

ILLINOIS POLLUTION CONTROL BOARD  
October 18, 2001

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 99-191  
 ) (Enforcement - Air)  
 PANHANDLE EASTERN PIPE LINE )  
 COMPANY, )  
 )  
 Respondent. )

ORDER OF THE BOARD (by C.A. Manning):

This enforcement action concerns air emissions from a natural gas compressor station in Glenarm, Sangamon County, Illinois (Glenarm Station). The Illinois Attorney General, on behalf of the People of the State of Illinois (People) and at the request of the Illinois Environmental Protection Agency (Agency), filed a complaint against Panhandle Eastern Pipe Line Company (Panhandle), a natural gas pipeline transmission company. The People allege that Panhandle, at Glenarm Station, violated requirements of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2000)) to limit emissions of nitrogen oxides (NO<sub>x</sub>). NO<sub>x</sub> is a pollutant emitted into the air by the compressor engines at Glenarm Station.

The hearing and briefing in this case are complete. Today the Board rules on pending motions, all three of which were filed by the People. The Board will decide the merits of the enforcement action in a separate opinion and order, which the Board expects to issue next month.

**DISCUSSION**

The Board's then Chief Hearing Officer John C. Knittle held a seven-day hearing in September and November 2000.<sup>1</sup> The People filed their first post-hearing brief on January 19, 2001. Panhandle filed a response brief on February 15, 2001, portions of which the People moved to strike on February 28, 2001. On March 9, 2001, Panhandle filed a response opposing the People's motion to strike.<sup>2</sup> The People filed a reply brief on March 5, 2001, along with a

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<sup>1</sup> The hearing transcript is cited as "Tr. at \_." Panhandle's hearing exhibits are cited as "Pan. Exh. \_;" the People's hearing exhibits are cited as "People Exh. \_."

<sup>2</sup> The People's first brief is cited as "People Br. at \_;" Panhandle's response brief is cited as "Pan. Br. at \_." The People's motion to strike is cited as "Mot. to Strike at \_;" Panhandle's response to the People's motion to strike is cited as "Resp. to Mot. to Strike at \_."

motion to waive the page-limit requirement for the reply brief. On March 9, 2001, Panhandle filed a response opposing the People's motion to waive.<sup>3</sup>

On March 12, 2001, the People moved the Board to reconsider its February 1, 2001 order in which the Board affirmed the hearing officer's ruling to exclude from evidence a United States Environmental Protection Agency (USEPA) letter to the Agency. On March 23, 2001, Panhandle filed a response opposing the People's motion to reconsider.<sup>4</sup>

### **The People's Motions**

Three motions by the People are pending: (1) a motion for the Board to reconsider its February 1, 2001 order; (2) a motion to strike portions of Panhandle's response brief; and (3) a motion to waive the page-limit requirement on the People's reply brief. The Board addresses these motions in turn.

#### **Motion to Reconsider**

The People moved the Board to reconsider its February 1, 2001 order in which the Board affirmed the hearing officer's ruling to exclude the People's Exhibit 5 from evidence. *See People v. Panhandle Eastern Pipe Line Co.*, PCB 99-191, slip op. at 6 (Feb. 1, 2001). The People's Exhibit 5 is an August 1998 letter from Mr. Andrew Anderson, Acting Chief of USEPA's Permits and Grants Section, to Mr. Donald Sutton, Manager of the Agency's Permits Section in the Division of Air Pollution Control. The letter responded to an Agency request for USEPA's guidance on the applicability of the Prevention of Significant Deterioration (PSD) requirements to Panhandle. People Exh. 5 at 1.

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902 (when ruling on a motion to reconsider, the Board "will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error").

The People identify no new evidence or change in the law. Instead, they argue that the Board erred by "overlooking both the facts pertaining [to] the materiality of Exhibit 5 and previous Board rulings concerning the reliability of similar hearsay evidence." Mot. to Rec. at 1.

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<sup>3</sup> The People's reply brief is cited as "Reply Br. at \_." The People's motion to waive is cited as "Mot. to Waive at \_;" Panhandle's response to the People's motion to waive is cited as "Resp. to Mot. to Waive at \_."

<sup>4</sup> The People's motion to reconsider is cited as "Mot. to Rec. at \_;" Panhandle's response to the People's motion to reconsider is cited as "Resp. to Mot. to Rec. at \_."

The People assert that the letter constitutes “evidence [that] is material, relevant and would be relied upon by reasonably prudent persons in the conduct of serious affairs.” *Id.* at 2.

In arguing for its admissibility, the People state that the letter “contains concise statements of USEPA’s opinions and/or interpretations regarding the applicability of the [PSD] program’s requirements to Panhandle . . . based on the specific facts presented in this case.” Mot. to Rec. at 2-3. In the letter, Mr. Anderson of USEPA opines about several matters, including whether Panhandle became subject to PSD and whether Panhandle violated PSD. People Exh. 5 at 1-2. These are the ultimate legal issues now pending in this case. It is the Board’s duty under the Act to decide these issues when it reaches the merits of the case. The letter provides only a series of legal conclusions, allegedly on the very facts before the Board. These circumstances readily distinguish this letter from other instances, cited by the People, in which the Board has referred to USEPA guidance.

The People’s Exhibit 5 constitutes legal argument and was properly not admitted as evidence at hearing. *See Coyne v. Robert H. Anderson & Associates, Inc.*, 215 Ill. App. 3d 104, 112, 574 N.E.2d 863, 868 (2d Dist. 1991) (an expert witness cannot testify regarding legal conclusions); *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill. App. 3d 257, 261, 432 N.E.2d 920, 924 (1st Dist. 1982) (an expert witness is not competent to give testimony amounting to statutory interpretation). The Board denies the People’s motion to reconsider.

### **Motion to Strike**

The People moved the Board to strike portions of Panhandle’s post-hearing brief that address aspects of Panhandle’s economic benefit from alleged noncompliance with the Act. The economic benefit to a violator from delayed compliance may be considered by the Board when imposing a civil penalty. *See* 415 ILCS 5/42(h)(3) (2000). The People argue that Panhandle’s brief, in an effort to rebut the People’s rebuttal case, contains statements about matters that are neither evidence in the record nor subject to official notice. Mot. to Strike at 1. The People argue that these matters were never subject to cross-examination and therefore the statements should be stricken from Panhandle’s brief. *Id.* at 3, 5.

The statements relate to (1) the cost of debt and (2) a stock price measurement called “beta coefficient.” Mot. to Strike at 1, 4. Information on cost of debt and beta coefficient were admitted with other evidence offered by the parties to try to show how much it would have cost Panhandle to install and operate NOx emission controls, as allegedly required for certain compressor engines at Glenarm Station. The parties intend the evidence to show any economic benefit Panhandle may have enjoyed from allegedly delayed compliance. People Br. at 84-113; Pan. Br. at 62-64, 82-83.

The People’s expert, Dr. John Nosari, testified about cost of debt and beta coefficient to try to rebut the testimony of Panhandle’s expert, Mr. Jasbinder Singh. Tr. at 1424-27, 1436-42, 1469. Panhandle makes several statements in its brief to respond to Dr. Nosari’s rebuttal testimony. The People object to six of these statements. Mot. to Strike at 2-5.

The six statements from Panhandle's brief are as follows: (1) Mr. Singh testified that he obtained cost of debt information from *several* versions of Moody's Public Utility's Manual (Pan. Br. at 79-80); (2) Dr. Nosari referred only to the 1987 version of Moody's manual for his rebuttal testimony about cost of debt (*id.* at 80); (3) the 1997 Moody's manual illustrates the type of debt cost information that those manuals provide (*id.*); (4) despite Dr. Nosari's testimony about beta coefficient, the stock prices of Panhandle's former parent corporation performed substantially below the Standard & Poor's 500 index, which can be verified at a referenced financial web site (*id.* at 82, n. 17); (5) beta coefficient is a statistical approach that investment firms use to predict future stock price; it is not a measure of how close a stock's historic levels compared to a given market indicator such as the Standard & Poor's 500 (*id.* at 82); and (6) a published financial article entitled *Financial Statement Analysis* found considerable errors in measuring individual stocks, which can lead to large variations in a company's estimated beta coefficient (*id.* at 82-83).

The Board finds that each of these statements falls into one of three categories: (1) the statement is supported by evidence in the record; (2) the statement does not introduce new evidence; or (3) the statement is either subject to the Board's official notice or properly allowed as surrebuttal to Dr. Nosari's rebuttal testimony. Panhandle's first statement is supported by the evidence. The context of Mr. Singh's testimony shows that he was referring to several versions of Moody's Public Utility Manual. Tr. at 927-28, 1044-45; Pan. Exh. 23; Resp. to Mot. to Strike at 5-7. In its second statement, Panhandle is merely making a plausible inference from Dr. Nosari's rebuttal testimony, not introducing new evidence. Tr. at 1424, 1426; Resp. to Mot. to Strike at 4-5. The rest of Panhandle's statements to which the People object are either readily subject to official notice (*see* 35 Ill. Adm. Code 101.630) or properly allowed as surrebuttal (*see* Ross v. Danter Associates, Inc., 102 Ill. App. 2d 354, 367, 242 N.E.2d 330, 336 (3d Dist. 1968) (the "purpose of surrebuttal is to permit the defendant to introduce evidence in refutation or opposition to new matters interjected into the trial by the plaintiff on rebuttal"). Resp. to Mot. to Strike at 2-3, 7-11, Att. A, B.

For these reasons, the Board denies the People's motion to strike any portion of Panhandle's brief. Of course, when deciding this case on the merits, the Board, to the extent necessary, would weigh all relevant evidence on economic benefit and the other statutory factors that bear on penalty. In doing so, the Board would consider whether that evidence was provided through sworn testimony, subject to cross-examination.

### **Motion to Waive Page Limit**

The People filed a 65-page reply brief on March 5, 2001, and at the same time moved the Board to waive the requirement limiting the number of pages for briefs. The Board's procedural rules impose a 50-page limit on all briefs. *See* 35 Ill. Adm. Code 101.302(k). The People state that they needed to exceed the page limit to address issues raised in Panhandle's response brief that the People did not address in their initial post-hearing brief. These issues include Panhandle's alleged jurisdictional defense based on Agency notice under Section 31(a)(1) of the Act (415 ILCS 5/31(a)(1) (2000)). Mot. to Waive at 2. Panhandle opposes the motion and suggests that the Board sanction the People by striking all or part of the reply brief or ordering

the People to file a new reply brief that complies with the page limit. Resp. to Mot. to Waive at 2-3.

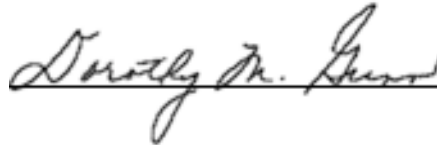
Fifteen pages of the People's 65-page reply brief are devoted to Panhandle's alleged Section 31(a)(1) defense. Reply Br. at 16-31. The People are correct that Panhandle addressed this alleged defense in its response brief, though the People had not addressed it in their initial post-hearing brief. The Board grants the People's motion to waive the 50-page limit of 35 Ill. Adm. Code 101.302(k).

**ORDER**

1. The Board denies the People's motion to reconsider the Board's February 1, 2001 order affirming the hearing officer's ruling to exclude the People's Exhibit 5 from evidence.
2. The Board denies the People's motion to strike portions of Panhandle's response brief.
3. The Board grants the People's motion to waive the 50-page limit of 35 Ill. Adm. Code 101.302(k) for the People's reply brief.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 18, 2001, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board