ILLINOIS POLLUTION CONTROL BOARD
*December 28, 1983*

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| PEOPLE OF THE STATE OF ILLINOIS | ) | |
| | ) | |
| v. | ) | PCB 83-215 |
| | ) | |
| COMMONWEALTH EDISON COMPANY | ) | |
| (Certification No. 21RA-ILL-WPC-81-12 | ) | |

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 has 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.

On December 20, 1983, the People of the State of Illinois ("People"), in open hearing in the above-captioned matter, moved to amend the December 6, 1983 Proposal to Revoke Tax Certifications for this case (R. 77). The motion to amend would change the first full sentence on page 2 of the December 6, 1983, proposal so that it would say:

> The Board finds that the facility which is the subject of this Certification falls within subparagraph (a)(i), (a)(ii), and/or (b), of paragraph 502a-2 of the Illinois Revenue Act of 1939, as amended.

Commonwealth Edison posed no objection to the motion, but noted for the record that the motion to amend came after testimony had been taken (R. 77).

Therefore, the Board grants the motion and the December 6, 1983 proposal is so modified.

At hearing, Commonwealth Edison objected to the decertification of this facility and presented opposing testimony (R. 46-77).

The amendment of Public Act 83-0883 requires under subparagraph (ii) of paragraph 502a-2, the decertification of any ". . . device constructed . . . or operated for the primary purpose of treating wastewater produced by the nuclear generation of electric power." The Tax Revenue Act provides that definitions in the Environmental Protection Act ("Act") shall apply when establishing whether a facility is a pollution control facility, Ill. Rev. Stat. ch. 120, par. 502a-2. The Act includes thermal alteration within the definition of water pollution (Ill. Rev. Stat. 1981, ch. 111½, par. 1003, nn). The stated purpose of the Act is to ensure that, ". . . no contaminants are discharged into the waters of the state . . . from any source within the State of Illinois, without being given the degree of treatment or control necessary to prevent pollution . . . ." Ill. Rev. Stat. 1981, ch. 111½, par. 1011(b).

The Dresden Cooling Pond receives thermally altered water from condensers and the thermal quality of the water is changed (R. 69-70, 76) before it is discharged into the Rock River or recycled. Commonwealth Edison, in its tax certification application for this facility, describes the water as "thermally polluted water" (Petitioner's Group Exhibit 3). Under the Act's definition of pollution, the pond is a treatment facility.

During hearing, Commonwealth Edison argued that the cooling pond provides no form of treatment to the water. However, upon cross-examination it was established that contaminants may be removed in settling ponds without any addition of chemicals (R. 66-69).

Since Commonwealth Edison has stated that treatment is the removal of contaminants and can be accomplished in a settling pond without chemical additives, it is a direct contradiction that a cooling pond, which also removes a contaminant without chemical additives, is not a treatment facility.

The Board therefore finds the Dresden Cooling Pond to fall within subparagraph (a)(ii) of paragraph 502a-2 of the Illinois Revenue Act of 1939, as amended and the subject of certification will be revoked.

Additionally, the Board finds that the Dresden Cooling Pond, the LaSalle Cooling Pond, and the Byron Cooling Towers #1 and #2, fall within 502a-2, (a)(i). Commonwealth Edison testified that cooling ponds remove energy in the form of heat, from water (R. 69). They also testified that a cooling tower facilitates the transfer of thermal energy to the atmosphere (R. 76).

Therefore, the Cooling Ponds and the Cooling Towers qualify under 502a-2, (a)(i), as a ". . . device constructed . . . or operated for the primary purpose of . . . reducing . . . energy".

Commonwealth Edison has objected to decertification on two legal grounds, inadequate notice of decertification and unconstitutionality of Public Act 83-0883. As soon as the Board was made aware of this legislation in late November, 1983, Commonwealth Edison was provided as much notice as possible. Moreover, Commonwealth Edison was provided a hearing at which it could and did present a witness to testify. The Board notes that Commonwealth Edison did not request depositions of or testimony by Agency witnesses. This discounts the argument that Commonwealth Edison could not discover the basis for the Agency request to decertify. Therefore, the Board finds that there was reasonable notice of decertification. That leaves only the constitutional argument.

The threshold question before the Board is whether it should adjudicate Commonwealth Edison's 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 is 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.

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-81-12 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