

OBJECTION TO THE ISSUANCE OF FEE ASSESSMENTS
ALCOA Generating Corporation and Southern Indiana Gas & Electric Company
1996 OEA 027, OEA CAUSE NO.: 94-A-J-1181

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OEA Cause No.:	94-A-J-1181
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Presiding ELJ:	Lori Kyle Endris
Party Representatives:	Elizabeth A. Zlatos, Esq. for IDEM George A. Porch, Esq. for SIGECO Jerry B. Fulmer, Esq. for Alcoa
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INDIANA OFFICE OF ENVIRONMENTAL ADJUDICATION

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STATE OF INDIANA)
) SS: BEFORE THE INDIANA OFFICE OF
COUNTY OF MARION) ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF) CAUSE NO. 94-A-J-1181
FEE ASSESSMENTS)
ALCOA GENERATING CORP.)
SO. IN. GAS & ELECTRIC CO.)

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND FINAL ORDER GRANTING IDEM'S MOTION FOR SUMMARY JUDGMENT

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This constitutes notice that on March 20, 1995, Alcoa Generating Corporation (Alcoa), by counsel, and Southern Indiana Gas and Electric Company (SIGECO), by counsel, filed a Motion for Summary Judgment. On March 22, 1995, the Indiana Department of Environmental Management (IDEM), by counsel, filed a Motion for Summary Judgment. Thereafter on April 24, 1995, the IDEM, by counsel, filed a Response to Petitioners' Motion for Summary Judgment. On April 27, 1995, Alcoa and Sigeco filed a Reply Brief in Support of Petitioners' Motion for Summary Judgment.

The Environmental Law Judge considered the Motions and the Responses and hereby finds:

1. The Office of Environmental Adjudication has jurisdiction over decisions of the Commissioner of the Indiana Department of Environmental Management (IDEM) pursuant to Ind.Code §4-21.5-7.
2. The Administrative Order and Procedures Act, Ind.Code §4-21.5-3-23(b) provides that "[t]he judgment sought shall be rendered immediately if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavit and testimony, if any, show that a genuine issue of material fact does not exist and that the moving party is entitled to judgment as a matter of law."

3. The facts relevant to Alcoa and SIGECO's fees are as follows:

SIGECO solely owns and operates the F.B. Culley Generating Station, which consists of three (3) Units. Alcoa solely owns Units 1, 2, and 3 of Warrick Power Plant; SIGECO and Alcoa jointly own Unit 4 of the Warrick Power Plant. Both the F.B. Culley Generating Station and the Warrick Power Plant are Title V sources.

Units 2 and 3 of the F.B. Culley Generating Station and Unit 4 of the Warrick Power Plant are listed as Phase I affected units in Table A of Section 404 of the Clean Air Act, as amended by the Clean Air Act Amendments of 1990 (Table A of 42 U.S.C. Section 7651c). Unit 1 of the F.B. Culley Generating Station and Units 1, 2, and 3 are not Phase I affected units.

With respect to the F.B. Culley Generating Station, SIGECO has previously paid to the IDEM the amount of Five Thousand Dollars (\$5,000) in excess of prior obligations, with the excess being available as a credit against future amounts owed to the IDEM. With respect to the Warrick Power Plant, Alcoa has previously paid to the IDEM the amount of Five Thousand Six Hundred Dollars (\$5,600) in excess of prior obligations, with the excess being available as a credit against future amounts owed to the IDEM.

In a letter dated December 12, 1994, the IDEM sent to SIGECO and Alcoa a final fee determination under 326 IAC 2-7-19(e) in response to SIGECO's and Alcoa's dispute of an earlier assessment, which determination asserted that the applicable exclusion from fee calculation provided in 326 IAC 2-7-19(c) applied only to Phase I affected units or substitution units and not to the remainder of the power plants. Attached to this letter were invoices dated December 8, 1994, for net estimated fees payable for the F.B. Culley Generation Station in the amount of Three thousand Five Hundred and Twenty Dollars (\$3,520) and for the Warrick Power Plant in the amount of Forty Thousand Seven Hundred and Eighty-seven Dollars (\$40,787).

In accordance with Paragraph 1 of the Prehearing Order entered in this cause, SIGECO paid to the IDEM the amount of Three Thousand Five Hundred Twenty Dollars (\$3,520) with respect to the F.B. Culley Generating Station, and Alcoa paid to the IDEM the amount of Forty Thousand Seven Hundred and Eighty-seven Dollars (\$40,787) with respect to the Warrick Power Plant.

4. SIGECO and Alcoa contend that the provision of 326 IAC 2-7-19(d) that states, "The commissioner shall exclude from the fee calculation [under 326 IAC 2-7-19(c)] the following...(2) Emissions for which a fee is due in accordance with 326 IAC 2-1-7.1..." means that a power plant subject to a fee under the latter section is exempt from an additional fee under 326 IAC 2-7-19(c). The IDEM contends the provision means that only Phase I units of such power plants are exempt from that additional fee.

The pertinent part of 326 IAC 2-1-7.1 reads as follows:

(a) The applicant shall pay a fee based upon the cost to the department of processing and reviewing the applicable registration, construction permit, or operating permit application and the cost of determining compliance with the terms and conditions of a permit. Except for sources identified in subdivisions (5)(A), (5)(C), and (5)(H), sources subject to 326 IAC 2-7-19 are exempt from the fees established by subdivisions (1) and (4) through (6)... The fees are established as follows:

(1) A basic filing fee of one hundred dollars (\$100) shall be submitted with any application submitted to the commissioner for review in accordance with this article.

...

(5) Operating permit fees paid prior to January 1, 1991, shall be credited toward the 1991 annual operating permit fee on a prorated basis. In lieu of fees assessed under subdivision (4), annual operating permit fees shall be assessed for identified source categories as follows, beginning in calendar year 1991:

(A) During the years 1995 through 1999 inclusive, a fee of fifty thousand dollars (\$50,000) shall be submitted upon billing for an electric power plant containing a Phase I affected unit, as identified in Table A of Section 404 of the CAA or for a substitution unit as determined by the U.S. EPA in accordance with Section 404 of the CAA. Any fees paid for that plant under 326 IAC 2-7-19 shall be credited toward this fee. Prior to 1995, a fee of three thousand dollars (\$3,000) shall be submitted upon billing by the sources described in this clause.

(emphasis added).

As used in 326 IAC 2-1-7.1(a)(5)(A), the phrase "electric power plant containing a Phase I affected unit" means an electric

power plant that contains one or more Phase I affected units and may contain non-Phase I units as part of such electric power plant.

The relevant part of 326 IAC 2-7-19 reads as follows:

(a) Owners or operators of Part 70 sources are required to pay annual fees as established by this rule...

(b) A source shall pay the annual fee...

(c) ...During the years of 1994 through 1999 inclusive, any affected unit under Section 404 of the CAA shall be exempted from the fees established under this section. ...

(d) The commissioner shall exclude from the fee calculation the following:

...
(2) Emissions for which a fee is due in accordance with 326 IAC 2-1-7.1, except for emissions from coke plants subject to 40 CFR 63, Subpart L*, 57 FR 57898*.

As used in 326 IAC 2-7-19, a "source" is defined as "[a]n aggregation of one (1) or more facilities which are located on one (1) piece of property or on contiguous or adjacent properties, and which are owned or operated by the same persons (or by persons under common control). 326 IAC 1-2-73. The term "facility" is defined as "[a]ny one (1) structure, piece of equipment, installation or operation which emits or has the potential to emit any air contaminant. Single pieces of equipment or installations with multiple emission points shall be considered a facility for the purpose of this rule." 326 IAC 1-2-27.

Rules applying to statutory construction apply to rules and regulations. *Indiana State Dep't of Welfare v. Stagner*, 410 N.E.2d 1348, 1352 (Ind.App. 1980). In examining the language used by an agency, Indiana Courts will "give effect if possible to every word and clause since [they] presume that all the language in the regulation was used intentionally." *Id.*

The F.B. Culley Generating Station and the Warrick Power Plants are subject to Title V requirements and its associated fees under 326 IAC 2-7-19 as well as to the Title IV (acid rain emission reduction requirements and its associated fees under 326 IAC 2-1-7.1. The Indiana Supreme Court has held that when statutes relating to the same subject matter are *in pari materia*, they should be construed together so as to produce a harmonious statutory scheme. *Sanders v. State*, 466 N.E.2d 424 (Ind. 1984). Thus, because 326 IAC 2-7-19 and 326 IAC 2-1-7.1 reference each other and contain language that provides for a total source calculation, they must be construed together so as to produce a

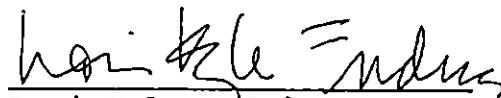
harmonious scheme. See *Id.*

Clearly, when construed as part of a harmonious scheme, 326 IAC 2-7-19(c) exempts a source's Phase I units from the emission based fee calculation. However, it does not exempt the entire source from the payment of emission based fees for any non-Phase I units at that source. The language set forth in 326 IAC 2-1-7.1 which states that "[a]ny fees paid for the plant under 326 IAC 2-7-19 shall be credited toward this fee" makes clear that an electric power plant containing one or more Phase I affected units pays a total fee that includes the assessment set forth in 326 IAC 2-1-7.1(a)(5)(A) and the assessment set forth in 326 IAC 2-7-19. 326 IAC 2-1-7.1(a)(5)(A). Therefore, the exclusion referred to in the fee calculation described in 326 IAC 2-7-19(d)(2) is the exclusion of emissions based fees for only Phase I affected units within a total source's fee calculation.

IT IS THEREFORE ORDERED that the IDEM's Motion is hereby GRANTED.

You are further notified that pursuant to the provisions of S.E.A 156 (P.L. 41-1995 amending Ind.Code §4-21.5-7), which became effective on July 1, 1995, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative reviews of decisions of the Fund Administrator of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with the applicable provisions of Ind.Code §4-21.5. Pursuant to Ind.Code §4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

Dated this 10th day of September, 1996.


Lori Kyle Endris
Environmental Law Judge