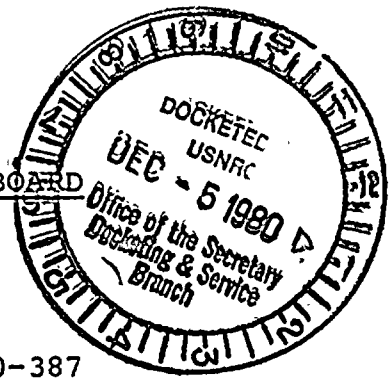
December 1, 1980

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of	)	
	)	
PENNSYLVANIA POWER & LIGHT COMPANY	)	
and	)	Docket Nos. 50-387
ALLEGHENY ELECTRIC COOPERATIVE INC.	)	50-388
	)	
(Susquehanna Steam Electric Station, Units 1 and 2)	)	

APPLICANTS' RESPONSE TO BOARD'S MEMORANDUM ON SUMMARY DISPOSITION MOTIONS

In its "Memorandum and Order Inviting Further Responses to Summary Disposition Requests" dated November 4, 1980 ("Memorandum") the Licensing Board invited all parties "to address the question... of the legal effect of a factual finding that ozone releases will comply with EPA requirements with respect to such releases." Memorandum at 2. Applicants respond hereby to the Board's invitation. 1/

At the outset, it is important to appreciate that EPA's ozone standards were not established by the agency on its own initiative, but were issued pursuant to the specific directive of Congress in the Clean Air Act, 42 U.S.C. § 7401 et seq. ("the Act"),

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1/ The Memorandum was served on November 5, 1980. Responses to it were due 21 days from the date of service. Under § 2.710 of the Commission's Rules of Practice, five days were to be added to the prescribed period since service was made by mail. Responses to the Memorandum, therefore, were due on December 1, 1980.

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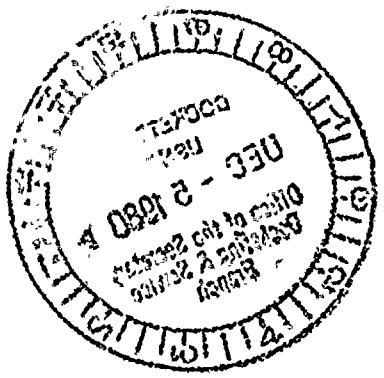

and are a fundamental element of the legislative scheme behind the Act. Thus, Congress ordered EPA to develop air quality criteria for each known pollutant, including ozone, which criteria were to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." Section 108 of the Act, 42 U.S.C. § 7408. Beyond the criteria, EPA was directed to publish national primary ambient air quality standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." Section 109 of the Act, 42 U.S.C. § 7409(b)(1). A similar directive was issued to EPA to develop national secondary standards. 42 U.S.C. § 7409(b)(2).

Under the statutory framework, not only is EPA charged with developing these criteria and standards, but the agency is required also to maintain its expertise in the area so that it is able to review the criteria and standards thoroughly every five years and modify them, if necessary, to reflect the latest scientific knowledge on the health and environmental effects of each pollutant. 42 U.S.C. § 7409(d)(1). The agency is further charged with enforcing those standards against States, other Federal agencies and private parties who fail to observe them. See, e.g., §§ 110, 113 and 303 of the Act, 42 U.S.C. §§ 7410, 7413 and 7603; and see, Train v. Natural Resources Defense Council, 421 U.S. 60, 93 n.28 (1975). There is no doubt, therefore, that EPA is the agency charged by Congress with the

responsibility of administering the Act and ensuring that air quality is maintained. Train v. NRDC, supra, 421 U.S. at 86-87.

The way that EPA went about fulfilling its statutory responsibility in the case of ozone is particularly noteworthy. The agency had issued its first national ambient air quality standards for ozone in 1971. At that time, and based on the best scientific, technical and medical data then available, EPA determined that limiting ozone emissions to an hourly rate of 80 ppb (.08 ppm) was sufficient to protect the public health. See 36 Fed. Reg. 8186 (April 30, 1971). In 1977, EPA undertook the process of reviewing this standard as required by § 109(d)(1) the Act, 42 U.S.C. § 7409 (d)(1). To do so, it conducted an extensive rulemaking proceeding in which is received over seventy written comments, held public hearings and examined the latest scientific evidence on the health effects of various levels of ozone in sensitive individuals (e.g., those suffering from chronic respiratory diseases). See, 44 Fed. Reg. 8202, 8203-05 (February 8, 1979). After almost two years of review and consideration of the most recent studies in the field, EPA reported:

> The health experts who were consulted were asked to focus not only on the most sensitive population group, but also on a very sensitive portion of that group (specifically, those persons who are more sensitive than 99 percent of the sensitive group, but less sensitive than 1 percent of that group). The lowest adverse health effect level estimate cited by the health panel and the median values developed through the expert interview process are reasonably consistent, ranging from 0.15 to 0.18 ppm. On the basis of the effect levels cited in the criteria documents, it is EPA's judgment that the most probable level for adverse health effects in

> sensitive persons, as well as healthier (less sensitive) persons who exercise vigorously, falls in the range of 0.15-0.25 ppm.

44 Fed. Reg. at 8215-16 (emphasis added).

Based on these findings, EPA determined that the national ambient air primary and secondary standards for ozone could be increased from 80 ppb to 120 ppb:

> ...[T]he Administrator has determined that a standard of 0.12 ppm is necessary and is sufficiently prudent unless and until further studies demonstrate reason to doubt that [redacted] adequately protects public health. 44 Fed. Reg. at 8217.

It is against this background that the Board's question must be examined. There are no explicit statutory restrictions on the consideration of the health and environmental impact of ozone releases in NRC licensing proceedings. Compare § 511(c)(2) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1371(c)(2). Nevertheless, determination that the ozone emissions associated with a facility fall well within the EPA national ambient air quality standards for ozone should constitute very persuasive, if not controlling evidence that the health and environmental effects of those ozone emissions are de minimis and need not be included in the cost-benefit analysis for the facility.[2/] Since the EPA ozone standards incorporate

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2/ Thus, it has been held that a documented determination in the EIS for a project that the ozone emissions associated with the project fall within the EPA ozone standards is sufficient for the EIS to comply with the requirements of NEPA. Citizens for Mass Transit, Inc. v. Adams, 492 F. Supp. 304, 307 (E.D. La. 1980).

"an adequate margin of safety" as required by the Act, see 42 U.S.C. § 7409(b)(1) and 44 Fed. Reg. at 8217, ozone emissions that are only a fraction of the standards must be regarded, in the absence of credible evidence to the contrary, as having negligible health and environmental impact.

Contention 17 in this proceeding alleges that the 500 kV transmission lines out of Susquehanna will generate "dangerous levels of ozone". However, the uncontested affidavits of Robert F. Lehman and Gerald Gears[3/] show that ozone concentrations at ground level beneath the lines will normally be less than 1 ppb, 0.8% of the EPA standard. Even under worst case situations, which occur less than 1% of the time, ozone levels might reach a hypothetical upper limit of 19 ppb, only less than 16% of the conservative limit set by EPA in its standards. In view of the wide margins by which the EPA standards are satisfied and the lack of evidence of adverse health effects from the ozone emissions at issue here, it is appropriate for the Board to take official notice of the EPA standards and conclude that the ozone levels associated with the Susquehanna transmission lines will not be dangerous and may be disregarded in the cost-benefit analysis of the facility. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC ___ (1980), slip op. at 19-20.[4/]

3/ Affidavit of Gerald Gears, attached to "NRC Staff Answer in Support of Applicants' Motion for Partial Summary Disposition of Contention 17 (Ozone)."

4/ This is not to say that a finding that a facility's ozone releases fall within EPA standards automatically forecloses the issue from consideration by the Board. If competent evidence were introduced tending to show that the estimated ozone releases would have a non-negligible impact on the health of the public, summary disposition might not be appropriate.

No such evidence has been provided here. Intervenor CAND's response to the Board's Memorandum ("Citizens Against Nuclear Dangers

(footnote continued on next page)

The decisions in Black Fox (Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC ___ (1980)), Yellow Creek (Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702 (1978)) and Douglas Point (Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974)) do not dictate

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(footnote continued)

Petition and Motions on Summary Disposition," dated November 24, 1980) ("CAND's response") presents no facts which contradict the Applicants and Staff's affidavits. Instead, CAND alleges that "an expert biophysicist testifying in Federal Court in Philadelphia cited scientific studies that indicate serious adverse effects caused by 500 kV transmission extending 2000 feet from the UHV lines" (CAND's response at 2, emphasis in original). There is, however, no indication that the "serious adverse effects" of transmission lines allegedly testified to in the Philadelphia proceeding had anything to do with ozone emissions. Since CAND has set forth no material, substantial facts showing that a genuine issue of fact exists with respect to the ozone contention, summary disposition of that contention must be granted, 10 C.F.R. § 2.749(b) and (d); Gulf States Utilities Company (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975); and see, Board's Memorandum at 4-5.

Even if the alleged testimony in the Philadelphia proceeding dealt with ozone emissions, it goes without saying that such an unsworn, multiple-hearsay reference to testimony of an unidentified third person in a different proceeding, offered by someone without competency in or personal knowledge of the subject matter of the proffered testimony is not admissible evidence and may not be used to oppose a summary disposition motion. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 756 n.46 (1977); Englehard Industries, Inc. v. Research Instrumental Corp., 324 F.2d 347, 351 (9th Cir. 1963), cert. denied, 377 U.S. 923 (1964); 6 Pt. 2 Moore's Federal Practice ¶ 56.22 [1] (1980).

CAND's response also asks the Board to direct Applicants to energize the Susquehanna transmission lines to 500 kV and test them for ozone levels during rain, sleet and snowstorms. CAND's response at 1. Not only is it doubtful that the Board can order Applicants to undertake such tests, but as a practical matter the tests can not be conducted since all but one of the lines are still under construction and the one line that is completed is operating at 230 kV and could not be energized at 500 kV without a substantial design effort and considerable expenditure of time and resources. In any event, such tests are unnecessary to the Board's ruling on the Applicants' motion for summary disposition, since ozone emission measurements have been conducted in a number of 500 and 765 kV lines. See Lehman and Gears affidavits.

a contrary result. In Black Fox, the Commission held that the Appendix I to 10 C.F.R. Part 50 was not intended to specify the health effects associated with radioactive releases from operating nuclear power plants and therefore litigation of those health effects was not foreclosed in individual licensing proceedings. CLI-80-31, supra, slip op. at 17-19.[5/]

Likewise, the Appeal Board in Douglas Point, supra, held that the values in Table S-3 of 10 C.F.R. § 51.20 for the environmental impact of the uranium fuel cycle were to be used in the cost benefit analyses for each facility, but the Licensing Board in each instance had to weigh those impacts in determining whether the facility should be licensed. 8 AEC at 86. See also, Yellow Creek, supra, 8 NRC at 713.

The issue here is different from that presented in those proceedings. There, litigation of the quantitative environmental effects of the activity in question had been foreclosed, but there was no ruling or standard on the health or environmental significance to be attached to those effects. Here, the magnitude of the ozone emissions from the Susquehanna transmission lines is open to factual dispute and is specifically put in issue by the summary disposition motion; if, as Applicants contend, the ozone releases associated

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5/ The Commission also held, however, that a Licensing Board "can take official notice of the environmental record compiled in Appendix I rulemaking in reaching its conclusions as to the health effects from releases within Appendix I". By so doing, a Licensing Board can rely upon the estimates of health effects from ionizing radiation contained in the 1972 BEIR Report and use them "along with any other evidence, in ruling on summary disposition motions..." CLI-80-31, slip op. at 19-20. That is precisely the course of action that the Board should follow in this instance.

with the Susquehanna facility are a small fraction of the limits set by EPA, the health impact of such releases need not be carried forward into the cost benefit analysis but can be disregarded as de minimis. Alabama Power Company v. Costle, ___ U.S. App. D.C. ___, 606 F.2d 1068, 1076 (1979); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-175, 7 AEC 62, 63 n.2 (1974), and ALAB-166, 6 AEC 1003, 1012-13 (1973); and see, Special Prehearing Conference Order herein, LPB-79-6, 9 NRC 291, 300 (1979).

In conclusion, even if the Board finds that the national primary and secondary ozone standards are not legally binding in this proceeding, it should take official notice of the process by which these standards were developed, the considerable wealth of scientific and technical expertise that went into their formulation, and the findings by EPA and the experts that contributed to the ozone rulemaking proceeding that ozone emissions within those standards have negligible health and environmental impacts. If official notice is taken of these matters, and in view of the uncontradicted evidence submitted by Applicants and Staff that the releases here are but a small fraction of the EPA standards, the Board must rule on Applicants' favor on the summary disposition motion.[6/]

For the foregoing reasons, and those contained in Applicants'

6/ The Board's Memorandum states that the ozone releases from the Susquehanna 500 kV lines are an "integral part of the overall [transmission line] contention." Memorandum at 3, 4. However, it is indisputable that, whatever health and environmental effects may be produced by other phenomena associated with the operation of the Susquehanna transmission lines, such phenomena and effects are wholly independent of the ozone releases. If the environmental impacts of ozone emissions from the lines are negligible, partial summary disposition of the ozone part of the contention must be granted. A contrary result would make it virtually impossible for summary disposition ever to be granted in environmental contentions, and would negate the beneficial function of summary disposition procedures. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1) ALAB-590, 11 NRC 542-550 (1980).

Brief in Support of Partial Summary Disposition of Contention 17, Applicants submit that a factual finding that the ozone releases from the Susquehanna 500 kV transmission lines fall well within the national ambient air quality primary and secondary standards for that pollutant necessarily requires a determination, based on the evidence presented in this case, that the health and environmental effect of the ozone emissions from those lines are negligible and summary disposition of the ozone portion of Contention 17 must be granted.

Dated: December 1, 1980.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Response to Board's Memorandum on Summary Disposition Motions" were served by deposit in the U.S. Mail, First Class, postage prepaid, this 1st day of December, 1980, to all those on the attached Service List.

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