

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

PPL BELL BEND, LLC

(Bell Bend Nuclear Power Plant)

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Docket No. 52-039

NRC STAFF'S BRIEF IN OPPOSITION TO
ERIC JOSEPH EPSTEIN'S APPEAL OF LBP-09-18

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the staff of the Nuclear Regulatory Commission (Staff) hereby files a brief in opposition to “Eric Joseph Epstein’s Appeal of the Memorandum and Order Issued by the Atomic Safety and Licensing Board [Board] on August 10, 2009” (Appeal), filed on August 20, 2009. The Board’s August 10, 2009, Order concluded that Mr. Epstein failed to demonstrate standing and failed to proffer an admissible contention, and therefore denied his May 18, 2009, “Petition for Leave to Intervene, Request for Hearing, and Contentions with Supporting Factual Data” (Petition). *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC __ (Aug. 10, 2009) (slip op. at 2) (Board Order). Pursuant to 10 C.F.R. § 2.311(a), Mr. Epstein now appeals two portions of the Board’s Order: 1) the Board’s conclusion that Mr. Epstein failed to demonstrate standing and 2) the Board’s conclusion that Mr. Epstein’s proposed Contention 2, regarding onsite storage of low level radioactive waste (LLRW), is inadmissible.¹ Appeal at 9. For the reasons set forth herein, these two Board determinations should be affirmed.

¹ Mr. Epstein does not appeal the Board’s decision with respect to the admissibility of his three other proposed contentions.

STATEMENT OF THE CASE

On October 10, 2008, PPL Bell Bend, LLC (Applicant), pursuant to the Atomic Energy Act of 1954, as amended (AEA), and 10 C.F.R. Part 52, submitted to the NRC an application (Application) for a combined license (COL) for a U.S. Evolutionary Power Reactor (U.S. EPR). The proposed facility would be located adjacent to the PPL Susquehanna Steam Electric Station in Luzerne County, Pennsylvania. Bell Bend Nuclear Power Plant Combined License Application (Rev. 1) (2009) at Part 3, Page 1-1 (ML090710465). The Application incorporates by reference the design certification application submitted on December 11, 2007, by AREVA NP ("AREVA") for the U.S. EPR, including supplements 1 and 2. *Id.* at Part 2, Page 1-1 (ML090710469). The Applicant calls the proposed plant the Bell Bend Nuclear Power Plant. *Id.*

On November 13, 2008, the Staff published in the *Federal Register* a "Notice of Receipt and Availability of Application for a Combined License" for the proposed facility. 73 Fed. Reg. 67,214 (Nov. 13, 2008). The Application was accepted for docketing on December 29, 2008. Acceptance for Docketing of an Application for Combined License for Bell Bend Nuclear Power Plant, 73 Fed. Reg. 79,519 (Dec. 29, 2008). On March 18, 2009, the NRC published a Notice of Hearing regarding the Application, which provided members of the public sixty days from the date of publication to file a petition for leave to intervene in this proceeding. Combined License Application for the Bell Bend Nuclear Power Plant; Notice of Hearing, Opportunity to Petition for Leave to Intervene, and Associated Order, 74 Fed. Reg. 11,606 (Mar. 18, 2009) (Notice of Hearing). In response to the Notice of Hearing, Mr. Epstein timely filed his Petition on May 18, 2009.²

² Mr. Gene Stilp and Taxpayers and Ratepayers United also filed a petition to intervene. See "Petition to Intervene in the Radioactive Bell Bend Nuclear Power Plant Combined Construction and License Application by Gene Stilp and Taxpayers and Ratepayers United (TRU)" (May 18, 2009) (Stilp/TRU Petition). The Board denied this petition because it failed to proffer an admissible contention. *Bell Bend*, LBP-09-18, 70 NRC ___ (slip op. at 56). Neither Mr. Stilp nor TRU appealed the Board's Order.

On June 12, 2009, the Applicant and Staff filed their respective answers to Mr. Epstein's Petition.³ Both the Applicant and Staff argued that Mr. Epstein had failed to demonstrate standing and that all of Mr. Epstein's proposed contentions were inadmissible. Mr. Epstein replied to the Applicant and Staff Answers on June 19, 2006.⁴ On August 10, 2009, the Board issued its Order ruling on standing and contention admissibility.

STATEMENT OF THE ISSUES

The issues presented are whether the Board erred in concluding that Mr. Epstein failed to demonstrate standing and that Contention 2 is inadmissible. The Board's decision should be reversed only if it committed an error of law or abuse of discretion causing it to wrongly reject Mr. Epstein's arguments regarding these issues. See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

LEGAL STANDARDS

I. Legal Standards for Review of a Board Order Denying a Petition to Intervene

Pursuant to 10 C.F.R. § 2.311(c), "[a]n 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." Because the Petition was wholly denied, this is an appeal as of right pursuant to 10 C.F.R. § 2.311(c). Such appeals and answers to such appeals must meet the requirements of § 2.311(b), which incorporates the requirements of 10 C.F.R. § 2.341(c)(2) for the briefs submitted by the parties.

³ "Applicant's Answer to Petitions to Intervene" (June 12, 2009) (Applicant Answer); "NRC Staff Answer to 'Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearing, and Presentation of Contentions with Supporting Factual Data'" (June 12, 2009) (Staff Answer).

⁴ "Eric Joseph Epstein's Reply to Applicant's Answers and the Nuclear Regulatory Commission Staff's Answer to 'Eric Joseph Epstein Petition for Leave to Intervene, Request for Hearing and Contentions with Supporting Factual Data'" (June 19, 2009) (Epstein Reply).

The legal standards applicable to the Commission's review of the board's rulings are set forth in Commission adjudicatory decisions. These decisions state that the Commission will give substantial deference to board determinations on threshold issues and will regularly affirm board decisions on issues of contention admissibility where the appeal fails to point to an error of law or abuse of discretion. See *AmerGen Energy Co., 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)). Similarly, board standing determinations are generally subject to deferential review and will not be overturned absent an error of law or abuse of discretion. See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 31 (2001).

A petitioner appealing a board's denial of intervention "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 Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)). The Commission applied this principle in *Millstone* to reject on appeal "general arguments" that failed to "come to grips with the Board's reasons for rejecting" the contention. *Millstone*, CLI-04-36, 60 NRC at 639.

II. Legal Standards for Standing

In accordance with the Commission's Rules of Practice:

[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing or petition for leave to intervene and a specification of the contentions which the person seeks to have litigated in the hearing.

10 C.F.R. § 2.309(a). The regulations further provide that the Licensing Board "will grant the [petition] if it determines that the [petitioner] has standing under the provisions of [10 C.F.R.

§ 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)].” *Id.*

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a request for hearing or petition for leave to intervene must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the [AEA] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.

10 C.F.R. § 2.309(d)(1). As the Commission observed, “[a]t the heart of the standing inquiry is whether the petitioner has ‘alleged such a personal stake in the outcome of the controversy’ as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.” *Sequoyah Fuels Corp. & Gen. Atomics (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 71 (1994) (citing *Duke Power Co. v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. 59, 72 (1978), and quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In order to demonstrate the requisite “personal stake,” the petitioner must:

- (1) allege an “injury in fact” that is
- (2) “fairly traceable to the challenged action” and
- (3) is “likely” to be “redressed by a favorable decision.”

Sequoyah Fuels, CLI-94-12, 40 NRC at 71-72 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted) (citing *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (*Perry*)).

For construction permit and operating license proceedings involving nuclear power reactors, the Commission generally has recognized a presumption of standing to intervene for those persons who have frequent contacts with the area. *USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005), citing *Perry*, CLI-93-21, 38 NRC at 95; see

Sequoyah Fuels, CLI-94-12, 40 NRC at 75, n.22. In such proceedings, the Commission has concluded that individuals residing within the 50-mile radius face a realistic threat of consequences if radioactive material were released from a facility, and therefore are not required to make individual showings of injury, causation, and redressability. See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (*St. Lucie*); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150 (2001)).

A prospective petitioner also has an affirmative duty to demonstrate that he has standing in each proceeding in which he seeks to participate, since a petitioner's status can change over time, and the bases for standing in an earlier proceeding may no longer apply. *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993). A petitioner may seek to rely on prior demonstrations of standing if those prior demonstrations are (1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing. *Id.*

III. Legal Standards for Contention Admissibility

The legal requirements governing the admissibility of contentions are well established and are currently set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice.

Section 2.309(f) provides:

- (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
 - (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
 - (ii) Provide a brief explanation of the 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 requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/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

10 C.F.R. § 2.309(f)(1). The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. Changes to the Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182, 2221 (Jan 14, 2004). See also *Private Fuel Storage*, CLI-99-10, 49 NRC 318, 325 (1999); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). "Mere 'notice pleading' does not suffice." *AmerGen Energy Co., LLC*, CLI-06-24, 64 NRC at 119. These rules focus the hearing process on real disputes susceptible to resolution in an adjudication. See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

DISCUSSION

I. The Board Correctly Found that Mr. Epstein Failed to Establish Standing.

A. Summary of the Board's Decision Regarding Standing

The Board correctly concluded that Mr. Epstein failed to demonstrate standing. The Board stated that Mr. Epstein "must explain the extent of his day-to-day activities within the vicinity of the plant site in order to demonstrate standing" because he lives more than fifty miles from the proposed site. *Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 13). The Board found

that Mr. Epstein failed to explain “the distances from where [he] lives to the proposed facility and the location of the towns and landmarks cited in his pleadings” sufficiently for the Board to understand his relationship to the proposed facility. *Id.* at 15. The Board also stated that it was “unable to gauge the extent, frequency, and duration which Mr. Epstein’s business and community service work take him to the Bell Bend site or the vicinity of the proposed plant.” *Id.* The Board correctly ruled that Mr. Epstein had the burden to state these facts. *Id.* at 15 (citing *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354-55 (1999); *PFS*, CLI-99-10, 49 NRC at 324 (1999)).

With respect to the prior proceedings in which Mr. Epstein participated as a party, the Board acknowledged that Mr. Epstein had previously demonstrated standing. *Id.* at 13-14 (citing *Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993)). The Board found, however, that Mr. Epstein “simply referred to the prior . . . decisions,” and failed to demonstrate, in accordance with *Comanche Peak*, that his status has not changed over time. *Id.* at 15. Accordingly, the Board correctly determined that, absent a showing of specific information regarding the geographic proximity, the timing and the duration of his visits, it was unable to conclude that Mr. Epstein has standing to participate in this proceeding. *Id.* at 16.

B. Mr. Epstein’s Appeal Does not Demonstrate Error in the Board’s Decision.

On appeal, Mr. Epstein argues the Board erred in concluding that he failed to establish standing. Appeal at 6. Mr. Epstein asserts that the Board’s decision is in error for three reasons. First, Mr. Epstein asserts that the Board did not identify what additional information was required to establish standing. *Id.* at 5. Second, Mr. Epstein claims that he provided sufficient information in his pleadings to demonstrate standing based on a regular pattern of contacts, which he asserts is the applicable standard. *Id.* at 5. Mr. Epstein asserts that NRC case law indicates that “significant contacts” with an affected area can be sufficient to establish standing. *Id.* at 6. Mr. Epstein recites the information he relied upon to establish a “regular

pattern of contacts” or “significant contacts.” *Id.* at 3-6 (quoting Petition at 7-9; quoting Reply at 7). Mr. Epstein argues that this information is sufficient to establish standing. *Id.* at 5-6. Third, Mr. Epstein claims that his presentation of contacts in the area of the proposed Bell Bend facility in this proceeding is similar to his presentation in the *Susquehanna* license renewal proceeding, in which he was granted standing. *Id.* at 5 (citing *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-04, 65 NRC 281, 294-96 (2007)).

A board’s determination regarding standing is given substantial deference “except when the Board clearly misapplied the facts or the law.” *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 (1998). Here, Mr. Epstein fails to show that the Board misapplied the facts or law. With respect to Mr. Epstein’s first argument that the Board did not identify what additional information was required to establish standing, the Board correctly explained that in order to determine standing, specific information regarding geographic proximity, timing and duration of visits is required. *Bell Bend*, LBP-09-18, 70 NRC ___ (slip op. at 15, 16 and n.89). The Board then identified the missing information: instead of providing “specific information regarding the geographic proximity, the timing and duration of his visits,” Mr. Epstein generally described his visits within the area and referred to the prior *Susquehanna* licensing board decisions in which he was granted standing. *Id.* at 15 (citing Epstein Reply at 6-9). The Board noted that Mr. Epstein failed to “avail himself of the opportunity to cure this omission in his reply by supplying more specific information” *Id.* at 15 (citing Epstein Reply at 86). Thus, Mr. Epstein’s first argument fails to demonstrate an error of law or fact.

As for Mr. Epstein’s second argument that he did provide sufficient information regarding his contacts within 50 miles of the proposed facility, the Board held that Mr. Epstein did not state specific facts sufficient to establish standing. *Id.* at 16. Specifically, the Board determined that while Mr. Epstein stated that he “routinely” pierces the 50 mile radius around the proposed plant during his “day-to-day” activities (Petition at 8; Appeal at 6), he failed to state the frequency of

these activities or the length of time he spends at these locations. *Bell Bend*, LBP-09-18, 70 NRC ___ (slip op. at 16); see Staff Answer at 8-9. On appeal, Mr. Epstein repeats the information contained in his Petition, stating that he commutes to an East Hanover Township building north of Grantville, 48 miles from the site, and engages in “site visits” (at unspecified locations) at least once a week. Appeal at 3. Mr. Epstein, however, does not specify the length of these visits and he fails to point to an error in the Board’s decision. Thus, while Mr. Epstein correctly stated that standing may be established based upon significant contacts with an affected area (Appeal at 6), the Board correctly ruled that Mr. Epstein failed to provide information sufficient to establish that his contacts with the area near the proposed facility are, in fact, significant, and adequate to support a determination that he has standing in this proceeding. *Bell Bend*, LBP-09-18, 70 NRC ___ (slip op. at 15-16) (citing *Private Fuel Storage*, CLI-99-10, 49 NRC at 324).⁵

⁵ The cases Mr. Epstein cites in his Appeal regarding standing are distinguishable. See Appeal at 6 (citing *PFS*, CLI-99-10, 49 NRC at 323-325; *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 31-32 (1998); *Georgia Power Co.* (Vogtle Electric Generating plant, Units 1 & 2), CLI-93-16, 38 NRC 25, 35 (1993)). First, as described in the first *PFS* decision, the intervenor, to establish its standing as an organization, relied on the standing of one of its members, Dr. Jim Catlin. Dr. Catlin had direct contacts with a specific site at issue, on which a rail line would have been built, and had engaged in other activities, including a reinventory of Bureau of Land Management lands in the area of the site. *PFS*, CLI-99-10, 49 NRC at 323-25. The specificity of Dr. Catlin’s description of his contacts with the site, although lacking the exact number of times he visited or planned to visit it, was sufficient, together with his other activities related to the area, to establish his and the intervenor’s standing. *Id.* at 323-25. In contrast, Mr. Epstein did not specify the locations, extent, frequency, and duration of his visits in relation to the proposed facility. See *Bell Bend*, LBP-09-18, 70 NRC ___ (slip op at 15).

In the second *PFS* decision, an organization seeking intervention relied upon an individual (Ms. Chissandra Reed) and her granddaughter, who regularly visited relatives at a location very close to the proposed site, to establish standing; there was no dispute as to the length of the visits or their nature. *PFS*, CLI-98-13, 48 NRC at 29-32. The facts Mr. Epstein describes, as set forth above, simply lack detail comparable to that presented in CLI-98-13, and the facts considered in that decision are not similar to the facts presented in this proceeding.

Finally, the facts of the *Vogtle* proceeding bear no similarity to those presented in this proceeding. The petitioner in *Vogtle*, Mr. Allen L. Mosbaugh, owned a house 35 miles from the plant and resided there for approximately 1 week each month. *Vogtle*, CLI-93-16, 38 NRC at 35. Mr. Epstein does not assert that he resides within a 50-mile radius of the proposed Bell Bend facility at all. Appeal at 3-6; *Bell Bend*, LBP-09-18, 70 NRC ___ (slip op. at 13-16).

Finally, Mr. Epstein's claim that the contacts presented in this case are "very similar to the showing he provided" in the *Susquehanna* license renewal proceeding is not sufficient to demonstrate that the Board erred in concluding that he failed to establish standing in this proceeding. See Appeal at 5. As the Board summarized the Commission's decision in *Comanche Peak*, a finding of standing in past NRC proceedings does not automatically confer standing in future proceedings; rather, to rely on a previous standing determination, a petitioner must show that past circumstances correctly reflect the current status. *Bell Bend*, LBP-09-18, 70 NRC ___ (slip op. at 13) (citing *Comanche Peak*, CLI-93-4, 37 NRC 156, 162-63); see Staff Answer at 9-10. Thus, the Board correctly found that Mr. Epstein failed to provide this required information and therefore, cannot rely on the *Susquehanna* license renewal decision to support standing in this proceeding. *Bell Bend*, LBP-09-18, 70 NRC ___ (slip op. at 15). Nothing in Mr. Epstein's Appeal demonstrates that the Board was incorrect in applying Commission case law. Further, the Board noted that the record compiled in the *Susquehanna* license renewal case "was much more detailed and comprehensive as to the proximity, timing, and duration of his contacts than the showing here." *Id.* at 14 (citing *PPL Susquehanna*, LBP-07-4, 65 NRC at 296).

In view of the foregoing, Mr. Epstein fails to demonstrate that the Board committed a legal error or an abuse of discretion in ruling that he did not establish standing in this proceeding, and the Board's ruling regarding Mr. Epstein's standing should be affirmed.

II. The Board Properly Found that Contention 2 is Inadmissible.

A. Summary of the Board Decision Regarding Proposed Contention 2

The Board did not commit legal error or abuse its discretion in ruling that Contention 2 is inadmissible. Mr. Epstein's proposed Contention 2 states as follows:

The Application to build and operate Bell Bend violated the National Environmental Policy Act ("NEPA") and NRC COLA guidelines by failing to demonstrate that the site has the capability to store Class B and C low level radioactive waste ("LLRW") during the entire operating life of the plant and beyond in the event

Barnwell remains closed to PPL, Clive, Utah operated by Energy Solutions “no longer becomes cost effective,” or no other waste disposal options are developed or available. Bell Bend Environmental Report (“ER”) is deficient in discussing its plans for management of Class B and C wastes. In light of the current lack of a licensed offsite disposal facility, and the uncertainty of whether a new disposal facility will become available during the license term, the ER must either describe how Applicant will store Class B and C wastes onsite *and the environmental consequences of extended onsite storage* by transferring its Class B and C wastes to another facility for storage of LLRW.

Appeal at 7 (quoting Petition at 20) (emphasis in original).

The Board rejected proposed Contention 2 because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). *Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 45). The Board reasoned that “Mr. Epstein has provided no alleged facts or expert opinion in support of the assertions in the contention and has failed to demonstrate a genuine dispute with the Application.” *Id.* In addition, the Board distinguished a licensing board decision to admit a similar contention in the *Calvert Cliffs* COL proceeding. *Id.* at 27, 46.⁶

B. Mr. Epstein’s Appeal Does Not Demonstrate Error in the Board’s Decision.

On appeal, Mr. Epstein claims that proposed Contention 2 should have been admitted because “there is no definitive discussion of the environmental impact of [onsite processing and storage of LLRW]” and such an omission is sufficient to support admission of this contention. Appeal at 8. To support this position, Mr. Epstein relies on the licensing board’s decision in the *Calvert Cliffs* COL proceeding, which he argues the Board incorrectly distinguished. *Id.* at 8-9 (citing *Calvert Cliffs*, LBP-09-04, 69 NRC __ (Mar. 24, 2009) (slip op.)).

⁶ A similar contention regarding LLRW management was proffered by Gene Stilp and TRU. See Stilp/TRU Petition at 26-27. The Board found the Stilp/TRU LLRW contention was also inadmissible and stated that it determined both the Stilp/TRU contention and Mr. Epstein’s Contention 2 to be inadmissible for many of the same reasons. *Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 45). Thus, in its discussion of Contention 2, the Board refers to its reasoning for rejecting the Stilp/TRU contention. *Id.* at 45 n.256.

As explained more fully below, Mr. Epstein fails to show that the Board erred in ruling Contention 2 is inadmissible for two reasons. First, Mr. Epstein fails to demonstrate that the Board erred in ruling that Contention 2 does not meet the admissibility standards of 10 C.F.R. § 2.309(f)(1). Second, Mr. Epstein fails to demonstrate that the Board erred in distinguishing the licensing board's decision in *Calvert Cliffs*.

1. The Board correctly ruled that Contention 2 does not meet the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1).

The Board ruled that Contention 2 was inadmissible because it does not meet the standards set forth in 10 C.F.R. § 2.309(f)(1)(v) and (vi). *Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 45). The Board correctly found that Mr. Epstein's general claim that there is a significant omission in the Applicant's discussion of LLRW management is not supported by alleged facts, expert opinion, or a specific regulatory basis and, therefore, is not sufficient to support admission of this contention. *Id.* at 45-46. In addition, the Board found that Mr. Epstein failed to directly raise a conflict with the Applicant's analysis of LLRW management in § 3.5.4 of the Environmental Report ("Bell Bend ER"). The ER addresses onsite processing, the possibility of transferring wastes to a licensed offsite processor, and plans for onsite short term and long term LLRW storage, and includes a discussion of environmental impacts. *See id.* at 26-27, 45 (citing Bell Bend ER at §§ 3.5.4.2-3.5.4.3). Thus, the Board correctly ruled that Contention 2 failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). *Id.* at 45.

Mr. Epstein asserts that his "burden is to show the facts necessary to establish that the application omits information that should have been provided." Appeal at 8 (quoting *Calvert Cliffs*, LBP-09-04, 70 NRC __ (slip op. at 69)). Mr. Epstein claims that this burden has been met because the ER does not fully discuss the environmental impacts for handling LLRW. *See id.* at 8. However, as the Board correctly stated, a "general suggestion that the Applicant's

presentation is insufficient” fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1). *Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 45).⁷ In addition, the Board concluded correctly that Mr. Epstein failed to support this assertion in his Petition. *Id.* In his Appeal, Mr. Epstein makes similar general, unsupported statements; he does not point to any portion of his Petition or Reply that demonstrates the Application is deficient. See Appeal at 7-9. In light of the Applicant’s analysis of LLRW issues appearing in the application, such general assertions of inadequacy do not identify errors in the decision below and cannot “revive a contention that lacks support in law or facts.” *Millstone*, CLI-04-36, 60 NRC 631, 639 (2004) (denying appeal where petitioner’s general arguments failed “to come to grips with the Board’s reasons for rejecting Contention IV and [we]re not nearly enough to revive a contention that lacks support in law or facts.”).

Further, it is well established that, where a licensing board holds that a contention is inadmissible for failing to meet more than one of the requirements specified in § 2.309(f)(1)(i)-(vi), a petitioner’s failure to address each ground for the board’s ruling is sufficient justification for the Commission to reject the petitioner’s appeal. *Millstone*, CLI-04-36, 60 NRC at 638. Here, Mr. Epstein fails to address each ground for the Board’s conclusion that Contention 2 is inadmissible, *i.e.*, that it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). Because Mr. Epstein fails to address each ground for the Board’s ruling on Contention 2, this ruling should be affirmed.

⁷ See also *Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 18) (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990) (an allegation that some aspect of a license application is inadequate or unacceptable does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect.)).

2. The Board correctly distinguished the licensing board's decision in *Calvert Cliffs*.

The Board correctly distinguished the licensing board's decision in the *Calvert Cliffs* COL proceeding, in which a similar contention regarding LLRW management was admitted.⁸ The Board distinguished the instant proceeding from *Calvert Cliffs* based on application-specific factors. See *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-03, 69 NRC __ (Feb. 17, 2009) (slip op. at 11) (questions regarding environmental impacts of onsite low-level radioactive waste storage are "largely site- and design-specific, and appropriately decided in an individual licensing proceeding, *provided that* litigants proffer properly framed and supported contentions."). The Board correctly found that the Bell Bend and Calvert Cliffs Applications are distinguishable and, therefore, reference to the *Calvert Cliffs* decision was not material to its decision in this proceeding. *Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 27, 46). The licensing board in *Calvert Cliffs* found that LLRW disposal was not sufficiently discussed where the applicant failed to acknowledge that an offsite disposal facility may not be available when operations commence due to the recent closure of the Barnwell facility and failed to "refer to a 'concept' for managing LLRW on-site absent a permanent disposal facility." See *id.* at 27, 46 (distinguishing *Calvert Cliffs*, LBP-09-04, 69 NRC __ (slip op.); *Calvert Cliffs*, LBP-09-04, 69 NRC __ (slip op. at 75). Unlike *Calvert Cliffs*, the Licensing

⁸ The contention, as narrowed and admitted by the *Calvert Cliffs* board states:

The ER for CCNPP-3 is deficient in discussing its plans for management of Class B and C wastes. In light of the current lack of a licensed off-site disposal facility, and the uncertainty of whether a new disposal facility will become available during the license term, the ER must either describe how Applicant will store Class B and C wastes on-site and the environmental consequences of extended on-site storage, or show that Applicant will be able to avoid the need for extended on-site storage by transferring its Class B and C wastes to another facility licensed for the storage of LLRW.

Calvert Cliffs, LBP-09-04, 68 NRC __ (slip op. at 66).

Board in this proceeding found that the Bell Bend Application discusses the LLRW issue in detail; the ER provides plans in the event that an offsite disposal facility is not available and addresses impacts of onsite storage. *Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 27, 45-46). The Board did not “see any omission in the Application on the LLRW issue” and stated that the Petitioner failed to cite any regulatory requirement to suggest that additional detail was required. *Id.* at 46.

On appeal, Mr. Epstein argues that the Board incorrectly distinguished *Calvert Cliffs*. Mr. Epstein claims that the Board erred in narrowing the *Calvert Cliffs* decision to the issue of whether an applicant considered any alternative to offsite disposal and failed to consider the *Calvert Cliffs* board’s discussion of an applicant’s obligation to consider environmental impacts of a proposed action. Appeal at 8-9 (citing *Calvert Cliffs*, LBP-09-04, 69 NRC __ (slip op. at 68)). Mr. Epstein argues that the ER is inadequate because it does not “fully discuss” the environmental impacts. *Id.* at 8. However, the *Bell Bend* Board found that the Application does discuss the “LLRW issue in detail,” including plans for additional storage and impacts of additional storage facilities, and Mr. Epstein failed to support his assertion that this discussion is inadequate; therefore, the Board correctly distinguished *Calvert Cliffs* from this proceeding. *Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 26-27, 45-46). Mr. Epstein fails to identify any flaw in the Board’s analysis distinguishing the *Calvert Cliffs* and *Bell Bend* Applications. In addition, as discussed above, Mr. Epstein failed to provide support for his assertion that any additional discussion of impacts is required. *See Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 45); Appeal at 7-9.

Further, Mr. Epstein quotes the *Calvert Cliffs* decision regarding the contention proffered in that proceeding, which asserts, in substance, that the *Calvert Cliffs* ER reflects conditions prior to the closure of Barnwell and therefore does not “accurately describe the proposed action and its impacts on the environment.” Appeal at 8 (quoting *Calvert Cliffs*, LBP-09-04, 69 NRC __ (slip op. at 68-69)). Mr. Epstein notes that in admitting this contention, the board in *Calvert*

Cliffs found that the contention raised an issue material to the NRC's licensing decision. *Id.* (quoting *Calvert Cliffs*, LBP-09-04, 69 NRC __ (slip op. at 68-69). Mr. Epstein argues that the contention admitted in *Calvert Cliffs* is similar to his proposed Contention 2. *Id.* This Board did not, however, find that Contention 2 failed to raise an issue material to the NRC's licensing decision (10 C.F.R. § 2.309(f)(1)(iv)). Rather, the *Bell Bend* Board rejected Contention 2 because it was not supported and failed to raise a genuine dispute with the Application (10 C.F.R. § 2.309(f)(1)(v) and (vi)). *Bell Bend*, LBP-09-18, 70 NRC __ (slip op. at 45).

Finally, Mr. Epstein's reliance on the admission of a similar contention in one proceeding is not by itself an adequate basis for admission of a similar contention in a different proceeding, particularly when the purported deficiencies in each application are different. Each licensing board has the responsibility for judging factual and legal disputes between parties. See *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI- 95-16, 42 NRC 221, 225 (1995). As illustrated above, Mr. Epstein has not shown that the Board incorrectly applied the law and facts in this proceeding.

For the reasons set forth above, Mr. Epstein does not demonstrate legal error or an abuse of discretion in the Board's decision denying proposed Contention 2, and the Board's decision that Contention 2 is inadmissible should be affirmed.

CONCLUSION

Mr. Epstein does not identify any legal error or abuse of discretion in the Board's standing and contention admissibility determinations in LBP-09-18. Therefore, Mr. Epstein's Appeal should be denied, and the Board's decision in LBP-09-18 should be affirmed.

Respectfully submitted,

/signed (electronically) by/

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/Executed in Accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
this 31st day of August, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S BRIEF IN OPPOSITION TO ERIC JOSEPH EPSTEIN'S APPEAL OF LBP-09-18" have been served on the following persons by Electronic Information Exchange on this 31st day of August, 2009:

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