

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemaking and Adjudications Staff

In the matter of
**Combined License Application for the
Bell Bend Nuclear Power Plant
Docket No.52-039-COL;
ASLBP No. 09-890-10-COL-BD01
Adams Accession No. MLO82140630**

**Eric Joseph Epstein's Appeal of the
Memorandum and Order Issued by the Atomic
Safety and Licensing Board on August 10, 2009**

Date: August 20, 2009

I. Introduction

This Appeal is made pursuant to 10 CFR Section 2.311(a) of the Nuclear Regulatory Commission's ("NRC" or "the Commission") regulations. This matter arises from an application by PPL Bell Bend, LLC ("PPL" or "Applicant") for a combined license ("COL") filed October 10, 2008, to construct and operate one U.S. Evolutionary Power Reactor which it proposes to locate adjacent to the PPL Susquehanna Steam Electric Station ("SSES") in Luzerne County, Pennsylvania. Eric Joseph Epstein timely filed a Petition for Leave to Intervene (along with other materials) on May 18, 2009.

In a Memorandum and Order dated August 10, 2009, Administrative Judges of the Atomic Safety and Licensing Board ("ASLB") determined that Mr. Epstein does not have standing and has not proffered any admissible contentions. Mr. Epstein appeals those rulings herein.

II. The Ruling On Standing

A. Standards Governing Standing

A Petitioner's right to participate in a licensing proceeding derives from Section 189a of the Atomic Energy Act ("AEA"), 42 U.S.C. Sections 2011 et seq. Accordingly, a hearing may be granted "upon the request of any person whose interest may be affected by the proceeding." (42 U.S.C. Section 2239(a)(1)(A)) Under 10 CFR Section 2.309(d) (the NRC's regulation implementing Section 189a), a licensing board must determine whether the Petitioner has an interest potentially affected by the proceeding by considering: (1) the nature of the petitioner's right under AEA or the National Environmental Policy Act of 1969 ("NEPA") (42 U.S.C. Sections 4321 et seq.) to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and, (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest. (10 CFR Section 2.309(d)(1))

When assessing whether a Petitioner has set forth a sufficient interest to intervene, licensing boards generally employ judicial concepts of standing. (See, *Entergy Nuclear Vermont Yankee, L.L.C., & Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station*, LPB-04-28, 60 NRC 548, 552 (2004). Such concepts require the Petitioner to show that: (1) he or she has personally suffered or will personally suffer a distinct and palpable harm that constitutes injury in fact; (2) the injury can fairly be traced to the challenged action; and, (3) the injury is likely to be redressed by a favorable decision. (See, *Allen v. Wright*, 468 U.S. 737, 751 (1984) In addition, the Petitioner must meet the "prudential" standing requirement by showing that the asserted interest arguably falls within the zone of interests protected by the governing law. (See, *Federal Elections Commission v. Akins*, 524 U.S. 11, 20 (1998)

For construction permit and operating license proceedings, the NRC "generally has recognized a presumption in favor of standing for those persons who have frequent contacts with the area near a nuclear power plant." (*Cleveland Electric Illuminating Company, (Perry Nuclear Power Plant, Unit 1, CLI-93-21, 38 NRC 87, 95 (1993) citing Virginia Electric & Power Company (North Anna Power Station, Units 1 and 2, ALAB-522, 9 NRC 54, 56 (1979). In particular, "Commission case law has established a 'proximity presumption,' whereby an individual may satisfy... standing requirements by demonstrating that his or her residence or activities are within the geographical area that might be affected by an accidental release of fission products, and in proceedings involving nuclear power plants this area has been defined as being within a 50-mile radius of such a plant." (*Carolina Power & Light Company, Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 65 NRC 41, 52 (2007)**

B. Mr. Epstein Has Proven Standing In This Proceeding

In finding that Mr. Epstein lacks standing in this Proceeding, the ASLB first observes that every Petitioner must demonstrate how it would have personally suffered or will suffer a distinct and palpable harm that constitutes injury in fact. The ASLB states:

Because Mr. Epstein apparently lives more than fifty miles from the proposed Bell Bend site, he must explain the extent of his day-to-day activities within the vicinity of the plant site in order to demonstrate he has standing in this proceeding. Mr. Epstein has sought, and been granted, standing to participate in NRC proceedings in the past.

“However, a petitioner has an affirmative duty to demonstrate that it has standing in each proceeding in which it seeks to participate because a petitioner's status can change over time and the bases for its standing in an earlier proceeding may no longer apply.” (Order, p. 13)

Memorandum and Order, p. 13.

Mr. Epstein does refer to the fact that he was granted standing in the PPL SSES license renewal proceeding (Epstein Petition to Intervene, p. 7). However, Mr. Epstein also identifies the extensive contacts that he has in the area of the proposed facility that cause him to pierce the 50-mile radius. Although Mr. Epstein lives slightly more than 50 miles from the proposed Bell Bend facility, he offers the following in support of his standing:

Mr. Epstein routinely pierces the 50-mile proximate rule during his day-to-day activities simply by traveling to Lebanon, Schuylkill and ... Dauphin counties. The proposed Bell Bend plant is actually closer in proximity to Mr. Epstein[']s business and professional interests than the [SSES].

Mr. Epstein has represented East Hanover Township as a contracted advocate since 2008. His livelihood is directly related to the well being and safety of East Hanover's residents, property, and infrastructure.

Portions of the township [are] within the 50-mile radius of Bell Bend and include the township's most substantial real estate located north of Grantville (48 miles from Bell Bend), and include the Penn National Racetrack, Hollywood Casino, and Holiday Inn.

In addition, his commute to the township building in Grantville and site visits occur at a minimum of once per week.

Mr. Epstein has been a member of the Board of Directors of the Sustainable Energy Fund of Central Eastern Pennsylvania since its inception in 1999. [Mr.] Epstein is a member of the non-profit's Finance and Human Relations Committee and also served as President, Vice President and Secretary and Treasurer.

Mr. Epstein is also a director of GreenConnexions, Inc. since 2006, and serves as the for-profit corporation[']s vice president. Both corporations are based in Allentown [and] have a 29-county constituency that mimics PPL's 1.4 million residential customer base, including Columbia and Luzerne Counties.

His commute to the SEF office in Allentown, and meetings at off site locations at the Eagles Building in Berwick and the Penn State Hazleton campus puncture the 50-mile proximity zone for substantial periods of time. Mr. Epstein's meeting schedule for this calendar year includes Berwick, Fogelsville, Hazleton, and Kingston.

The SEF's program related investments are substantial and include loans in close proximity, i.e., within 50 miles of Bell Bend including the Diocese of Scranton (\$207,532); CEI-Wind Park, Bear Creek, Pa (\$1,028,613); [Juniata] County School District (\$756,258); Shazaam Reality, Kingston (\$122,163); Pine Hurst Acres, Danville (\$110,000); Town of Bloomsburg (\$6,200); Borough of Hamburg (\$8,109); Muhlenburg Township (\$27,972); City of Pottsville (\$38,614); Minersville Borough (\$15,905); Shenandoah Borough (\$16,464); the Borough of Mt. Carmel (\$5,750); and, Children's Wonderland Child Care Center, Sugarloaf (\$4,000). (Epstein Petition to Intervene, pp. 8-9.)

Mr. Epstein has well-established business, professional interests "within a 50-mile radius of the facility." The issues in the Bell Bend COL application are germane to Mr. Epstein's health, safety and well being, an intervention is necessary to protect against the potential adverse health and safety consequences, loss of business revenue, and security harms associated with the proposed Bell Bend Nuclear Power Plant.

The ASLB states that Mr. Epstein was granted standing in the SSES license renewal proceeding only after he was able to "demonstrate, during oral argument, a significant pattern of regular contacts within the fifty-mile radius around the plant. We note that the record compiled in that case was much more detailed and comprehensive as to the proximity, timing, and duration of his contacts than the showing here." (Memorandum and Order, p. 14)

The ASLB obviously believes that Mr. Epstein's identification of contacts is insufficient. However, the ASLB does not specifically identify what additional information he should have included. In fact, Mr. Epstein's identification of contacts in the area of the proposed Bell Bend facility is very similar to the showing he provided in the SSES proceeding. For example, the ASLB in the SSES license renewal proceeding discussed Mr. Epstein's contacts offering as follows:

We do, however, find that Petitioner Epstein has made a sufficient showing to establish standing for himself under the "proximity presumption." Mr. Epstein admits that he resides more than fifty miles from the plant. However, significant contacts with an affected area can be sufficient to establish standing, even when full-time residence within the 50-mile zone is not shown. While not all such intermittent contacts are sufficient to establish standing, the regularity of Mr. Epstein's trips to the area around the plant, for a number of years, weighs in his favor. In addition, he resides six miles outside the area in question and can therefore be expected to continue to conduct business there in the future. *Because of this pattern of regular contacts within the 50-mile radius around the plant, we find that Mr. Epstein has standing on his own behalf.* (Emphasis added) (1)

This discussion indicates that Petitioners like Mr. Epstein (who live outside of the 50-mile zone) must establish a *pattern of regular contacts* for an extended period of time. The record indicates that Mr. Epstein has satisfied this requirement. Among other things, he has stated that : (1) he routinely pierces the 50-mile zone during his day-to-day activities by traveling to places in

¹ *In the Matter of PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-04* ___ NRC___ , slip opinion, pp. 10-11 (2007).

Lebanon, Schuylkill and Dauphin counties; (2) the proposed Bell Bend plant is actually **closer** to Mr. Epstein's business and professional interests than the plant in the SSES license renewal proceeding; (3) that since 2008 he has represented East Hanover Township, parts of which are located only 48 miles from the proposed Bell Bend plant; (4) site visits to Grantville, which is only 48 miles from the proposed plant, occur once a week; (5) since 1999 he has been on the Board of Directors of SEF, which is located in Allentown and that he commutes to meetings that pierce the 50-mile zone; and, (6) his meeting schedule for the remainder of the year include meetings in Berwick, Fogelsville, Hazleton and Kingston, all of which pierce the 50-mile zone. These substantial contacts indicate that the ASLB was mistaken in its determination that Mr. Epstein had not provided sufficient contact support to rely upon the "proximity presumption."

Moreover, NRC case law indicates that significant contacts with an affected area can be sufficient to establish standing, even when full-time residence within the 50-mile zone is not shown. (*See, Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation, CLI-99-10, 49 NRC 318, 323-325 (1999)* (frequent recreational use of a specific parcel of land is sufficient to establish standing); *Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 31-32 (1998)* (frequent, extended visits to relatives is sufficient to establish standing); *Georgia Power Company (Vogle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 35 (1993)* (residence in a location one week per month is sufficient to establish standing). In this regard, Mr. Epstein has demonstrated that he *regularly* pierces the 50-mile zone several times per month and has done so for several years.

For all of the reasons stated above, Mr. Epstein submits that the determination of the ASLB that Mr. Epstein has not demonstrated sufficient contacts to take advantage of the "proximity presumption," should be reversed by the Commission.

III. The Ruling on Contentions.

Despite the fact that the ASLB ruled against Mr. Epstein on the question of standing, it still fully discussed and rejected each of his four contentions.

Mr. Epstein appeals the ruling on Contention #2.

A. Epstein Contention # 2 Should Have Been Approved By The ASLB

Mr. Epstein's proposed Contention #2 provides 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 licensed offsite disposal facility, and the uncertainty of whether a new disposal facility will become available during the licensing term, the ER must either describe how the 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. (Emphasis added)

The ASLB determined that Mr. Epstein's contention is inadmissible, stating "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. This contention, therefore, does not meet the standards set forth in 10 C.F.R. Section 2.309(f)(1)(v) and (vi) and is inadmissible." (Memorandum and Order, p. 45) The ASLB goes on to state that while Mr. Epstein has correctly observed the uncertainty in offsite disposal of Class B and C LLRW in light of the closure of the Barnwell facility to non-compact states, and with possible disposal of such wastes at Clive, Utah. "His argument that there is a significant omission

in the discussion of LLRW management in the Application, however, is not supported. Onsite processing and storage of LLRW is discussed in the ER in Section 3.5.4." (Id)

However, while the section of the PPL ER cited by the ASLB generally discusses the onsite processing and storage of LLRW, there is no definitive discussion of the environmental impact of such action.

A recent Memorandum and Order involving the Calvert Cliffs nuclear power station indicates that such an omission is sufficient to support a contention. In *In the Matter of Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC*, COL Docket No. 52-016-COL, ASLBP No. 09-874-02-COL-BDO1, *slip opinion*, March 24, 2009 ("*Calvert Cliffs*"), the ASLB found that a contention very similar to Mr. Epstein's Contention #2 was "material to compliance with NEPA and the NRC regulations implementing NEPA, and therefore satisfies the requirement of Section 2.309(f)(1)(iv). The environmental report prepared for a COL application must describe the proposed action and discuss, among other things, "[t]he impact of the proposed action on the environment," "[a]ny adverse environmental effects which cannot be avoided should the proposal be implemented," and "[a]ny irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." The information submitted in the ER pursuant to these requirements "should not be confined to information supporting the proposed action but should also include adverse information." (Emphasis added) (*Calvert Cliffs Memorandum and Order*, pp. 68-69)

The *Calvert Cliffs* Memorandum and Order goes on to state that "the Petitioner's burden is to show the facts necessary to establish that the application omits information that should have been provided." (*Calvert Cliffs Memorandum and Order*, p. 69) The fact that PPL's ER does not fully discuss the environmental impact of how it proposes to handle Class B and C LLRW is glaringly apparent.

However, instead of pursuing the environmental impact issue, the ASLB conveniently focuses its discussion, at p. 46 of the PPL Memorandum and Order, 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."

Finally, the PPL ASLB states that *Calvert Cliffs* is distinguishable because it "was focused on that application's lack of consideration of any alternative to offsite disposal of LLRW." (*Id*) However, as discussed above, the ASLB in *Calvert Cliffs* engaged in considerable discussion about the need for an applicant to explain all aspects of the environmental impacts of the onsite Class B and C LLRW disposal proposal.

In summary, since PPL has failed to adequately discuss the environmental impact of its proposed method to handle Class B and C LLRW, the Commission should reverse the ASLB and find that Mr. Epstein has proven Contention # 2.

IV. Conclusion

For the reasons stated in this brief, the Commission should reverse the ASLB and find that Eric Joseph Epstein has standing in this proceeding and has proven the admissibility of Contention #2.

Respectfully submitted,

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cc: See attached Certificate of Service