August 31, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
PPL BELL BEND, LLC	)	Docket No. 52-039-COL
	)	
(Bell Bend Nuclear Power Plant)	)	

APPLICANT'S BRIEF IN OPPOSITION TO PETITIONER EPSTEIN'S APPEAL FROM LBP-09-18

David A. Repka
Tyson R. Smith
Rachel Miras-Wilson
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

Bryan A. Snapp
PPL Services Corporation
2 North Ninth Street
Allentown, PA 18101

COUNSEL FOR PPL BELL BEND, LLC

August 31, 2009

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I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.311(b), PPL Bell Bend, LLC ("PPL" or "Applicant"), applicant in the above captioned matter, hereby files this brief in opposition to Eric Joseph Epstein's appeal from LBP-09-18, dated August 20, 2009.[1] For the reasons discussed below, the Atomic Safety and Licensing Board ("Licensing Board") correctly concluded that Mr. Epstein lacked standing and that Mr. Epstein had, in any event, failed to proffer an admissible contention. Accordingly, the Appeal should be denied.

This proceeding relates to PPL's application for a combined license ("COL") to construct and operate one U.S. EPR at a site in Luzerne County, Pennsylvania — the Bell Bend Nuclear Power Plant ("Bell Bend"). PPL filed its application on October 10, 2008, and the Nuclear Regulatory Commission ("NRC") accepted the application for docketing on December 19, 2008. 73 Fed. Reg. 79,519. Petitioner Epstein timely filed a petition to intervene on May 18,

[1] *See* "Eric Joseph Epstein's Appeal of the Memorandum and Order Issued by the Atomic Safety and Licensing Board on August 10, 2009," dated August 20, 2009 ("Appeal").

2009. The Applicant and the NRC Staff filed their respective answers on June 12, 2009.[2] The Licensing Board issued its decision with respect to the hearing requests — addressing standing and the admissibility of the proposed contentions — on August 10, 2009. The Licensing Board found that Mr. Epstein lacked standing to intervene and, in any event, failed to proffer a single admissible contention. Accordingly, the Licensing Board terminated the proceeding.[3] On August 20, 2009, Mr. Epstein filed his Appeal, challenging the Licensing Board's determination that he lacks standing and the admissibility of his proposed Contention 2.[4]

II. REGULATORY BACKGROUND

A. Standing

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that he or she has standing. 10 C.F.R. § 2.309(a). The Commission has long applied contemporaneous judicial concepts of standing to determine whether a party has a sufficient interest to intervene as a matter of right. Y*ankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998). To establish standing, there must be an "injury-in-fact" that is either actual or threatened. *Id*., *citing Wilderness Soc'y v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987). The injury must be "concrete and particularized," not "conjectural" or "hypothetical." *Sequoyah Fuels Corp. & Gen. Atomics*

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2 *See* "Applicant's Answer to Petitions to Intervene," dated June 12, 2009 ("Applicant's Answer").

3 *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 69 NRC __ (Aug. 10, 2009) (slip op. at 2). Gene Stilp and Taxpayers and Ratepayers United ("TRU") also submitted a separate petition to intervene. The Licensing Board found that Mr. Stilp and TRU had standing, but denied their petition after concluding that neither proffered a single admissible contention. Neither Mr. Stilp nor TRU appealed the decision.

4 Mr. Epstein does not appeal the Licensing Board's finding that his other proposed contentions (related to adequacy of decommissioning funding assurance, foreign ownership, and certain socioeconomic environmental impacts of the proposed action) are inadmissible. Accordingly, those contentions are not addressed herein.

(Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). Further, a petitioner must establish a causal nexus between the alleged injury and the challenged action. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998). Finally, a petitioner must establish redressibility — that is, that the claimed actual or threatened injury could be cured by some action of the decisionmaker. *Sequoyah Fuels Corp*. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

B. Admissibility of Contentions

To gain admission to a proceeding as a party, a petitioner must submit at least one valid contention that meets the requirements of 10 C.F.R. § 2.309(f)(1). The contention rule is "strict by design," and failure to comply with any of the requirements is grounds for dismissal. *Dominion Nuclear Conn.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). The Commission's procedures do not allow "'the filing of a vague, unparticularized contention,' unsupported by affidavit, expert, or documentary support." *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

To be admissible, contentions must fall within the scope of the proceeding. *See Florida Power and Light Co*. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000). A contention must present a genuine dispute with the applicant on a material issue, and any contention that fails directly to controvert the application or mistakenly asserts the application does not address a relevant issue can be dismissed. *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993). The petitioner must present factual information and expert opinions to support its contention. *Ga. Inst. of Tech.* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305 (1995). Neither mere speculation nor bare assertions alleging that a matter should be considered will

suffice to allow the admission of a proffered contention. *Fansteel, Inc*. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner. *Georgia Tech*, 41 NRC at 305.

III. DISCUSSION

The Commission's longstanding practice is to give substantial deference to Licensing Board conclusions on standing and contention admissibility unless there is a clear error of law or an abuse of discretion. *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *Portland General Electric Co*. (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-273, 1 NRC 492, 494 (1975). The Commission's standard of "clear error" for overturning a Licensing Board's factual finding is quite high. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-03-08, 58 NRC 11, 25-26 (2003). The Commission has described "a 'clearly erroneous' finding [as] one that is not even 'plausible in light of the record viewed in its entirety.'" *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 189 (2004).

The Commission will not overturn a Licensing Board's findings simply because the Commission might have reached a different result or because the record could support a view different from that of the Licensing Board. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 382 (2001) ("[The Commission] has repeatedly declined to second guess plausible Board decisions"). The Commission will reverse a Licensing Board's legal conclusions only "if they are 'a departure from or contrary to established law.'" *Tennessee Valley Authority*, CLI-04-24, 60 NRC at 190.

Under these standards and as discussed below, Mr. Epstein's Appeal should be denied. Mr. Epstein fails to show that the Licensing Board clearly erred in finding that he does not have standing or in finding that Contention 2 is not an admissible contention. Likewise, Mr. Epstein fails to show that the Board departed from established Commission cases in reaching its conclusions.

A. Mr. Epstein Fails to Establish Standing in the Bell Bend Proceeding

In his Appeal with respect to standing, Mr. Epstein relies heavily on the fact that he was granted standing in the *Susquehanna* license renewal proceeding in 2007. *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-04, 65 NRC 281 (2007). He argues that in the present case his "identification of contacts in the area of the proposed Bell Bend facility is very similar to the showing he made [in 2007]." Appeal at 5. However, Mr. Epstein's reliance on the Licensing Board's decision in the *Susquehanna* proceeding from two years ago is misplaced.

A grant of standing in one proceeding does not automatically grant standing in a second proceeding, even if both proceedings involve the same facility, because circumstances may change over time. *See, e.g. Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, __ NRC __ (2009) (slip op. at 14) (requiring a new showing of standing for each proceeding in case the person has moved, died, or simply changed his views); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992). A petitioner may only rely on a prior demonstration of standing if that prior demonstration is shown to correctly reflect the current status of the petitioner's standing. *Id*. at 163. Here, Mr. Epstein failed to adequately demonstrate that his current circumstances are sufficient to establish standing for this proceeding.

According to the Licensing Board in LBP-09-18, the contacts Mr. Epstein identifies in this proceeding are insufficient to establish standing — a determination entitled to great deference. There is no dispute that Mr. Epstein does not reside within 50 miles of the proposed plant, and that he cannot rely on a presumption of standing based on his residence near the site. Mr. Epstein instead attempted to rely upon other personal and business contacts within the 50-mile radius in his attempt to establish standing. The Licensing Board explained, however, that it was unable to weigh accurately the number, length, and frequency of his trips to or near the Bell Bend site based on the information provided by Mr. Epstein. LBP-09-18 at 15. The Board was also unable to gauge the extent, frequency, and duration of Mr. Epstein's business and community service work in the vicinity of the proposed plant. *Id*. Mr. Epstein did not sufficiently explain the distances between the proposed facility and the location of the towns and landmarks referenced in his pleadings or the relationship of his contacts to the proposed facility at Bell Bend. *Id*. It is the burden of the petitioner to clearly state these facts in a petition to intervene, and Mr. Epstein failed to do so. *Id*. He therefore failed to meet his burden — and the Licensing Board did not make any mistake in this regard.

Further, the NRC's requirements for standing are not new to Mr. Epstein. The Board in LBP-09-18 pointed out that the NRC's standing requirements had been "patiently explained" to Mr. Epstein in the *Susquehanna* extended uprate proceeding. *Id*. at 14 *citing PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-10, 66 NRC 1, 19 (2007). The Board also noted that the Applicant and the NRC Staff had highlighted the deficiencies in Mr. Epstein's standing in opposing his petition to intervene. LBP-09-18 at 15. Mr. Epstein was therefore aware of the NRC's standing requirements, including the need to

provide specific and current information regarding geographic proximity and the timing of visits to the areas around a site.[5]

Despite these warnings, Mr. Epstein was inexplicably silent in his petition (and reply) as to the length of the "substantial periods of time" he claims to spend within the 50-mile radius of the proposed site. There is no specificity regarding the duration of time spent in proximity to the proposed Bell Bend site in any of Mr. Epstein's pleadings. Even after the Applicant and the NRC Staff highlighted the deficiencies in his standing, Mr. Epstein did not avail himself of the opportunity to cure the omission in his reply by supplying more specific information regarding the frequency, nature, and length of his contacts within the area near the site. As the Board noted, it was imperative for Mr. Epstein to provide the requisite information or update the information provided over two years ago in the *Susquehanna* proceedings. *Id*. Instead, "he simply referred to the prior *Susquehanna* decisions and his original petition." *Id*. The contacts Mr. Epstein described in his filings lack the necessary detail and are incomplete as to the proximity, timing, and duration of his contacts. Thus, the Board correctly concluded that Mr. Epstein lacks standing.

In his Appeal, Mr. Epstein does not point to a clear error in the Licensing Board's decision nor does he establish that the Licensing Board incorrectly applied Commission precedent. Accordingly, the Licensing Board's determination that Mr. Epstein lacks standing should be upheld.

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[5] In the *Susquehanna* extended power uprate proceeding, Mr. Epstein described specifically the duration of his contacts with the proposed site. *Susquehanna*, CLI-07-10, 66 NRC at 19, n. 2. The *Susquehanna* Licensing Board determined these contacts to be of "minimally sufficient regularity and duration" to establish standing. *Id*. at 21 (emphasis added). As the Licensing Board in LBP-09-18 noted (at 14), the record in the current matter is far less detailed than in the uprate proceeding.

B. Proposed Contention 2 is Inadmissible

In proposed Contention 2, Mr. Epstein asserts that PPL's Environmental Report ("ER") is "deficient in discussing its plans for management of Class B and C wastes." Epstein Pet. at 20. The proposed contention states that the ER is "deficient by omission" and fails to offer a realistic plan for disposal of Class B and C wastes in light of the closure of disposal facility in Barnwell, South Carolina to waste generated outside the Atlantic Compact Commission states. *Id*. The Licensing Board determined that proposed Contention 2 is inadmissible, largely because PPL's application does address the long-term storage of low level radioactive waste ("LLRW") in the absence of a disposal site and the environmental impacts of such storage.[6] LBP-09-18 at 44-46. The Licensing Board pointed out that the proposed contention contains no facts or expert opinion that call into question PPL's plan for managing LLRW. *Id*. at 45. Likewise, the Petitioner "has not cited any regulatory requirement that suggests that additional detail is required in the ER beyond the discussion that the Applicant has already provided." *Id*. at 46. Accordingly, the Licensing Board concluded that the proposed contention is inadmissible.

On appeal, Mr. Epstein argues that the Licensing Board inappropriately focused its discussion "upon the mere fact that the application covers 'the possibility that no offsite disposal facility will be available for Class B and C waste when operations commence.'" Appeal at 9. Mr. Epstein relies almost exclusively on a recent decision in the Calvert Cliffs Unit 3 proceeding. *See Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-04, 68 NRC __ (March 24, 2009).

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[6] *See* ER Sections 3.5.4.3 (describing LLRW management) and 3.5.4.2 (describing the offsite processing option).

However, it is precisely this decision that the Licensing Board correctly distinguished in LBP-09-18, based specifically on the fact that the PPL application "covers" the LLRW storage issue.

In *Calvert Cliffs*, a LLRW contention was proffered and admitted, as narrowed, by the Licensing Board. The *Calvert Cliffs* decision to admit the contention hinged on the fact that the applicant had not acknowledged in the ER the closing of Barnwell and did not explain how it would manage low-level waste in the absence of an offsite disposal facility. *Id*. at __ (slip op. at 75). The narrow contention of omission admitted in *Calvert Cliffs* "alleges that the discussion of LLRW management in the ER does not reflect current conditions but rather those that existed prior to the partial closure of the Barnwell facility, and therefore the ER fails to accurately describe the proposed action and its impact on the environment." *Id*. at __ (slip op. at 69).

The *Bell Bend* Licensing Board clearly distinguished the *Calvert Cliffs* decision. LBP-09-18 at 46.[7] Unlike the application in *Calvert Cliffs*, the Bell Bend application explicitly acknowledges that an offsite disposal facility may not be available. The ER describes a plan for handling LLRW that provides for years of onsite storage, discusses the impacts of expanding onsite storage if necessary, describes volume reduction techniques that could be applied, and preserves the option to ship wastes to a third party processor. The ER also includes a discussion of the environmental impacts of storing such waste onsite for an extended period. The Licensing Board therefore correctly concluded that the omission alleged in the *Calvert Cliffs* contention is not present in the Bell Bend application, and that the Petitioner had not cited any regulatory requirement that suggests additional detail is required.

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[7] As a separate matter, one licensing board is not bound by the un-reviewed decision of another licensing board. *See, e.g.*, *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (2005).

In his Appeal, Mr. Epstein cites broad language from the *Calvert Cliffs* decision concerning the Commission's requirements for ER content generally. Appeal at 8. He states that "the fact that PPL's ER does not fully discuss the environmental impact of how it proposes to handle [LLRW] is glaringly apparent." But, Mr. Epstein fails to identify any specific omission or deficiency in the ER. Furthermore, none of his pleadings provide any factual support or expert opinion to demonstrate that the ER discussion is inadequate or that it overlooked some environmental impact of onsite storage of LLRW.[8] Proposed Contention 2 fails therefore to provide sufficient information to show that a genuine dispute exists on a material issue as required by 10 C.F.R. § 2.309(f)(1)(vi).

Mr. Epstein has not cited any requirement (and there is none) that the Applicant's ER specify exactly how it will manage LLRW based on myriad future contingencies and economic uncertainties regarding access to disposal sites. NEPA requires applicants only to analyze reasonably foreseeable environmental effects, not those that are speculative. *See Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1286 (1st Cir. 1996) (an "environmental effect would be considered too speculative for inclusion in the EIS if it cannot be described at the time the EIS is drafted with sufficient specificity to make its consideration useful to a reasonable decision-maker") (internal citation omitted). Likewise, on appeal Mr. Epstein does not challenge the Licensing Board's conclusion that NRC regulations do not limit the duration and capacity of onsite LLRW storage or its conclusion that the NRC's Part 20 dose limits will apply. LBP-09-18 at 45. The latter inherently supports the further conclusion that there will be no significant environmental impacts if there is long term storage onsite. Accordingly, the Licensing Board correctly concluded that proposed Contention 2 is inadmissible.

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[8] *See Millstone*, CLI-01-24, 54 NRC at 358 (explaining that a contention must contain more than "bald or conclusory allegation[s]").

At bottom, PPL's ER contains a plan for managing LLRW at Bell Bend and a description of the environmental impacts of the plan. Therefore, there is no basis for a simple contention of omission. Likewise, Mr. Epstein does not present any factual information or expert opinion that calls into question PPL's plan for managing LLRW or provides a regulatory basis for a contention that more analysis is necessary. Mr. Epstein has not identified a clear error of law or fact in LBP-09-18, and the Licensing Board's determination that proposed Contention 2 is inadmissible should be upheld.

IV. CONCLUSION

For the foregoing reasons, the Licensing Board's decision finding that Mr. Epstein has not demonstrated standing and that his proposed Contention 2 is inadmissible should be upheld.

Respectfully submitted,

/s/ signed electronically by

David A. Repka
Tyson R. Smith
Rachel Miras-Wilson
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

Bryan A. Snapp
PPL Services Corporation
2 North Ninth Street
Allentown, PA 18101

COUNSEL FOR PPL BELL BEND, LLC

Dated at Washington, District of Columbia
this 31st day of August 2009

August 31, 2009

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NUCLEAR REGULATORY COMMISSION

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Rachel Miras-Wilson
Address:	Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006
E-Mail:	rwilson@winston.com
Telephone Number:	(202) 282-5635
Facsimile Number:	(202) 282-5100
Admissions:	Commonwealth of Massachusetts
Name of Party:	PPL Bell Bend, LLC

/s/ signed electronically by
Rachel Miras-Wilson
COUNSEL FOR PPL BELL BEND, LLC

Dated at Washington, District of Columbia
this 31st day of August 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S BRIEF IN OPPOSITION TO PETITIONER ESPTEIN'S APPEAL FROM LBP-09-18" and "NOTICE OF APPEARANCE" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 31st day of August 2009 on the following persons:

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, DC 20555-0001

William J. Froehlich, Chair
Administrative Judge
E-mail: wjf1@nrc.gov

Michael F. Kennedy
Administrative Judge
E-mail: mfk2@nrc.gov

Randall J. Charbeneau
Administrative Judge
E-mail: Randall.Charbeneau@nrc.gov

Zachary Kahn, Law Clerk
E-mail: zxk1@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-15 D21
Washington, DC 20555-0001
Jessica Bielecki, Esq.
Sara Kirkwood, Esq.
Susan Vrahoretis, Esq.
Robert Weisman, Esq.
Marian Zobler, Esq.

E-mail:
jessica.bielecki@nrc.gov
sara.kirkwood@nrc.gov
susan.vrahoretis@nrc.gov
rmw@nrc.gov
mlz@nr.gov
OGCMailCenter@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16C1
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Gene Stilp, Pro Se
275 Popular Street
Willkes-Barre, PA 18702
E-mail: genestilp@comcast.net

Eric Epstein, Pro Se
4100 Hillsdale Road
Harrisburg, PA 17112
E-mail: lechambon@comcast.net

Taxpayers and Ratepayers United (TRU)
275 Popular Street
Willkes-Barre, PA 18702
E-mail: genestilp@comcast.net

/s/ signed electronically by
David A. Repka
Tyson R. Smith
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

COUNSEL FOR PPL BELL BEND, LLC