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**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Commission

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| In the Matter of | ) | |
| | ) | Docket Nos. 50-387-OLA |
| PPL SUSQUEHANNA, LLC | ) | 50-388-OLA |
| | ) | |
| (Susquehanna Steam Electric Station, Units 1 and 2) | ) | ASLBP No. 07-854-01-OLA-BD01 |
| | ) | |

# PPL SUSQUEHANNA'S BRIEF IN OPPOSITION TO APPEAL OF ERIC JOSEPH EPSTEIN

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**PPL SUSQUEHANNA'S BRIEF**
**IN OPPOSITION TO APPEAL OF ERIC JOSEPH EPSTEIN**

Pursuant to 10 C.F.R. § 2.311(a), PPL Susquehanna, LLC ("PPL Susquehanna") submits this brief in opposition to Eric Joseph Epstein's appeal in the Susquehanna Steam Electric Station ("SSES") power uprate proceeding.[1] Mr. Epstein seeks review of an Atomic Safety and Licensing Board ("Board") July 27, 2007 Memorandum and Order[2] denying Mr. Epstein's hearing request in the proceeding[3] The Board properly denied Mr. Epstein's hearing request because none of his contentions was admissible. Indeed, Mr. Epstein's contentions essentially ignored PPL Susquehanna's uprate application, giving little indication that Mr. Epstein had read it with any care. Instead, Mr. Epstein's proposed contentions focused predominantly on water withdrawal permitting by the Susquehanna River Basin Commission ("SRBC") -- a matter entirely outside the scope of this proceeding.

The Commission should affirm the Board's decision because (1) Mr. Epstein has failed to identify any error of fact or law in that decision, and has not charged the Board with any

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[1] Eric Joseph Epstein's Appeal of the Atomic Safety and Licensing Board's Memorandum and Order (Ruling on Stating and Contentions) (Aug. 5, 2007) (hereinafter cited as "Pet. Br.").

[2] PPL Susquehanna, LLC (Susquehanna Steam Electric Station), LBP-07-10, 66 N.R.C. __ (slip op. July 27, 2007) ("LBP-07-10").

[3] Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearing, and Presentation of Contentions with Supporting Factual Data (May 11, 2007) ("Petition" or "Pet.").

procedural errors that might warrant Commission review; (2) Mr. Epstein improperly seeks to raise new issues that were not encompassed by his original contentions; and (3) the Board's decision was clearly correct. In essence, this proceeding involves a petitioner who wants to litigate State permitting issues before the NRC and fails to challenge any particular aspect of the uprate application.

## STATEMENT OF THE CASE

On October 11, 2006, PPL Susquehanna submitted its application requesting approval of amendments to Operating License Nos. NPF-14 and NPF-22 for SSES Units 1 and 2 to increase the maximum authorized power level from 3489 megawatts thermal (MWt) to 3952 MWt,[4] approximately a 13% increase. The Application includes a number of attached analyses, including a 350-page Power Uprate Safety Analysis Report ("PUSAR")[5] and a 54-page Environmental Report ("ER").[6] As a constant pressure power uprate, the increase in electrical output is accomplished primarily by generating and supplying higher steam flow to the turbine generator (PUSAR at xxvii), rather than any significant increase in reactor or main steam pressure or temperature.[7] See LBP-07-10, slip op. at 2-3.

On March 13, 2007, the Nuclear Regulatory Commission ("NRC" or "Commission"), published a notice of consideration of the amendment, proposed determination of no significant hazards considerations, and opportunity for hearing ("Notice"). 72 Fed. Reg. 11,383, 11,384,

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[4] PPL Letter PLA-6076, Susquehanna Steam Electric Station, Proposed License Amendment Numbers 285 for Unit 1 Operating License No. NPF-14 and Proposed License Amendment 253 for Unit 2 Operating License No. NPF-22, Constant Pressure Power Uprate (Oct. 11, 2006) (ADAMS Accession No. ML062900160) ("Application').

[5] Id., Attachment 6, Power Uprate Safety Analysis Report (ADAMS Accession No. ML062900401).

[6] Id., Attachment 3, Supplemental Environmental Report (ADAMS Accession No. ML062900161).

[7] See PUSAR at 3-23 ("The nominal operating pressure and temperature of the reactor are not changed by CPPU. Aside from [Main Steam] and [Feedwater], no other system connected to the [Reactor Coolant Pressure Boundary] experiences a significant increased flow rate at CPPU conditions."). See also id. at 1-20 (Table 1-2, "Current and CPPU Plant Operating Conditions").

11,392 (Mar. 13, 2007). 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. at 11,384. The Notice directed that any petition must set forth the specific contentions sought to be litigated and stated:

> Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include 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 matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/ requestor to relief. A petitioner/ requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Id.

On May 11, 2007, Mr. Epstein submitted his Petition (see note 3 supra) proposing three contentions, the first two of which are subject to Mr. Epstein's appeal.[8] Although Mr. Epstein's discussion of Contention 1 included a rambling hodgepodge of assertions, Contention 1 alleged in essence that PPL had failed to consider the impact of state and federal water use regulations on surface water withdrawal for SSES cooling systems. Pet. at 10. Mr. Epstein explained that the crux of his contention was that state and federal regulation may impact, constrict or restrict water flow that would adversely impact cooling systems at the plant, and lead to health and safety challenges. Id.; Transcript, Susquehanna Steam Electric Station Prehearing Conference (July 10, 2007) ("Tr.") 29-30 Contention 2 and Mr. Epstein's explanation of its basis alleged in

[8] Because Mr. Epstein has not appealed the Board's ruling on the third contention, the third contention is not discussed further in this Brief.

essence that PPL Susquehanna had failed to disclose and include action plans to repair corroded piping in the River Intake Structure. Pet. at 19.

On May 31, 2007, the Board issued an Initial Prehearing Order. As an aid to the Board and other participants in identifying Mr. Epstein's concerns, the Board reviewed Mr. Epstein's contentions and determined that they sought to raise technical issues, and not environmental issues regarding NEPA-related matters. Memorandum and Order (Initial Prehearing Order) (May 31, 2007) at 2. The Board allowed Mr. Epstein an opportunity to supplement his petition if he disagreed with this classification. Id. Mr. Epstein did not disagree with the Board's designation of these contentions as technical, and did not supplement his petition.

On June 5, 2007, PPL Susquehanna and the NRC Staff each submitted an answer to the Petition. PPL Susquehanna's Answer to Eric Epstein's Petition for Leave to Intervene (June 5, 2007) ("PPL Answer"); NRC Staff's Response to Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearing and Contentions (June 5, 2005) ("Staff Resp."). Both PPL Susquehanna and the NRC Staff opposed the admission of Mr. Epstein's contentions on the grounds that they were vague, unsupported and sought to raise matters outside the scope of the NRC proceeding. PPL Answer at 15-27; Staff Resp. at 7-14.

On June 12, 2007, Mr. Epstein filed Eric Joseph Epstein's Reply to PPL Susquehanna LLC and the NRC Staff Responses to Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearing, and Contentions ("Reply"). On July 10, 2007, the Board conducted a telephonic prehearing conference which included argument on the proposed contentions. Thereafter, the Board issued its Memorandum and Order, LPB-07-10, denying Mr. Epstein's hearing request.

## ARGUMENT

### I. MR. EPSTEIN FAILS TO IDENTIFY ERRORS IN THE BOARD'S DECISION

The Commission should affirm the Board's decision because Mr. Epstein has failed to identify any error of law or fact, procedural error, or abuse of discretion by the Board. Here, Mr. Epstein's brief barely mentions the Licensing Board's rulings, but instead mainly regurgitates (indeed, in many instances, cuts and pastes) arguments from prior pleadings[9] and attacks the NRC Staff.[10]

Licensing board rulings are affirmed where the "brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of the Board's decision." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 N.R.C. 261, 265 (2000) (citation omitted); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 637 (2004). A "failure to illuminate the bases" for an exception to the Board's decision is "sufficient grounds to reject it as a basis for appeal." Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 N.R.C. 285, 297 (1994), aff'd, Advanced Medical Sys., Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995) (Table). In that decision, the Commission stated:

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[9] For example, the assertions on pages 13-15 of Mr. Epstein's brief are essentially drawn from the prehearing conference transcript. Compare Pet. Br. at 13-15 with Tr. 31-33. The discussion on page 16-19 of Mr. Epstein's brief similarly repeat arguments from the prehearing conference. Compare Pet. Br. at 16-19 with Tr. 13-15. And Mr. Epstein's entire argument on Contention 2 is essentially lifted from his June 12, 2007 Reply. Compare Pet. Br. at 30-31 with Reply at 9.

[10] See, e.g., Pet. Br. at 4 ("NRC staff misinterpreted and ignored parallel regulatory guidelines"); 5 ("the ASLBP took their cure from the staff who was poorly prepared and unwilling to pursue numerous interagency issues"); 6 ("the NRC staff remains steadfast in their opposition to follow up meetings with the SRBC;" "the staff has no intention of following up and meeting with the SRBC"); 7 ("This pattern of decided disengagement by the NRC staff. . ."; "It's not the staff's role to serve as a surrogate cheerleader in 'support' of an application"); 21 ("The NRC Staff incorrectly opined"); 28 ("Had PPL Susquehanna or the NRC staff scratched the regulatory surface"); 29 ("Staff erroneously alleged. . .:"; "Staff created a specious syllogism"); and 30 ("PPL and the Staff both provide excuses. . .").

> 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.

Id., citing General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 N.R.C. 1, 9 (1990); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 N.R.C. 277, 278 (1982). "A mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result 'is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below.'" Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 N.R.C. 192, 198 (1993) (citation omitted).

Here, Mr. Epstein merely makes general arguments that, for the most part, simply repeat allegations from prior pleadings. Such general arguments that do not come to grips with the Board's reasons for rejecting a contention are not enough to overturn a licensing board's rulings. Millstone, CLI-04-36, 60 N.R.C. at 639.

## II. MR. EPSTEIN IMPROPERLY RAISES ISSUES THAT WERE NOT WITHIN THE SCOPE OF HIS ORIGINAL CONTENTIONS

With respect to Contention 1, one of Mr. Epstein's threshold arguments – that PPL Susquehanna never received an SRBC approval for the 2001 uprate (Pet. Br. at 4-12) – should be rejected, because it seeks to raise an issue that was not presented in his original contentions. Mr. Epstein's Petition contained no allegation that the 2001 uprate required or lacked any SRBC approval. Instead, Mr. Epstein first alleged that there might be an issue concerning SRBC approval of the 2001 uprate during the July 10, 2007 prehearing conference. Tr. 12, 33, 41, 51, 66. Indeed, Mr. Epstein's citations in footnote 20 of his brief admit as much. Pet. Br. at 11 n.20.

The Commission has clearly 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) ("LES"); Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619, 623 (2004). In CLI-04-25, the licensing board had "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 would 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 reaffirmed its holding in CLI-04-25 that a reply to an answer may 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.

LES, CLI-04-35, 60 N.R.C. at 623 (emphasis added).

These holdings apply with even greater weight to new claims raised during a prehearing conference, since a prehearing conference occurs even later in the process than a petitioner's reply to the answers to its contentions. Allowing a petitioner to inject new issues during a prehearing conference would eviscerate the Commission's rules in just the same way as would allowing new claims in a reply.

Since the allegation concerning whether PPL Susquehanna received an SRBC approval for the 2001 uprate was never raised in the original contention, it was never properly before the Board. Thus, Mr. Epstein's assertion that the Board "failed to investigate the allegation" (Pet. Br. at 11) does not signify any error by the Board.[11]

## III. THE BOARD'S DECISION REJECTING MR. EPSTEIN'S CONTENTIONS IS CLEARLY CORRECT

### A. CONTENTION 1 WAS UNSUPPORTED, SPECULATIVE, AND OUTSIDE THE SCOPE OF THE PROCEEDING

The Licensing Board properly rejected Contention 1 because, among other things, the issues Mr. Epstein sought to raise were outside the scope of this proceeding and lacked materiality. LBP-07-10, slip op. at 21. First, the Board found no nexus between Contention 1 and any safety issue. As described in the Application, SSES has an ultimate heat sink consisting of a concrete-lined spray pond covering approximately 8 acres and containing 25 million gallons

[11] Of course, the Licensing Board's responsibility was to rule on the Petition and determine whether the contentions as proposed in the Petition were admissible, not to "investigate" an allegation. Further, while this allegation was not addressed by the Board (or by the Staff and PPL Susquehanna) because it was not part of the original contention and was raised for the first time only during the prehearing conference, the allegation clearly would have been inadmissible for multiple reasons. First, the proceeding before the Board involves PPL Susquehanna's 2006 application for a CPPU uprate, not the measurement uncertainty recapture power uprate granted in 2001. Thus, an allegation that the 2001 uprate required an SRBC approval is obviously beyond the scope of the proceeding. In addition, the Board's ruling that NRC licensing proceedings are not the forum for litigating matters that are the responsibility of other agencies (LPB-07-10, slip op. at 22) is equally applicable to any approval that might be applicable to the 2001 uprate.

of water. PUSAR at 6-12; ER at 7-7. See also PPL Answer at 16. Thus, as the Board observed, "although it provides makeup water to the SSES cooling towers, the Susquehanna River is not a safety-related source of water for the SSES in the context of this amendment." LBP-07-10, slip op. at 21. As the Board observed, the spray pond must be maintained 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 -- as well as provide spent fuel pool cooling -- for thirty days; and under SSES technical specifications, if the delineated water levels are not maintained, PPL is required to take certain actions, which ultimately might include facility shutdown. Id. at 21-22, citing Tr. at 35-39. The Board therefore found that Mr. Epstein's concern that the water availability shortfalls for SSES might occur sometime in the future as a consequence of state or SRBC regulation "lacks materiality in terms of any substantial health and safety implications." Id. at 22. The Licensing Board also heeded the Commission's precedent that, absent some need for resolution to meet the agency's statutory responsibilities, the NRC's adjudicatory process is not a forum for litigating matters that are primarily the responsibility of other federal or state regulatory agencies. Id. citing Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 N.R.C. 119, 121-22 (1998).

On appeal, Mr. Epstein identifies no error in this ruling. While his brief "contends that the Intake is a safety related system that impacts the Susquehanna River regardless of the NRC's restrictive definition of 'safety'" (Pet. Br. at 23), he provides no basis for this claim and sets forth no citation to any portion of the record in which he provided any support for such an assertion. For example, none of Mr. Epstein's pleadings ever identified any portion of the Application, or

Updated Final Safety Analysis Report, indicating that the River Intake Structure is safety-related.[12]

Mr. Epstein does repeat the same argument that he made during the prehearing conference – that water use restrictions could cause scrams (compare Pet. Br. at 14 with Tr. 31), but the Licensing Board addressed this very argument. As the Board observed,

> Certainly, nothing that has been presented suggests that the periodic modification of power generation levels that might possibly result from Susquehanna River water use restrictions would be the type of unplanned reactor scram that has been identified as potentially resulting in safety significant challenges to reactor systems.

LBP-07-10, slip op. at 22 n.19. In short, the Board found that Mr. Epstein had provided no basis for his claims, and Mr. Epstein identifies no error in this ruling. Moreover, as the Board noted, this argument was first voiced at the prehearing conference. Id. As previously discussed, attempting to inject new bases for a contention after its initial filing is improper.

Moreover, as PPL Susquehanna pointed out in its Answer, Mr. Epstein provided no basis to assume that SSES's surface water withdrawals will be restricted (see PPL Answer at 17) [13], and the Board found the possibility of the purported harm to be speculative (LPB-07-10, slip op. at 22 n.19). Mr. Epstein identifies no error in Board's finding, and nothing in his prior pleadings or statements suggests otherwise. Mr. Epstein's Petition referred vaguely to Pennsylvania Act

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[12] Mr. Epstein observes that the Susquehanna River provides makeup for the spray pond. Pet. Br. at 23. The fact that the river is a source of makeup under normal operating conditions does not make it a safety-related source of cooling water. As reflected in the Board's decision, the 25-million gallon ultimate heat sink provides sufficient water to accommodate a design-basis loss of coolant accident at one unit, bring both units to cold shutdown and maintain the units in that state, as well as provide spent fuel pool cooling, over a thirty day period. LBP-07-10, slip op. at 21-22. See also Tr. 35-39.

[13] Although the Board did not explicitly rely in its decision on Mr. Epstein's failure to provide a basis for this argument, the Board's decision may be defended on any ground advanced below. See Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station Unit 2), ALAB-264, 1 N.R.C. 347, 357 (1975); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 N.R.C. 1591, 1597 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 N.R.C. 135, 141 (1986), rev'd in part on other grounds, CLI-87-12, 26 N.R.C. 383 (1987); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 N.R.C. 775, 789 (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 N.R.C. 897, 908 n.8 (1982), citing Black Fox, supra, ALAB-573, 10 N.R.C. at 789.

220 (Pet. at 12), which requires an update to a State Water Use plan, but that Act does not provide any authority to regulate or control water withdrawal or use permits. See LBP-07-10, slip. op. at 21 n.18, citing PPL Answer at 17-18. Mr. Epstein's Petition also referred to the SRBC's authority to regulate water withdrawal (Pet. at 12 n.9), but provided no basis to assume that PPL Susquehanna's application to the SRBC for a water withdrawal and use approval related to the uprate (See Pet., Exh. 1) will not be granted.[14] Nor is this possibility material, since without necessary water use approvals, operation at the uprated conditions cannot occur. See Tr. 50 (Judge Cole); see also Tr. 35.

Mr. Epstein's assertions concerning sections 316(a) and (b) of the Clean Water Act are equally irrelevant. Mr. Epstein argues, "[t]he SRBC must investigate the impact of the Environmental Protection Agency' (EPA) 316(a) and 316(b) milestones on PPL's present request." Pet. Br. at 16. The NRC has no authority to direct the SRBC to investigate any particular issue. Mr. Epstein then faults the Licensing Board for not acknowledging or discussing a recent decision in Vermont Yankee relating to consideration of heat shock as an issue in a license renewal proceeding.[15] Pet. Br. at 16. Mr. Epstein is in no position to fault the Board, since he stated at the prehearing conference, "my challenge is really not focused on 316(a) or (b)." Tr. 13. Indeed, in his Brief itself, Mr. Epstein now states: "This specific issue [of alternative thermal limitations under section 316(a) on which the Vermont Yankee decision focused] was never raised by Mr. Epstein because SSES is a closed-cycle plant." Pet. Br. at 17.

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[14] Mr. Epstein repeats his argument from the prehearing conference that PPL has not produced evidence that the water use or consumption will not be restricted (compare Pet. Br. at 15 with Tr. 32-33). However, under the NRC rules, a petitioner has the burden of providing facts, expert opinion and references supporting its contention, and sufficient information to show that a genuine, material dispute exits. 10 C.F.R. § 2.309(f)(1)(v)-(vi).

[15] Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 N.R.C. 371 (2007)

And quite frankly, Mr. Epstein's discussion of the Vermont Yankee decision (see Pet. Br. at 16-19) is difficult to comprehend.

Further, compliance with sections 316(a) and (b) of the Clean Water Act relate to environmental impacts (thermal discharge, entrainment and impingement). As previously discussed, the Board construed Contention 1 as raising a technical contention, not an environmental one, and gave Mr. Epstein to opportunity to supplement his Petition if he intended to raise environmental issues. Mr. Epstein neither disagreed with the Board's interpretation of his contention nor filed any supplement to make it an environmental contention.[16]

Moreover, the Board specifically ruled that alternative thermal effluent limitations under Section 316(a) do not apply to SSES because it employs closed cycle cooling, and that Mr. Epstein had failed to establish any genuine dispute with the portion of the Application addressing compliance with Section 316(b) rules. LBP-07-10, slip op. at 23 n.20. Section 7.2.3 of the ER explains that the EPA 316(a) Phase II regulations[17] are met by a plant that has intake flows commensurate with a closed cycle cooling system, which SSES has. See ER at 7-10; PPL

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[16] Because Mr. Epstein essentially agreed that Contention 1 sought to raise safety rather than environmental issues, the statements in his discussion of Contention 1 concerning potential effects on shad ladders or of biocides used to control nuisance organism (Pet. at 15-16) were irrelevant. Nevertheless, the Board considered these claims too, and found that Mr. Epstein had failed to provide a sufficient factual basis to support a genuine material dispute with the Application. LBP-07-10, slip. op. at 23 n.20. For example, as noted by the Board, the shad ladders on the Susquehanna River are located on dams approximately 100 river-miles downstream SSES. Id., citing PPL Answer at 21. In his Brief, Mr. Epstein cuts and pastes a footnote from this Reply (compare Pet. Br. at 25 n.48 with Reply at 8 n.16), but provides no explanation how operation of SSES, which employs cooling towers, is going to have any effect on a shad ladder 100 river-miles downstream. He thus identifies no error with the Board's ruling. Similarly, the Board noted that the use of biocides to control Asiatic clams was addressed in sections of the Application that Mr. Epstein had not challenged. LBP-07-10, slip op. at 23 n.20. In his Brief, Mr. Epstein identifies no error in the Board's ruling. Instead, he asserts for the first time on appeal that a release of Clamtrol at TMI in 1999 exceeded permitted limits for about an hour. This attempt to add a new basis on appeal is improper (Millstone, CLI-04-36, 60 N.R.C. at 640) and in any event provides no grounds to disturb the Board's finding that Mr. Epstein's original contention failed to address or controvert relevant information in the Application. Nor does Mr. Epstein explain how the TMI event has any relevance to the application at issue here.

[17] Final Rule to Establish Regulations for Cooling Water Intake Structures at Phase II Existing Facilities (69 Fed. Reg. 41,576 (July 9, 2004). These regulations were recently suspended after a decision by the U.S. Court of Appeals for the Second Circuit, Riverkeeper, Inc. v. EPA, 475 F.3d 83 (2d. Cir. 2007). See Staff Resp. at 9.

Answer at 20. As the Board held, Mr. Epstein never contested this discussion in the Application, rendering his concern "an insufficient basis . . . as lacking adequate factual support and failing to allege any genuine material dispute with the portion of the application that is relevant to his concern." LBP-07-10, slip op. at 23 n.20. Mr. Epstein identifies no error with this ruling.[18]

In the end, Contention 1 amounted to nothing more than a suggestion for a dialogue between the NRC and Pennsylvania Department of Environmental Protection, and SRBC.

> And what I'm saying is, look, lets have a dialog with DEP. Let's have a dialogue with the Susquehanna River Basin Commission. Let's work through this together. Let's not deal with it in isolation so that we create a tragic event where one, you know, denial of a permit, you know, holds up the whole works.
>
> JUDGE COLE: Who should have the dialogue?
>
> MR. EPSTEIN: I think the NRC and the Susquehanna River Basin Commission, which have begun the dialogue, as PPL has begun the dialogue with the Susquehanna River Basin Commission also. I think that we need to get together in a room to clarify this issue.

Tr. at 51-52. See also LBP-07-10, slip op. at 21 ("petitioner Epstein seemingly wishes to have this proceeding serve as the vehicle to promote coordination regarding facility water use among the various state and federal bodies"). The purpose of an adjudicatory hearing, however, is to litigate genuine, material disputes with an application. A desire by a petitioner to promote interagency communication simply raises no such dispute.

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[18] On page 21 of his brief, Mr. Epstein states, "PPL's ER §§ 7.2.1 to 7.2.4 . . . is a broad scoping brush that does not address Susquehanna River Basin issues and presumes complete nullification of 316(a) and 316(b) as a future event." Pet. Br. at 21. Such an assertion was not contained in the original Petition, or in any other pleading or argument before the Board. Such a new assertion made for the first time on appeal is improper. Millstone, CLI-04-36, 60 N.R.C. at 640. This new assertion is also incorrect, as demonstrated by the ER on its face. Section 7.2.1 of the ER quantifies the increased water consumption, Section 7.2.3 evaluates entrainment and impingement, Section 7.2.4 evaluates thermal discharge effects, and Section 7.2.2 evaluates discharges of liquid effluents. Indeed, the Board found that these sections of the ER evaluated increased water consumption, entrainment and impingement, and thermal and liquid effluent discharges, and that these sections had not been challenged by Mr. Epstein. LBP-07-10, slip op. at 22. Mr. Epstein identifies no error in this ruling.

## B. CONTENTION 2 WAS UNSUPPORTED, IMMATERIAL AND OUTSIDE THE SCOPE OF THE PROCEEDING

As previously stated (see note 10 supra), Mr. Epstein's brief cuts and pastes the portion of his prior reply concerning Contention 2 and does not even mention the Board's ruling. Compare Pet. Br. at 30-31 with Reply at 9. This mere recitation of his prior positions with no attempt to come to grips with the Board's ruling provides no grounds to overturn the Board's ruling. Comanche Peak, CLI-93-10, 37 N.R.C. at 198; Millstone, CLI-04-36, 60 N.R.C. at 639.

The Board's decision on Contention 2 should also be upheld because it was clearly correct. The gravamen of Contention 2 was that the Application has not disclosed plans to repair corrosion and fouling of the River Intake piping that is affecting the accuracy of flow meters. See LBP-07-10, slip op. at 24. Because the River Intake system is not a safety-related structure and the accuracy of the flow meters relates solely to SRBC monitoring requirements, the Board held that Mr. Epstein's contention raised no issue material to the safety findings that the NRC must make in this proceeding. Id. at 25-26. The Board found that Mr. Epstein had not provided any support for a safety issue. Id. at 26. Mr. Epstein identifies no error in these rulings.

## CONCLUSION

For the reasons stated above, the Commission should affirm the Board's decision and terminate this proceeding.

Respectfully Submitted,

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Dated: August 16, 2007

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Commission

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | Docket Nos. 50-387-OLA |
| PPL SUSQUEHANNA, LLC | ) | 50-388-OLA |
| | ) | |
| (Susquehanna Steam Electric Station, Units 1 and 2) | ) | ASLBP No. 07-07-854-01-OLA-BD01 |

CERTIFICATE OF SERVICE

I hereby certify that copies of "PPL Susquehanna's Brief in Opposition to Appeal of Eric Joseph Epstein," dated August 16, 2007, were 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 16th day of August, 2007.

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Washington, D.C. 20555

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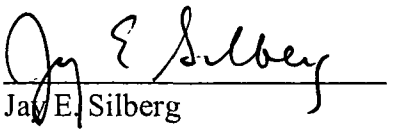

Jay E. Silberg