

February 13, 2007

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

DOCKETED  
USNRC

In the Matter of	)	
	)	
PPL Susquehanna, LLC	)	Docket Nos. 50-387-LR
	)	50-388-LR
(Susquehanna Steam Electric Station,	)	ASLB No. 07-851-01-LR
Units 1 and 2)	)	

February 13, 2007 (2:09pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**PPL SUSQUEHANNA'S MOTION TO STRIKE PORTIONS OF  
ERIC EPSTEIN'S RESPONSE TO ANSWERS TO PETITION TO INTERVENE**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.323(a), PPL Susquehanna, LLC ("PPL Susquehanna") hereby moves to strike certain portions of "Eric Joseph Epstein's Response to PPL Susquehanna's Answer to Eric Joseph Epstein's Petition to Intervene and Eric Joseph Epstein's Response to NRC Staff's Response to Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearing, and Contentions Re: ..." ("Reply") dated February 5, 2007. In particular, PPL Susquehanna moves to strike those portions of the Reply that seek to raise safety and aging management issues under the ambit of Mr. Epstein's Contention 2.<sup>1</sup> These are entirely new issues and claims not found in his original contention, and such new claims in a reply is not permissible.

**II. BACKGROUND**

On September 13, 2006, PPL Susquehanna submitted its application for renewal of Operating License Nos. NPF-14 and NPF-22 for the two units at the Susquehanna Steam Electric Station ("SSES") (the "Application"). On November 2, 2006, the Nuclear Regulatory Commission ("NRC" or "Commission") published a Notice of Opportunity for Hearing ("Notice") regarding

<sup>1</sup> The impermissible portions of Mr. Epstein's Reply include the second paragraph on page 20, the first paragraph on page 21, the third and fourth paragraphs on page 22, and the last line of the first paragraph and all that follows on page 23.

PPL Susquehanna's application. 71 Fed. Reg. 64,566 (Nov. 2, 2006). The Notice permitted any person whose interest may be affected to file a request for hearing and petition for leave to intervene within 60 days of the Notice. Id.

The Notice directed that any petition must set forth with particularity the interest of the petitioner and how that interest may be affected, as well as the specific contentions sought to be litigated. Id. The Notice provided that to properly support a contention

the requestor/petitioner shall provide a brief explanation of the bases of each contention and a concise statement of the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matter within the scope of the action under consideration. The contention must be one that, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Id. at 64,566-67 (footnote omitted).

On January 2, 2007, Mr. Epstein submitted "Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearing, and Presentation of Contentions with Supporting Factual Data" ("Petition") seeking to raise five proposed contentions for consideration in this proceeding. On January 29, 2007, PPL Susquehanna and the NRC Staff ("Staff") filed answers to the Petition opposing the intervention on the grounds that Mr. Epstein had failed meet either the standing or admissible contention standards contained in NRC's rules.<sup>2</sup>

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<sup>2</sup> PPL Susquehanna's Answer to Eric Epstein's Petition for Leave to Intervene (Jan. 29, 2007) ("Answer"); NRC Staff Response to Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearing, and Contentions (Jan. 29, 2007).

On February 5, 2007, Mr. Epstein filed his Reply. As discussed below, Mr. Epstein's attempt to provide new claims and arguments nowhere found within the four corners of the original Petition is clearly impermissible under the Commission's well-established rules of practice, and PPL Susquehanna requests that the Board strike these portions of the Reply.

### III. ARGUMENT

Under 10 C.F.R. § 2.309(h)(2), a petitioner may file a reply to any answer within seven days after service of that answer. While the Commission's rules do not specify the content of such a reply, other provisions of Part 2, the Statement of Considerations published with the final rule, and Commission precedent make clear that a reply to an answer is to "be narrowly focused on the legal or logical arguments presented" in the answers of the applicant/licensee and NRC Staff. 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004) (emphasis added). In this case, Mr. Epstein has gone beyond any reasonable interpretation of an allowable reply by making certain new claims attempting to recast his second contention. If the hearing procedures established in Part 2 are to have any meaning whatsoever, these portions of the Reply must be stricken.

The Commission has held that a reply to an answer may not be used as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 225 (2004), reconsideration denied, Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619, (2004). In that case, in rejecting four contentions filed by the State of New Mexico Environment Department ("Environment Department") and the New Mexico Attorney General ("Attorney General"), the licensing board "declined to consider new 'purportedly material' information in support of the contentions that was first submitted as part of a reply pleading." LES, CLI-04-25, 60 N.R.C. at 224 (footnote omitted). On appeal of the board's decision, the Commission agreed that "the reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the

reply briefs.” Id. The Commission went on to state that such a course of action was clearly impermissible under its rules of practice:

[O]ur contention admissibility and timeliness requirements “demand a level of discipline and preparedness on the part of petitioners,” who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The Petitioners’ reply brief should be “narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer,” a point the Board itself emphasized in this proceeding. As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply could be “no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements” and add new bases or new issues that “simply did not occur to [them] at the outset.”

Id. at 224-25 (footnotes omitted) (emphasis added).

In CLI-04-35, the Commission rejected requests for reconsideration from the Attorney General and the Environment Department and reaffirmed its holding in CLI-04-25. In its reconsideration decision, the Commission noted that the “contentions at issue contained conclusory and unsupported allegations and thus no adequate basis.” LES, CLI-04-35, 60 N.R.C. at 622. The Commission then reiterated the reasons set forth in CLI-04-25 explaining why allowing a reply to raise new arguments or claims not found in the original contention would eviscerate its requirements for the pleading of contentions:

“Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements” . . . “by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later.” The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort. We believe that the 60-day period provided under 10 C.F.R. § 2.309(b)(3) for filing hearing requests, petitions, and contentions is “more than ample time for a potential requestor/intervenor to review the application, prepare a filing on standing, and develop proposed contentions and references to materials in support of the contentions.” Under our contention rule, Intervenor’s are not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset. We agree with the Licensing Board that on these four particular contentions, the Attorney General and the Environment Department failed to do so.

Id. at 622-23 (footnotes omitted).

Finally, the Commission went on to strongly reaffirm its holding in CLI-04-25 that a reply to an answer could not, under its rules of practice, be used as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention:

What our rules do not allow is using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions.

Id. at 623 (emphasis added).

Thus, the Commission has squarely ruled that a reply to an answer may not be used to cure an otherwise deficient contention. As made clear by the Commission, a contrary ruling would eviscerate the rules of practice governing timely filing of properly pled contentions, contention amendments, and submission of late-filed contentions.

Mr. Epstein's Reply clearly runs afoul of the Commission's rules of practice and its precedents. Specifically, Mr. Epstein makes a number of new arguments and claims regarding Contention 2. These claims and arguments are found nowhere in the original Petition, and rely upon documents previously unidentified.

The original Contention 2 alleged that in the Application, PPL Susquehanna "failed to factor, consider and address numerous water use and indigenous aquatic challenges present and anticipated for the Susquehanna River." Petition at 23. Mr. Epstein provided two purported bases for this vague contention: (1) a statement that a comprehensive water use plan was being developed under Pennsylvania Act 220; and (2) a reference to Asiatic clams and Zebra mussels. Id. He then cited numerous sections of the Application to which he claimed his contention was addressed. Id. All of the sections cited were from the Environmental Report. Later, in addressing whether a genuine dispute exists, Mr. Epstein provided a rambling string of unconnected as-

sertions and questions. None of these assertions or questions related to the Integrated Plant Assessment or any aging management program.

In his Reply, Mr. Epstein makes no reference to, or defense of the adequacy of, Contention 2 as originally pled in response to the arguments raised by the PPL Susquehanna and Staff. Rather, he claims for the first time that the “Aging Management program” proposed in the Application is inadequate. Reply at 20. Whereas Contention 2 was exclusively an environmental contention in Mr. Epstein’s original Petition, his Reply has attempted to transform the contention into an issue of safety and aging management.

This attempted transformation is stark. Instead of emphasizing his concern over the Application’s alleged failure to consider the effects of extended operation of SSES on the Susquehanna River and its neighboring aquatic environment, Mr. Epstein is suddenly concerned about an entirely new set of alleged issues. For example, Mr. Epstein now complains about the Application’s supposed failure to consider “water challenges” from “mechanical adversaries” and the lack of a “voluntary tritium action plan.” Reply at 20. He then complains that the Application “does not provide for adequate inspection of all systems and components that may contain radioactively contaminated water” and lacks “adequate monitoring to determine if and when leakage from these areas occurs.” Id. Not only have these concerns not been previously expressed, but they are wholly unrelated to the issues originally raised in Contention 2.

The arguments raised by PPL Susquehanna and Staff regarding Mr. Epstein’s submitted Contention 2 were neither novel nor complicated. Rather, they were straightforward: (1) the contention is impermissibly vague; (2) the contention seeks to raise issues outside the scope of the proceeding; and (3) the contention is not supported by a basis demonstrating a genuine, material dispute. Rather than addressing these arguments in his Reply, Mr. Epstein has attempted to introduce entirely new information and raise entirely new arguments, hoping that this new information demonstrates “some independent health and safety significance.” Reply at 20. How-

ever, Mr. Epstein's Reply ignores the Commission's well-established rules of practice, put in place specifically to avoid this type of attempted transformation, to ensure judicious, efficient administration of the Commission licensing proceedings. Both the Commission's rules and precedents mandate striking these portions of his Reply.

Accordingly, PPL Susquehanna moves to strike all portions of the Reply that attempt to raise aging management or safety issues under the ambit of Contention 2, including all claims concerning (1) aging management; (2) inspection of systems and components that contain radioactively contaminated water; (3) monitoring for leakage; and (4) a tritium action plan. See note 1 supra.

Pursuant to 10 C.F.R. § 2.323(b), PPL Susquehanna has discussed this motion with Mr. Epstein but was unable to resolve the dispute.

#### CONCLUSION

For the reasons stated above, the Board should strike all portions of Mr. Epstein's Reply that attempt to raise aging management or safety issues under the ambit of Contention 2.

Respectfully Submitted,



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Dated: February 13, 2007

**UNITED STATES OF AMERICA  
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of "PPL Susquehanna's Motion to Strike Portions of Eric Epstein's Response to Answers to Petition to Intervene" dated February 13, 2007, was served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 13th day of February, 2007.

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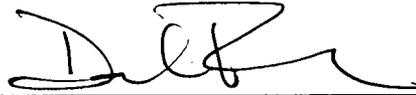
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