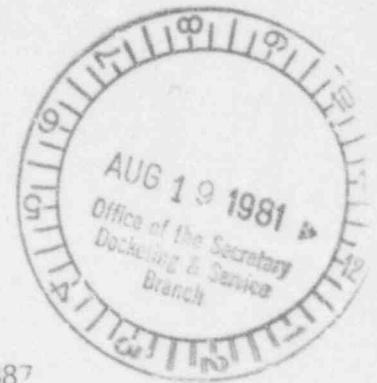


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PENNSYLVANIA POWER & LIGHT CO. :

and :

ALLEGHENY ELECTRIC COOPERATIVE, :
INC. (Susquehanna Steam Electric :
Station, Units 1 and 2) :Docket Nos. 50-387
50-388COMMONWEALTH OF PENNSYLVANIA'S MEMORANDUM
OF LAW IN RESPONSE TO APPLICANTS' LETTER
OF JULY 27, 1981 (REBUTTAL TESTIMONY)

During the July 23, 1981 Prehearing Conference, counsel for the Applicants cited an Appeal Board ruling in the joint radon proceeding for two propositions: (1) only the Applicant is entitled to rebuttal in NRC proceedings; and (2) rebuttal testimony need not be submitted in advance in writing. Tr. 868-69 (Silberg). The Applicant followed up on this statement in its letter of July 27, 1981, citing Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-566, 10 NRC 527 (1979).

The Commonwealth reads the Philadelphia Electric decision somewhat differently from the Applicants, and feels compelled to respond. The Commonwealth is aware that it is unusual for a Board to rule on evidentiary matters in advance of a specific dispute. However, consideration of this issue is in the interest of both expedition and fairness to the parties. The intervenors have a right to know in advance whether their rebuttal testimony will be considered, particularly in light of their limited resources. The Applicants have a right to know in advance whether rebuttal testimony must be prepared prior to the hearing.

In the joint radon case, a schedule was proposed for the filing of written testimony in three phases: (1) Applicants' testimony; (2) Intervenor's testimony (approximately one month later); and (3) Applicants' rebuttal testimony. 10 NRC at 529. Obviously, if this schedule were adopted, there would be no need for separate intervenor rebuttal testimony, since the intervenors would have the benefit of the Applicants' testimony while preparing their direct testimony. Id. In the instant proceeding, all parties will file direct testimony simultaneously.

The intervenors in the radon case nevertheless rejected the three-phase schedule on the basis that the Applicants would have two opportunities to present testimony. In this context, the Board explained that the Applicants have a right to rebuttal testimony:

What seemingly had been overlooked was that the applicants possess the ultimate burden of persuasion on the radon release issue ... Under familiar adjudicatory principles, parties saddled with that burden typically proceed first and then have the right to rebut the case presented by their adversaries.

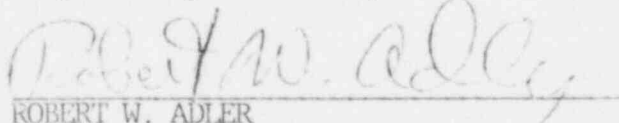
Id. (emphasis added). The Board simply noted that the Applicants had a right to rebuttal testimony; nowhere did they rule that only Applicants have such a right. Such a ruling would expressly contradict both the NRC Rules of Practice and the Administrative Procedure Act.* The NRC Rules provide that: "Every party to a proceeding shall have the right to present such oral or documentary evidence and rebuttal evidence as may be required for full and true disclosure of the facts." 10 C.F.R.

* It is elementary, of course, that NRC Proceedings are governed by the provisions of the A.P.A. 42 U.S.C. §2231; Siegel v. Atomic Energy Commission, 400 F.2d 778 (1968).

§2.743(a) (emphasis added). The A.P.A. provides that: "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. §556(d) (emphasis added). Thus, all parties to this proceeding have a right to present rebuttal evidence.

With respect to the issue of notice, the Applicants indicated that they would do their best to serve written rebuttal testimony prior to the hearing. Tr. 872-74 (Silberg). The Board indicated that it would ensure that all witnesses and parties have sufficient time to prepare for the hearing of rebuttal testimony. Tr. 872-73 (Chairman Gleason). The Commonwealth agrees with this approach. It should be noted in this regard, however, that the Appeal Board in the radon case established a clear preference for the filing of rebuttal testimony prior to the hearing. In particular, the Board wrote: "it appeared manifest to us that the intervenors would be materially assisted in their trial preparation if the substance of the applicants and the staff rejoinder to their evidence became known to them well before the hearing commenced (instead of, for the first time, after the intervenors' witnesses had concluded their oral testimony)." 10 NRC at 529. The Board later repeated that "we think it virtually axiomatic that any party to an adjudicatory proceeding (as well as the expeditious process of the hearing itself) will be advantaged if as much as possible of its adversaries' evidence is disclosed in advance." Id. at 529-30. This hearing should be governed by the above-quoted principles.

Respectfully submitted,



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