| |) | |
| PRESTWICK UTILITIES COMPANY, |) | |
| |) | |
| Respondent. |) | |

Revocation of Tax Certifications.

JOHN VAN VRANKEN AND BARBARA A. CHASNOFF, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF PETITIONER; AND

DANIEL J. KUCERA AND RAYMOND A. FYLSTRA (CHAPMAN & CUTLER) APPEARED ON BEHALF OF RESPONDENT.

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

These matters come before the Board upon a Proposal to Revoke Tax Certification adopted by the Board on December 6, 1983.

Recently enacted Public Act (P.A.) 83-883, 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 Environmental Protection Agency for decertification under this language. On the basis of this information, the Board proposed to revoke five tax certificates held by the Citizens Utilities Company of Illinois (Citizens), and two tax certificates held by Prestwick Utilities Company. (Preswick) The certifications relate to wastewater treatment facilities which the Board believed fell within subparagraph (c) of paragraph 502a-2 of the Illinois Revenue Act of 1939, as amended.

The Board provided an opportunity for a hearing to present contrary facts on this matter on December 20, 1983 at 9:00 a.m. at the Pollution Control Board Offices. Such hearings were scheduled if the Board received a request for hearing, and a short statement of the facts to be presented at hearing, no later than 12:00 noon on December 19 1983. Citizens and Prestwick made hearing requests on December 15, and filed the required factual statements on December 19. At hearing, Citizens and Prestwick made certain factual stipulations, presented evidence and argument, and filed their joint Memorandum In Opposition to the revocation proposal. The Attorney General filed Petitioner's Brief in support of revocation on December 27, 1983, pursuant to the briefing schedule established in the Board's Order of December 6, 1983. As the parties have de facto treated these actions in consolidated fashion, the Board will formally order them to be consolidated, and treat them in a single Order.

Citizens is a public utility within the meaning of An Act Concerning Public Utilities, Laws of Illinois 1921, p. 702, Ill.

Rev. Stat. ch. 111-2/3 sec. 1 et seq. It provides water and sanitary sewer service to portions of the metropolitan Chicago area under certificates of public convenience and necessity granted by the Illinois Commerce Commission. These proceedings concern four waste water treatment plants which Citizens owns and operates, located in DuPage and Will Counties, and which are certified pollution control facilities under section 21a-1 et seq. of the Revenue Act of 1939. The four plants and their corresponding certificate numbers and case numbers are as follows:

| <u>Plant</u> | <u>Certificate Nos.</u> | <u>Case Nos.</u> |
|---------------------|-------------------------|------------------|
| West Suburban No. 1 | 21RA-ILL-WPC-79-4 | PCB 83-187 |
| | 21RA-ILL-WPC-79-8 | PCB 83-201 |
| West Suburban No. 2 | 21RA-ILL-WPC-74-6 | PCB 83-188 |
| Santa Fe | 21RA-ILL-WPC-74-7 | PCB 83-189 |
| Valley View | 21RA-ILL-WPC-77-4 | PCB 83-202 |

Prestwick also is a public utility. It provides water and sanitary sewer service in a portion of Will County under certificates of public convenience and necessity granted by the Illinois Commerce Commission. These proceedings concern two waste water treatment plants which Prestwick owns and operates and which are certified pollution control facilities, as follows:

| <u>Plant</u> | <u>Certificate Nos.</u> | <u>Case Nos.</u> |
|-----------------------|-------------------------|------------------|
| Frankfort Square | | |
| Subdivision | 21RA-ILL-WPC-80-18 | PCB 83-206 |
| Prestwick Subdivision | 21RA-ILL-WPC-80-19 | PCB 83-207 |

At hearing, Citizens, Prestwick, and the Attorney General made a joint stipulation that a) the respondents are not governmental units, b) that the pollution control equipment involved is used for "sewage treatment disposal" (sic), and that the meaning of the term "sewage" is that contained in 35 Ill. Adm. Code 301.385 (formerly Rule 104 of Chapter 3: Water Pollution), i.e. "water-carried human and related wastes from any source" (R. p.5). Based on this factual stipulation, the Board finds that each of the seven tax certifications here involved (Resp. Ex. 1-7) fall within subparagraph (c) of paragraph 502a-2 of the Illinois Revenue Act of 1939, as amended by P.A. 83-883, and that the Board is thereby mandated to revoke each of them.

Citizens and Prestwick oppose revocation on the grounds that P.A. 83-883 is unconstitutional both on its face and as applied to their facilities. Respondents argue that P.A. 83-883 violates federal and state guarantees of equal protection, due process of law and uniformity in taxation. Briefly, but more specifically, respondents assert that the recent amendment to the Revenue Act

creates a decertification classification which is not reasonably related to the purpose of, and public policy behind, section 21a-1 of the Revenue Act: the encouragement of installation of pollution control facilities by providing tax benefits to business. Citizens and Prestwick further argue that P.A. 83-883 constitutes "invidious discrimination," because it arbitrarily singles out for loss of tax benefits sewage treatment facilities a) not operated by governmental entities, and b) treating domestic as opposed to industrial and other types of wastes. Citizens and Prestwick support their contentions by citation to various legal authorities, and by reference to documents generated by the Department of Revenue indicating the small number of certifications affected by P.A. 83-833 (Resp. Ex.7-8).

In his brief in response, the Attorney General argues that the pollution control facility sub-classifications affected by P.A. 83-883 were reasonably made, based on real and substantial differences, and that the effect of the amendment is reasonable and within the original intention of the benefit bestowed under Section 21-a of the Revenue Act.

The threshold question before the Board is whether it should adjudicate respondents' 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, ¶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, §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 arguments 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.

Finding that the 7 tax certifications here involved fall within paragraph 502 a-2(c) of the Revenue Act, and that the Board is not an appropriate forum for consideration of the constitutional questions raised, each tax certificate is hereby revoked.

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

ORDER

Pursuant to Ill. Rev. Stat. Ch. 120, par. 502a-2, each of the following Pollution Control Facility Tax Certifications is hereby revoked:

- a) Certificates issued to Citizens Utilities Company of Illinois

| <u>Plant</u> | <u>Certificate Nos.</u> | <u>Case Nos.</u> |
|---------------------|-------------------------|------------------|
| West Suburban No. 1 | 21RA-ILL-WPC-79-4 | PCB 83-187 |
| | 21RA-ILL-WPC-79-8 | PCB 83-201 |
| West Suburban No. 2 | 21RA-ILL-WPC-74-6 | PCB 83-188 |
| Santa Fe | 21RA-ILL-WPC-74-7 | PCB 83-189 |
| Valley View | 21RA-ILL-WPC-77-4 | PCB 83-202 |

- b) Certificates Issued to Prestwick Utilities Company

| <u>Plant</u> | <u>Certificate Nos.</u> | <u>Case Nos.</u> |
|---------------------------------|-------------------------|------------------|
| Frankfort Square Subdivision | 21RA-ILL-WPC-80-18 | PCB 83-206 |
| Prestwick Subdivision | 21RA-ILL-WPC-80-19 | PCB 83-207 |

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, Clerk
Illinois Pollution Control