



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

April 24, 2000

Jim Ryan
ATTORNEY GENERAL

FILE NO. 00-008

COUNTIES:
Authority to Regulate the
Location of "Peaker Plants"

The Honorable Gary W. Pack
State's Attorney, McHenry County
2200 North Seminary Avenue
Woodstock, Illinois 60098

Dear Mr. Pack:

I have your letter wherein you inquire whether a non-home-rule county may, through the exercise of its zoning powers, regulate the location of "peaker plants", which are facilities that are used to " * * * generate electricity only during periods where there is a great need for electricity * * * [with t]he electricity * * * [being] sold to electric companies for distribution to the end user. * * *" For the reasons hereinafter stated, it is my opinion that the location of peaker plants is subject to regulation through county zoning ordinances.

You have stated that two petitions for conditional use permits have been filed with the McHenry County Board to facilitate the construction of "peaker plants". To illustrate the

The Honorable Gary W. Pack - 2.

nature of the facilities which are the focus of your inquiry, you have forwarded a copy of one of the petitions, filed by Indeck Pleasant Valley, L.L.C., seeking the issuance of a conditional use permit to allow the construction and operation of an electrical generating facility in McHenry County.

According to the information you have provided, Indeck Pleasant Valley, L.L.C., is the owner of approximately 22.5 acres of real property which is located within a larger parcel of approximately 177 acres. The property is situated in an unincorporated area of McHenry County and is currently zoned "A-1-Agricultural District". The conditional use permit, if granted, would allow the construction and operation of an electrical generating facility on the subject property for a period of 20 years. Although information relating to the physical description of the buildings and equipment to be erected at the site is minimal, it appears that construction of a 300 megawatt electrical generating facility is contemplated. A minimum six foot high fence with barbed wire capping is to be installed around the perimeter of the plant, together with video surveillance equipment. Natural gas will be used to power an unspecified number of Siemens V84.3A gas-powered turbine generators to generate electricity. Waste water produced from the generating process will be stored in resin tanks located at the site. The petition also

The Honorable Gary W. Pack - 3.

appears to contemplate the storage of certain chemicals and lubricants at the site. Electricity generated by the plant will be distributed over 183KV distribution lines owned by Commonwealth Edison. Given the character of the project, you have inquired whether a non-home-rule county, such as McHenry County, would be precluded from exercising its zoning powers to regulate the location and construction of such a peaker plant because it is a "public utility".

It is well established that non-home-rule counties may exercise only those powers which have been expressly granted to them by the constitution or by statute, together with those powers which are necessarily implied therefrom to effectuate the powers which have been expressly granted. (Redmond v. Novak (1981), 86 Ill. 2d 374, 382; Heidenreich v. Ronske (1962), 26 Ill. 2d 360, 362.) Under Division 5-12 of the Counties Code (55 ILCS 5/5-12001 et seq. (West 1998)), counties have been granted the authority, through the adoption and application of zoning ordinances, to regulate and restrict the use of real property generally. Section 5-12001 of the Code (55 ILCS 5/5-12001 (West 1998)) provides, in pertinent part:

"Authority to regulate and restrict location and use of structures.

For the purpose of promoting the public health, safety, morals, comfort and general

welfare, conserving the values of property throughout the county, lessening or avoiding congestion in the public streets and highways, and lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters, the county board or board of county commissioners, as the case may be, of each county, shall have the power to regulate and restrict the location and use of buildings, structures and land for trade, industry, residence and other uses which may be specified by such board, to regulate and restrict the intensity of such uses * * *; to divide the entire county outside the limits of such cities, villages and incorporated towns into districts of such number, shape, area and of such different classes, according to the use of land and buildings, the intensity of such use (including height of buildings and structures and surrounding open space) and other classification as may be deemed best suited to carry out the purposes of this Division; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; and to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder: * * *.

The powers by this Division given shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted * * *; nor shall any such powers include the right to specify or regulate the type or location of any poles, towers, wires, cables, conduits, vaults, laterals or any other similar distributing equipment of a public utility as defined in the Public Utilities Act, if the public utility is subject to the Messages Tax Act, the Gas Revenue Tax Act or the Public Utilities Revenue Act, or if such facilities or equipment

are located on any rights of way and are used for railroad purposes, nor shall any such powers be exercised with respect to uses, buildings, or structures of a public utility as defined in the Public Utilities Act * * *

* * *

(Emphasis added.)

Under the language of section 5-12001 of the Code, although a county board may exercise its zoning powers "* * * to regulate and restrict the location and use of buildings, structures and land * * *" generally, it may not do so "* * * with respect to uses, buildings, or structures of a public utility", as that term is defined in the Public Utilities Act. Therefore, the dispositive issue is whether a peaker plant is a "public utility", in the context of the Public Utilities Act. (220 ILCS 5/1-101 et seq. (West 1998).)

Section 3-105 of the Public Utilities Act (220 ILCS 5/3-105 (West 1998)) provides, in pertinent part:

"* * * 'Public utility' means and includes, except where otherwise expressly provided in this Section, every corporation, company, limited liability company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:

a. the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes;

* * *

'Public utility' does not include, however:

* * *

3. electric cooperatives as defined in Section 3-119;

* * *

7. cogeneration facilities, small power production facilities, and other qualifying facilities, as defined in the Public Utility Regulatory Policies Act and regulations promulgated thereunder, except to the extent State regulatory jurisdiction and action is required or authorized by federal law, regulations, regulatory decisions or the decisions of federal or State courts of competent jurisdiction;

* * *

9. alternative retail electric suppliers as defined in XVI." (Emphasis added.)

As used in section 3-105 of the Public Utilities Act, the term "public utility" includes (1) corporations, companies, limited liability companies, associations, firms, partnerships or individuals (2) that own, control, operate or manage within this State, either directly or indirectly, (3) a plant, equipment or

The Honorable Gary W. Pack - 7.

property used or to be used for the production of electricity (4) for public use. Based upon the information you have provided, it appears that the applicants for conditional use permits meet the first three enumerated criteria. It must be determined, however, whether the peaker plants will be operating and producing electricity "for public use".

Mississippi River Fuel Corp. v. Illinois Commerce Comm'n (1953), 1 Ill. 2d 509, discussed the issue of whether the direct sale of natural gas to 23 industries under individual contracts for their own use, together with the sale of natural gas to two public utilities for resale to the general public, rendered a corporation operating a natural gas pipeline system through southern Illinois a "public utility", within the meaning of "AN ACT concerning public utilities" (hereinafter referred to as the "Illinois Public Utilities Act") (Ill. Rev. Stat. 1951, ch. 111 2/3, par. 1 et seq.). In reaching its conclusion that the corporation was not a "public utility" for purposes of section 10.3 of the Illinois Public Utilities Act (Ill. Rev. Stat. 1951, ch. 111 2/3, par. 10.3), from which current section 3-105 of the Public Utilities Act is derived, the court stated:

" * * *

* * * Mississippi [River Fuel Corporation] has never intended to assume the status of a public utility or professed to devote

its property to 'public use.' The record shows that it did not exercise the right of eminent domain in laying its pipelines in this State, and that it has never taken any municipal or other public franchise to sell its gas. It has not established uniform rates for the industries which buy gas from it. The prices vary with the contracts, and range from 18 cents per 1000 cubic feet for interruptible gas, to 38.41 cents per 1000 cubic feet for firm gas.

The mere fact that the thing sold by a company is water or gas or electricity or telephone service, such as are ordinarily sold by public utility companies, does not of itself render the seller a public utility. * * * 'A public utility implies a public use of an article, product or service, carrying with it the duty of the producer or manufacturer, or one attempting to furnish the service to serve the public and treat all persons alike, without discrimination. * * * When once determined to be a public utility under the statute the company must furnish all who apply, and the service it furnishes must be without discrimination and without delay. * * *'

* * *

"

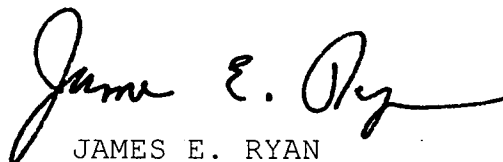
Mississippi River Fuel Corp. v. Illinois Commerce Comm'n (1953), 1 Ill. 2d 509, 515-516.

Applying the court's reasoning to the facts you have provided, it is my opinion that a peaker plant is not a "public utility". Peaker plants operate for only a limited time, generally during the summer months. Although the plants produce electricity, the electricity is not sold to the general public

The Honorable Gary W. Pack - 9.

but is sold by special contract at negotiated prices to electric companies for distribution to Illinois consumers. Moreover, there is no evidence that the applicants have held themselves out as public utilities or professed to devote their property to public use. Consequently, it must be concluded that the operation of a peaker plant, in the circumstances described herein, does not render the operator a "public utility", within the meaning of section 3-105 of the Public Utilities Act. Therefore, because the location and construction of a peaker plant is not exempted from the application of the county's zoning powers pursuant to section 5-12001 of the Code, it is my opinion that a non-home-rule county does have the authority to regulate the location of peaker plants through the exercise of those powers.

Sincerely,

A handwritten signature in cursive script that reads "James E. Ryan". The signature is written in dark ink and is positioned above the typed name.

JAMES E. RYAN
ATTORNEY GENERAL