

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

SERVED 10/05/07

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)
)
PPL Susquehanna LLC) Docket Nos. 50-387-OLA and 50-388-OLA
)
Susquehanna Steam Electric Station,)
Units 1 and 2) _____

CLI-07-25

MEMORANDUM AND ORDER

Eric Joseph Epstein appeals the Atomic Safety and Licensing Board's ruling denying him a hearing in the matter of PPL Susquehanna LLC's (PPL) application for a power uprate at the Susquehanna Steam Electric Station (SSES).¹ Although the Board found that petitioner Mr. Epstein demonstrated standing, it found that he had offered no admissible contention, and therefore denied his hearing request. Because Mr. Epstein has not shown that the Board made any error of law or abused its discretion, we deny his appeal.

I. PPL'S APPLICATION FOR AN EXTENDED POWER UPRATE

On October 11, 2006, PPL applied for an extended power uprate (EPU)² for the two nuclear reactors at the SSES on the banks of the Susquehanna River in Pennsylvania. SSES draws water from the river for all cooling associated with plant operations, and returns whatever is not lost through evaporation to the river. An 8-acre,

¹ LBP-07-10, 66 NRC ____ (July 27, 2007).

² PPL has asked to increase power from 3489 megawatts thermal (MWt) to 3952 MWt, or approximately 13 percent over its current maximum authorized power. A power uprate between seven and 20 percent is classified as an extended power uprate. See <http://www.nrc.gov/reactors/operating/licensing/power-uprates.html#definition>.

25 million gallon spray pond is the station's ultimate heat sink for the Engineered Safeguard Service Water System and supplies auxiliary cooling water.³ The station also draws makeup water from the Susquehanna to keep the spray pond at the 25 million gallon level required by its licenses.⁴

The use of water from the Susquehanna River is controlled by the Susquehanna River Basin Commission (SRBC), an agency created by a compact between the Federal government and the states hosting the Susquehanna River.⁵ After PPL submitted its EPU application to NRC, it applied to SRBC for approval to increase its water use to meet its increased water needs under the proposed uprate. PPL currently withdraws a maximum of 58 million gallons per day from the Susquehanna, and has asked SRBC to increase this limit to a maximum of 66 million gallons of water per day.⁶ PPL's average consumptive water use at SSES (that is, water not returned to the river), is about 38 million gallons per day when both reactors are at full power.⁷ According to PPL's EPU application, the uprate is expected to increase average consumptive use to 44 million gallons per day.⁸ PPL currently has SRBC's approval for a maximum consumptive use of up to 48 million gallons per day, and it apparently has not asked SRBC to raise that limit.⁹

Mr. Epstein filed a timely petition to intervene, request for hearing, and proposed contentions on May 11, 2007. Both PPL and the NRC Staff opposed the intervention.

³ Susquehanna Environmental Report, Extended Power Uprate, Susquehanna Steam Electric Station (March 2006) (ER), at 7-7.

⁴ *Id.*

⁵ Susquehanna River Basin Compact, Pub. L. 91-575, 84 Stat. 1509 et seq. (1970). See http://www.srbc.net/docs/srbc_compact.pdf.

⁶ See Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearing, and Presentation of Contentions with Supporting Factual Data (May 11, 2007) (Petition for Intervention), Exhibit 1, PPL Susquehanna, LLC Application for Surface Water Withdrawal Request to Modify Application 19950301 EPUL-0578 (Dec. 20, 2006) (SRBC Application), at 2.
⁷ ER at 7-7.

⁸ *Id.*

⁹ SRBC Application, at 3. In addition to the 48 million gallon per day maximum, PPL currently must maintain a 30-day average consumptive use of 40 million gallons per day. Its SRBC application requested the elimination of this requirement. *Id.*

The Board issued a prehearing order stating that, as an initial matter, it considered each of the proposed contentions to be “technical,” as opposed to “environmental” contentions.¹⁰ The Board held a prehearing conference by telephone on July 10, 2007.

In LBP-07-10, the Board found that none of the three proffered contentions raised a litigable issue in this licensing proceeding. Mr. Epstein appeals the Board’s ruling with respect to two of those proposed contentions, but does not dispute the ruling on the third, which claimed that PPL failed to consider the consequences of an accident caused by the proposed uprate.

On July 27, 2007 – the same day the Board issued its ruling on standing and contentions – Mr. Epstein filed a “Notice of Intent to File a Petition in Opposition to PPL Susquehanna, Application for Surface Water Withdrawal Request to Modify Application 19950301-EPUL-0572”¹¹ with the SRBC. On August 1, 2007, he filed a petition with the SRBC opposing PPL’s application for increased water usage.¹²

II. MR. EPSTEIN’S PROPOSED CONTENTIONS DID NOT RAISE A LITIGABLE ISSUE WITHIN THE SCOPE OF THE UPRATE PROCEEDING

NRC rules of practice provide for an automatic right to appeal a Board decision denying a petition to intervene.¹³ The Commission defers to the Board’s rulings on admissibility of contentions, however, unless the appeal points to an error of law or abuse of discretion.¹⁴ Here, Mr. Epstein largely ignores the Board’s thorough explanations of why the contentions are outside the scope of the proceeding, do not present an issue material to the findings the NRC must make in its review, or are factually unsupported. Instead, he simply repeats or adds to his previous claims.

¹⁰ Memorandum and Order (Initial Prehearing Order), at 2 (May 31, 2007).

¹¹ A copy is available on the Agencywide Documents and Management System (ADAMS), accession number ML072210358.

¹² A copy is available on ADAMS ML072210363.

¹³ 10 C.F.R. § 2.311(b).

¹⁴ *E.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004).

A. Contention TC-1: PPL Did Not Consider Impact of Uprate on Water Use Issues

Mr. Epstein's first contention, which the Board designated TC-1, fails because it attempts to interject into this proceeding matters that are not material to the findings the agency must make on this application, and that are appropriately within the jurisdiction of other agencies. Contention TC-1 claimed that PPL did not consider the impact the uprate would have on the use of water from the Susquehanna River. It is telling that the contention cites Pennsylvania law and U.S. Environmental Protection Agency (EPA) regulations, but no NRC regulation:

PPL failed to consider the impact of the proposed uprate on certain state and federal water use issues, and the potential impact these regulations will have on water flow, water volume and surface water withdrawal for the SSES's cooling systems. The traditional implications of the Pennsylvania Public Utility Commission ("Pa PUC") policy and regulations relating to "withdraw and treatment" of water, i.e., referred to as "cost of water" under the Public Utility Code, Title 66, have to be factored in this application absent a Pa PUC proceeding as well as Act 220 water usage guidelines. PPL has not established (nor has the NRC reviewed) compliance milestones for EPA's Act 316(a) or 316(b) [*sic.*]¹⁵ and their impact on power uprates at the Susquehanna Electric Steam Station [*sic.*][footnote omitted].¹⁶

The Board's decision also took into consideration Mr. Epstein's concerns as discussed during the July 10, 2007 prehearing conference. According to Mr. Epstein, in March 2008, the SBRC will complete a study of projected water use which could result in water rationing among permittees in areas where water use threatens to exceed supply.¹⁷ Mr. Epstein contends that the uprate will require the use of additional water from the Susquehanna River, and, because it is unknown whether the SRBC will allow PPL to

¹⁵ Mr. Epstein apparently intended to cite sections of the Federal Water Pollution Control Act, or "Clean Water Act," 33 U.S.C. §1251 et seq.

¹⁶ Eric Joseph Epstein's Petition for Leave to Intervene, Request for Hearing, and Presentation of Contentions with Supporting Factual Data (Petition for Intervention), at 10 (May 11, 2007).

¹⁷ *Id.* at 12.

withdraw more water, PPL should submit an alternative plan to address that contingency.¹⁸

The Board found that this contention – as stated in Mr. Epstein’s original pleading and as explained during the prehearing conference – was outside the scope of, and not material to, the proceeding, and lacked factual support.¹⁹ The Board correctly explained that the NRC’s adjudicatory process was not the proper forum for investigating alleged violations that are primarily the responsibility of other Federal, state, or local agencies.²⁰ Further, the Board observed that the potential restrictions in water use from the Susquehanna River did not present a safety issue, because the spray pond provides cooling in the case of an emergency, and the spray pond as ultimate heat sink is governed by technical specifications.²¹ If SRBC were to impose water rationing, the Board acknowledged, PPL might have to reduce its power generation levels accordingly.²² But the Board found that Mr. Epstein offered no factual support for the claim that “[p]eriodic modification of power generation levels ... would be the type of unplanned reactor scram that has been identified as potentially resulting in safety significant challenges to reactor systems.”²³

Much of Mr. Epstein’s argument on appeal consists of factual assertions, which, even if true, would provide no basis for overturning the Board’s decision. For the most part, Mr. Epstein simply repeats the claims that the Board found to be outside the scope of the hearing, immaterial, or unsupported, without ever attempting to show that the

¹⁸ *Id.* See also Eric Joseph Epstein’s Appeal of the Atomic Safety & Licensing Memorandum and Order (Ruling on Standing and Contentions)(Appeal), at 15 (Aug. 5, 2007).

¹⁹ LBP-07-10, slip op. at 22.

²⁰ *Id.* at 22-23, citing *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 121-22 (1998).

²¹ LBP-07-10, slip op. at 22.

²² *Id.* at 22 n.19.

²³ *Id.*

Board erred or abused its discretion in so finding. But Mr. Epstein also makes claims of fact that go beyond his initial contentions.

For example, Mr. Epstein dedicated two pages of his appeal brief to arguing that PPL failed to obtain SRBC approval for increased water usage for an earlier uprate in 2001.²⁴ That claim never appeared in his original intervention petition, and Mr. Epstein first raised it in the prehearing conference.²⁵ Unless Mr. Epstein could show good cause why he did not raise the issue in his initial pleading, the argument came too late.²⁶ But even if Mr. Epstein had filed a timely contention on the issue, he would not be entitled to relief. Whether PPL needed any SRBC approval prior to the earlier uprate is a question for SRBC. The issue is outside the scope of the current licensing proceeding, and not material to any matters the NRC must decide herein.²⁷

Mr. Epstein urges the NRC to coordinate with the SRBC and Pennsylvania authorities to resolve water use issues. We think, however, that the respective responsibilities of NRC, Pennsylvania PUC, SRBC, and the EPA in this area are clear. A contention that merely seeks to “advance generalizations regarding [a petitioner’s] particular view of what applicable policies ought to be” is not admissible.²⁸ And as the Board’s ruling recognized, it is clearly SRBC that is charged with determining whether increased water use from the Susquehanna River is permissible. The NRC’s

²⁴ Appeal at 10-12.

²⁵ See Susquehanna Steam Electric Station Prehearing Conference (Jul. 10, 2007), Tr. 12-13, 33, 41, 51.

²⁶ As is true in courts of law, litigants in NRC proceedings cannot raise entirely new arguments in a reply brief (see, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)), or on appeal, *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006), cf. 10 C.F.R. §2.341. Similarly, an issue first raised in a prehearing conference comes even later in the proceeding than a reply brief, and its admission could defeat the Commission’s rules regarding timeliness of submissions. Therefore, a matter raised for the first time in a prehearing conference would only be admissible if the petitioner could satisfy the test for admitting late-filed contentions, found at 10 C.F.R. § 2.309(c).

²⁷ See, e.g., *Hydro Resources*, 48 NRC at 120-22.

²⁸ *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21, n.33 (1974), citing *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-128, 6 AEC 399, 401 (1973).

consideration of the EPU application does not affect SRBC's authority to grant or deny the permit for additional water usage.²⁹

Similarly, Mr. Epstein asks NRC to "investigate the impact of the Environmental Protection Agency's [Clean Water Act] 316(a) and 316(b) compliance milestones." Mr. Epstein ignores the Board's ruling, which pointed out that the EPA's alternative thermal effluent limitations, issued pursuant to Clean Water Act §316(a), do not apply to the SSES because it employs closed-cycle cooling, and that PPL's environmental report had addressed §316(b) compliance.³⁰ Again, Mr. Epstein's argument does not show Board error, but simply sets forth what he believes NRC policy ought to be.

In short, we agree with the Board. Mr. Epstein did not show that information in PPL's application was inaccurate or insufficient to satisfy NRC regulations. He did not show that the Board misapplied the law or abused its discretion. He only claims that NRC ought to concern itself with water use matters within the jurisdiction of other state and Federal agencies. Mr. Epstein's water use complaints simply do not articulate any issue material to this proceeding, and he has shown no reason for us to otherwise overturn the Board's ruling.

B. Contention TC-2: Failure to Disclose Needed Repairs In River Water Intake System

Mr. Epstein's second proposed contention failed before the Board because it concerns matters that are entirely the concern of SRBC, and thus outside the scope of this uprate proceeding. Mr. Epstein claims PPL omitted information about the condition of the river water intake pipes in its application, and argues that the NRC should oversee repairs to correct constriction in the pipes. But Mr. Epstein has not shown that the Board erred or abused its discretion in finding that possible repairs to the river water intake

²⁹ Mr. Epstein seemed to recognize this when, shortly after the Board's decision, he filed a petition before the SRBC opposing PPL's application to increase its water use. SBRC Petition, *supra* note 12.

³⁰ LBP-07-10, slip op. at 23 n.20. See *also* ER at 7-8 to 7-9.

pipes were not material to the uprate proceeding, and that there was no reason for PPL to include this information in its uprate application.

According to Mr. Epstein, PPL's EPU application "failed to disclose damaging information included in a hastily filed Application for Surface Water Withdrawal" that PPL filed with the SRBC.³¹ The "information" to which the contention referred is that PPL discovered constriction in the pipes that take in water from the Susquehanna River, which had in turn caused errors in the calibration of meters used to monitor water withdrawal for the plant. According to PPL, the intake pipes are not clogged (and Mr. Epstein offered no evidence that they are).³² PPL states that it now uses an alternative method for calculating how much river water the plant takes in to satisfy SRBC monitoring requirements.³³

The Board rejected Mr. Epstein's claim that the problems with the river intake system reduced the margin of safety at the plant.³⁴ The Board pointed out that Mr. Epstein's concerns were based on the "misdirected premise that, in the context of the EPU application, the river intake system is a safety-related structure."³⁵ It appears that Mr. Epstein never disputed PPL's assertion that the water kept in the 25 million gallon spray pond is sufficient to cool the reactor and the spent fuel pool for thirty days in an emergency.³⁶ In addition, the Board noted that Mr. Epstein's contention lacked any supporting expert opinion, and appeared to confuse various plant components.³⁷ In fact, the flow meters in the river intake structure are not used to meet an NRC requirement.

³¹ Petition for Intervention at 19-20.

³² See Tr. 62-63.

³³ SRBC Application at 3 and Att. C. See also PPL Susquehanna's Answer to Eric Epstein's Petition for Leave to Intervene (June 5, 2007), at 25.

³⁴ LBP-07-10, slip op. at 25.

³⁵ *Id.* at 26.

³⁶ See PPL Answer to Eric Epstein's Petition for Leave to Intervene (June 5, 2007), see also Attachment 6 to PLA-6076, Power Uprate Safety Analysis Report, at 6-12.

³⁷ LBP-07-10, slip op. at 26-27 & n. 21 (For example, Mr. Epstein was concerned that inability to gauge river water intake would threaten the standby liquid control system that uses borated water. But, as the Board pointed out, that system is separate from the intake system that feeds the cooling basin).

For that reason, the Board found that repairs to the system fall under the purview of SRBC, not the NRC.³⁸

In the brief discussion of this concern in his appeal, Mr. Epstein has not demonstrated that the Board erred in making these findings. We agree with the Board that neither problems with the river water intake flow meters, nor PPL's failure to include this information in its EPU application, are material to this proceeding. Mr. Epstein has not shown how a slight constriction in the intake pipes could have a safety-significant impact, given the 25 million gallon ultimate heat sink available in case of an emergency. We also agree with the Board that this issue falls properly within SRBC's jurisdiction to determine what steps PPL must take to verify its water use, and that this matter is outside the scope of our EPU proceeding. We therefore reject Mr. Epstein's suggestion that NRC take on the task of inspecting the river water intake pipes at the SSES.

For the foregoing reasons and for the reasons discussed in the Board's opinion, we deny Mr. Epstein's appeal.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of October 2007

³⁸ *Id.* at 25.