

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PPL SUSQUEHANNA, LLC)	Docket Nos. 50-387-OLA
)	and 50-388-OLA
(Susquehanna Steam Electric Station)	
Units 1 and 2))	ASLBP No. 07-854-01-OLA-BD1

NRC STAFF'S BRIEF IN OPPOSITION TO MR. EPSTEIN'S APPEAL OF LBP- 07-10

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August 16, 2007

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), the staff of the Nuclear Regulatory Commission ("Staff") hereby files its brief in opposition to Mr. Eric Joseph Epstein's ("Petitioner" or "Appellant") appeal from the decision of the Atomic Safety and Licensing Board ("Board"), LBP-07-10 dated July 27, 2007, which, *inter alia*, denied Petitioner's hearing request and petition to intervene. As discussed below, the Board properly found that Petitioner had not proffered an admissible Contention. Accordingly, the Commission should affirm the Board's Order denying Petitioner's request for hearing and petition to intervene.

STATEMENT OF CASE

This proceeding involves an application by PPL Susquehanna, LLC (hereinafter PPL) for a license amendment to allow an increase in the authorized power level of the Susquehanna Steam Electric Station (SSES) Units 1 & 2. The proposed amendment would change the SSES operating license to increase the maximum authorized power level from 3,489 megawatts thermal ("MWt") to 3,952 MWt. This requested change,

designated an "extended power uprate" ("EPU"), represents an increase of approximately 13 percent above the current maximum authorized power level. On March 13, 2007 the NRC published a notice of consideration of issuance of the proposed amendment and opportunity for hearing, and the NRC's determination that the amendment request involves no significant hazards consideration. See PPL Susquehanna LLC; Notice of Consideration of Issuance of Amendment to Facility operating License and Opportunity for Hearing, 72 Fed. Reg. 11,392. By letter dated May 11, 2007, Petitioner submitted Petition for Leave to Intervene on the Amendment to Increase Thermal Power to Susquehanna Steam Electric Station (SSES) Units 1 & 2. Thereafter, on May 31, 2007, an Atomic Safety and Licensing Board (Board) was established to preside over the proceeding. See PPL Susquehanna LLC; Notice of Establishment of Atomic Safety and Licensing Board, 72 Fed. Reg. 31,617 (June 7, 2007).

On June 5, 2007, both PPL and the staff filed their responses to the Petition. PPL and Staff's position was that Petitioner lacked standing and the Petition failed to contain any admissible Contentions¹. On June 12, 2007, Petitioner Epstein filed his reply to the PPL and NRC Staff answers. See Eric Joseph Epstein's Reply to PPL and NRC Staff's Responses to Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearings and Contentions (June 12, 2007) (ADAMS Accession No. ML071690471). The Board issued an order proposing a schedule for a telephone prehearing conference during which the participants were permitted to orally address the issue of standing and admissibility of the Contentions. See Licensing Board Memorandum and Order (Initial Prehearing Conference Schedule; Argument Allocations) (June 13, 2007) at 1 (ADAMS

¹ See PPL Susquehanna's Answer to Eric Epstein's Petition for Leave to Intervene (June 5, 2007) at 1 (ADAMS Accession No. ML071620231) [hereinafter PPL Susquehanna's Answer]; NRC Staff Response to Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearing, and Contentions (June 5, 2007) at 1 (ADAMS Accession No. ML071650220) [hereinafter NRC Staff Response].

Accession No. ML071640116). On July 10, 2007, the Board conducted the teleconference. See Transcript at 1-88 (ADAMS Accession No. ML071970391). On July 27, 2007 the Board issued its order, LBP-07-10, granting Petitioner standing but denying all Contentions as inadmissible.

ISSUE PRESENTED

Appellant has appealed the denial of Contention TC-1 alleging that PPL had failed to consider the impact of its proposed uprate on water use issues. Appellant also appealed the denial of Contention TC-2 that PPL had allegedly failed to disclose damaging information regarding faulty and corroded intake piping.

The issue presented is whether the Board committed an error of law or abuse of discretion in denying the admission of Contentions TC-1 and TC-2.

LEGAL STANDARDS

A. Legal Standards for the Admission of Contentions

To gain admission to a proceeding as a party, a Petitioner for intervention, in addition to establishing standing, must proffer at least one Contention that satisfies the admissibility requirements of 10 C.F.R. § 2.309(f). See 10 C.F.R. § 2.309(a). See *also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 333 (1999). For a Contention to be admissible, the Petitioner must satisfy the following six requirements:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of basis for the Contention;
- (iii) Demonstrate that the issue raised in the Contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the Contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

- (v) Provide a concise statement of the alleged facts or expert opinions which support the Petitioner's position on the issue and on which the Petitioner intends to rely at the hearing, together with references to the specific sources and documents on which the Petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the Petitioner disputes and the supporting reasons for each dispute, or, if the Petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the Petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). These Contention requirements are "strict by design."

Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). A Contention that fails to comply with any of these requirements will not be admitted for litigation. *Private Fuel Storage, L.L.C.*

(Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999);

Changes to Adjudicatory Process [Final Rule], 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

The Petitioner must do more than submit bald or conclusory allegations of a dispute with the applicant. *Millstone*, CLI-01-24, 54 NRC at 358. There must be a specific factual and legal basis supporting the Contention. *Id.* at 359. A Contention will not be admitted if it is based only on unsupported assertions and speculation. See *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." See d. 10 C.F.R. §§ 2.309(f)(1)(iii), (iv). Failure to comply with any of these requirements is grounds for dismissing a contention. See *Private Fuel Storage*, CLI-99-10, 49 NRC at 325; see also *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

B. Scope of Commission Review of Board's Rulings

NRC regulation 10 C.F.R. § 2.311 (b) provides that: "An order denying a petition to intervene and/or request for a hearing is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted." The legal standards applicable to the Commission's review of the Board's rulings are set forth by the Commission decisions. The Commission has established that in its review, the Commission will give substantial deference to the Boards' determinations and will regularly affirm Board decisions on issues of admissibility of contentions where the appeal fails to point to an error of law or abuse of discretion. *See AmerGen Energy Company, LLC*, (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) citing *USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 n.32 (2006).

Consistent with the standard of review, the appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims. *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004) at n.25 (quoting *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

ARGUMENT

A. There Was No Error of law or Abuse of Discretion in the Board's Rulings

Petitioner does not point out any errors of law or abuse of discretion regarding the Board's decision. While the NRC regulations typically allow Petitioners the opportunity to appeal the denial of their intervention petitions, *See* 10 C.F.R. § 2.311(b),

the Commission typically will affirm the Board's decision absent a showing of an error of law or abuse of discretion. See *AmerGen Energy Company, LLC*, (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) citing *USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 n.32 (2006). Appellant's appeal does not point to any error of law or abuse of discretion on the part of the Board, nor does his appeal contain sufficient information and cogent arguments to alert the Staff, PPL or the Commission to the precise nature of and support for his claims. In short the appeal fails to establish a basis for Commission review of the Board's ruling.

B. The Licensing Board was Correct in Finding Technical Contention 1 Inadmissible ²

The Appellant alleged in Technical Contention 1 that PPL had failed to consider the impact of its proposed uprate on water use issues. Not only is this Contention outside the scope of the amendment proceeding, but it is also outside the scope of the agency's responsibility. This is a matter for the Susquehanna River Basin Commission (SRBC) which the Petitioner-Appellant fully recognizes in that he has filed identical arguments in his August 1, 2007 Petition to the SRBC opposing Licensee's withdrawal of water application.³ More to the point, Appellant is requesting that the Commission, without authority, insert itself in matters that are within the jurisdiction of other federal, state, or local government entities.

The Licensing Board correctly found, the proposed TC-1 Contention is inadmissible as appellant attempts "to have this proceeding serve as the vehicle to promote coordination regarding facility water use among the various state and federal

² Appellant attempts to raise new issues on appeal and breaks out TC-1 in the Table of Contents under five headings. The disinclination to entertain an issue raised for the first time on appeal is particularly strong where the issue and factual averments underlying it could have been, but were not, timely put before the Licensing Board. *Puerto Rico Electric Power Authority* (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34 (1981).

³ See Eric Joseph Epstein's Petition in Opposition to PPL Susquehanna, LLC Application for Surface Water Withdrawal Request to Modify Application 19950301-EPU-0572 and Formal Request for A Public Input Hearing Under Subpart A - Conduct of Hearings § 808.1, dated August 1, 2007 (ADAMS Accession No. ML072210363)

bodies -- including the SRBC, which operates under the aegis of a federal/state interstate compact -- having regulatory jurisdiction over the SSES.” See Transcript at 41, 49. The Board further found that the issues that the Appellant raised were outside the scope of this proceeding and lacked materiality. See 10 C.F.R. §§ 2.309(f)(1)(iii), (iv).” PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 65 NRC ___, slip op. at 21(July 27, 2007).

Appellant stated during the July 10, 2007 prehearing conference, See Transcript at 48-49, that his main concern was the possibility of a regulatory “gap” relating to the regulation of water withdrawal from the Susquehanna River by the SSES facility that will lead to health and safety impacts as a result of higher power operation of the SSES units in accord with the PPL EPU request. However, there is no regulatory gap, the SRBC regulates water usage and the NRC regulates licensees.

Furthermore, the Board properly ruled that while the water use issues may have an impact upon the availability of water from the river, since it provides makeup water to the SSES cooling towers, however the river is not a safety-related source of water⁴ and therefore potential future water shortfalls lacks materiality in terms of any substantial health and safety implications. Order, slip op. at 21. Additionally, as the Commission has made abundantly clear, absent some need for resolution to meet the agency’s statutory responsibilities, the agency’s adjudicatory process is not a forum for litigating matters that are primarily the responsibility of other federal or state/local regulatory agencies. See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 121-22 (1998). In ruling that Contention TC-1 was not within the purview of the NRC and that the issues raised were not safety related, the

⁴ Since the plant has an ultimate heat sink that consists of an eight-acre, 25-million gallon spray pond that has to be kept at specified water levels to provide cooling water sufficient to accommodate a design-basis loss of coolant accident in one unit, and bring both units to cold shutdown and maintain the units in that state, and must provide spent fuel pool cooling for thirty days. Under the plants technical specifications, if the specified water levels are not maintained, Licensee must take action which could include plant shut down. See Transcript at 35-39.

Board correctly applied the Commission's precedents and correctly noted that there was no support for Mr. Epstein's Contention TC-1. Moreover, this appeal fails to demonstrate that the Board's ruling contains an error of law or abuse of discretion.

C. The Licensing Board was Correct in Ruling Technical Contention 2 Inadmissible

Appellant alleged, in Technical Contention 2, that PPL had failed to disclose damaging information regarding faulty and corroded intake piping. As a preliminary matter, the Staff notes that Contention TC-2 begins on page thirty (30) of Petitioner's appeal and has exceeded the allowable page limit set by the regulation. The Commission's appeal regulation clearly states that, "Unless the Commission orders otherwise, any briefs on review may not exceed thirty (30) pages in length, exclusive of pages containing the table of contents, table of citations, and any addendum containing appropriate exhibits, statutes, or regulations." See 10 CFR § 2.341(c)(2). Since Appellant's brief on the TC-2 Contention begins on page 30, the Commission should not consider any arguments or information contained in subsequent pages of the brief.

Regardless of the above, the Staff agrees with the Board's ruling on this Contention. The crux of the Petitioner's TC-2 Contention is his assertion that the EPU application is deficient in that it does not include plans for repairing faulty and corroded piping and inaccurate flow meters associated with the river water intake system. Even though the Licensee identified this matter in its pending December 2006 SRBC increase application, the Petitioner asserts this failure to address, correct, and analyze the problems of the river intake system will significantly reduce the plants' safety margins, and undermines the proper evaluation of the impact that the uprate might have on water-related components and systems causing a decreasing in the ability to accurately gauge the amount of water passing through the plant's cooling system for consumption, cooling, and discharge purposes. See Eric Joseph Epstein's Petition for Leave to

Intervene, Request for Hearing, and Presentation of Contentions with Supporting Factual Data (ADAMS Accession No. ML072010117) at 20-23.

Again as previously noted, the river intake has no relevance to the Licensee's application since it relates to SRBC-imposed requirements and is not relied upon for NRC safety-related analyses or any other relevant purpose. Furthermore, Petitioner makes no mention of any NRC requirement for such disclosures, and cites Act 220⁵ and related SRBC regulations which are not within NRC's jurisdiction. As the Board correctly held, this proceeding is not the proper forum for litigating matters primarily the responsibility of other federal/state/local regulatory agencies. Issues regarding the adequacy of the SSES river intake flow meters and the methods used to measure water withdrawal are wholly within the purview of the SRBC and are therefore outside the scope of this EPU proceeding. See 10 C.F.R. § 2.309(f)(1)(iii).

The Board properly ruled that Epstein did not provide any support for his allegations that PPL's failure to submit information regarding the river intake system in its EPU amendment application and to analyze and correct that item significantly reduces the SSES safety margin and undermines its evaluation of EPU impacts on water-related components and systems. Appellant did not support this contention with any citation to the portions of the PPL application that were deficient, or reference any documentation or expert opinion that supports his margin of safety reduction assertion or identifies the water-related components and systems he believes are in jeopardy. In addition, The Board correctly determined that the Contention was inadmissible because it is based on the incorrect premise that the river intake system is a safety-related structure such that alleged inaccuracies with its withdrawal metering would have safety significance. See 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), (vi).

⁵ The Commonwealth of Pennsylvania is currently implementing the Water Resources Planning Act (Act 220 of 2002), which calls for the State Water Plan to be updated by March 2008, and updated every 5 years thereafter.

Therefore, the Contention failed to merit admission on scope and materiality grounds. See LBP-10, 65 NRC ___, slip op. at 26 (July 27, 2007). Accordingly, the Appellant has not demonstrated that the Board's ruling of Contention TC-2 contains an error of law or abuse of discretion.

CONCLUSION

For the reasons discussed above, the Appellant did not proffer an admissible Contention. This appeal is not justified in that the Appellant has failed to demonstrate that the Board's ruling is erroneous as a matter of law or reflects an abuse of discretion. Therefore, the Commission should affirm the Licensing Board's Decision denying Mr. Epstein's request for a hearing and petition to intervene.

Respectfully submitted,

/RA/

Lloyd B. Subin
Counsel for NRC Staff

Dated at Rockville, Maryland
This 16th day of August 2007

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NUCLEAR REGULATORY COMMISSION

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)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S BRIEF IN OPPOSITION TO MR. EPSTEIN'S APPEAL OF LBP- 07-10" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 16th day of August, 2007.

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- 2 -

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