UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

Before Administrative Judges:

ASLBP BOARD 09-876-HLW-CAB01 William J. Froehlich, Chairman Thomas S. Moore Richard E. Wardwell	ASLBP BOARD 09-877-HLW-CAB02 Michael M. Gibson, Chairman Lawrence G. McDade Nicholas G. Trikouros	ASLBP BOARD 09-878-HLW-CAB03 Paul S. Ryerson, Chairman Michael C. Farrar Mark O. Barnett

In the Matter of	)	Docket No. 63-001-HLW
	)	
U.S. DEPARTMENT OF ENERGY	)	
	)	
(High-Level Waste Repository	)	
Construction Authorization Application)	)	

NYE COUNTY REPLY TO THE NRC STAFF APPEAL OF LBP-09-06.

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II. INTRODUCTION AND BACKGROUND OF NYE COUNTY'S POSITION

A. Introduction

Nye County, Nevada ("Nye County" or "County") is the "unit of local government within whose jurisdiction" the geological repository is proposed to be located under the Nuclear Waste Policy Act of 1982 ("NWPA"), as amended. See, e.g., 42 U.S.C. § 10137(d)(2008); 42 U.S.C. § 10101 (31)(2008). As such, Nye County has party standing to intervene as a matter of right in the licensing proceeding. 10 CFR § 2.1001; 2.309(c)(2008). The health and safety of Nye County's citizens, as well as their property, natural resources, and environmental rights, are all within the zone of interests expressly recognized and protected by the NWPA. Simply stated, because the proposed Yucca Mountain repository will be located in Nye County, the potential impact from its construction and operation, both negative and beneficial, will be felt first and foremost by the citizens of the County. Should a radiological release or other emergency occur at Yucca Mountain, Nye County will have to respond. Therefore, the County seeks not only to support its own contentions and proposed remedial actions, but also to participate in the hearing concerning all safety and environmental aspects of the license application, other petitioners' contentions, and adjudication of any issues that have the potential to injure or otherwise impact the health, safety and welfare of Nye County's citizens or Nye County's natural resources and environment.

So long as the Yucca Mountain repository is constructed and operated in a manner that adequately protects the health and safety of the citizens of Nye County, and its natural resources and environment, the County has no objection to issuance of a license to DOE for the proposed facility. Therefore, if the specific issues raised in the contentions filed by Nye County are adequately addressed by NRC and DOE, in the timely manner specified in each contention, Nye County does not object to DOE's license application. It should also be noted that Nye County's contentions, although identifying deficiencies in the DOE work completed to date, specifically identified remedies that could expeditiously correct each deficiency. Unlike several other petitioners, the County does not claim that a repository at Yucca Mountain cannot be constructed and operated safely. Nye County seeks only to safeguard the health, safety, natural resources, and property rights of its citizens, who will be living in close proximity to Yucca Mountain and the proposed repository in perpetuity.

B. Procedural Background

On June 3, 2008, the Department of Energy (DOE) submitted the Yucca Mountain Repository License Application (LA) to the NRC, seeking authorization to construct a geologic repository at Yucca Mountain, Nevada, in accordance with the provisions of 10 C.F.R. Part 63. The notice of receipt of this application was published in the Federal Register on June 17, 2008.[1]

On September 15, 2008, the NRC Staff determined that the application contained sufficient information and docketed the application.[2] On October 17, 2008, the Commission issued its "Notice of Hearing and Opportunity to Petition for Leave to Intervene."[3] The Notice of Hearing was subsequently published in the Federal Register on October 22, 2008.[4]

Numerous participants, including Nye County, filed Petitions to Intervene on December 19, 2008.[5] DOE filed answers to the various petitions to intervene on January 15 and 16, 2009, and the NRC Staff filed its answer to all petitioners on February 9, 2009 (NRC Staff Answer). Nye County filed its Reply to the Answers of DOE and the NRC Staff on February 24, 2009.[6] A telephonic prehearing conference was conducted on March 13, 2009, and the three Construction Authorization Boards (CABs or Boards) designated to rule on the petitions heard oral argument on contention admissibility on March 31 through April 2, 2009, in Las Vegas, Nevada. Nye

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1 Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008); Yucca Mountain; Notice of Receipt and Availability of Application; Correction, 73 Fed. Reg. 40,883 (July 16, 2008).

2 Department of Energy; Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 53,284 (Sept. 15, 2008).

3 *U.S. Dept' of Energy* (High-Level Waste Repository), CLI-08-25, 68 NRC __ slip op. (Oct. 17, 2009).

4 In the Matter of U.S. Department of Energy (High-Level Waste Repository); Notice of Hearing and Opportunity To Petition for Leave to Intervene on an Application for Authority To Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008).

5 Nye County Petition to Intervene and Contentions.

6 Nye County Response to the Answers of NRC Staff and the Department of Energy.

County counsel fully participated in those oral arguments and presented the County's position on why its contentions should be admitted.

On May 11, 2009, the Boards granted ten petitions to intervene and admitted 301 of 318 proffered contentions. May 11 Order at 1, 8-10. The Boards reached their decisions based upon a consideration of over 12,000 pages in filings by the DOE, NRC Staff and various petitioners in the proceeding, and noted the time constraints imposed on their decision.[7] The Boards addressed proffered contentions globally in terms of overarching issues. *See* May 11 Order at 21-62. The overarching issues discussed include pleading requirements for NEPA contentions (*Id*. at 21), HLW transport under NEPA (*Id*. at 36), and the treatment of contentions that presented legal issues (*Id*. at 61 and 102). Each of the three Boards adopted as its own the discussion of legal standards that govern Board decisions, as well as the conclusions reached on overarching issues, but each Board independently ruled upon the petitions and contentions it was assigned. See, May 11 Order at 2-3.

On May 21, 2009 the NRC Staff brought the instant appeal.

7 *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC ___ slip op. (May 11, 2009)(May 11 Order).

III. REPLY TO NRC STAFF ARGUMENTS IN OPPOSITION TO ADMISSIBILITY OF NYE COUNTY'S SAFETY CONTENTION # 4 (Radon)

The NRC Staff's appeal raises two separate alleged deficiencies in the Boards' May 11 Order, as that Order pertains to the admissibility of Nye County's Safety Contention # 4 ("Nye Safety # 4"). First, the NRC Staff asserts that the CABs admitted Nye Safety # 4[8] even though that contention did not meet all of the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). NRC Staff Brief at 7. Additionally, the NRC Staff argues that the CABs erred in admitting Nye Safety # 4 because the legal issue to be briefed on the merits after admission is one of the six contention admissibility criterion – in this case what authority, if any, the NRC has to regulate the significant radon and daughter emission plume that is caused by DOE's active ventilation of that repository. NRC Staff Brief at 10. Neither of the NRC Staff's arguments is correct, and Nye Safety # 4 should be scheduled for further briefing on the merits of the contention.

A. Nye County Safety #4 met all of the Contention Admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1).

The NRC Staff contends that the Boards erroneously admitted Nye Safety # 4 even though it did not meet all of the contention admissibility requirements of Section 2.309(f)(1). NRC Staff Brief at 7; 10 C.F.R. § 2.309(f)(1)(i)-(vi)(2009). While discussing the contention admissibility requirements, the NRC Staff stated that:

> With respect to certain contentions designated by the CABs as "legal contentions," the Boards state that each admitted contention satisfies all of the Commission's admissibility standards. LBP-09-06, slip op at 102. But the Boards also stated that "[n]ot all the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) necessarily apply to legal issue contentions." *Id.* at 61. ***As an example, the Boards point to Section 2.309(f)(1)(v), noting that "a purely legal issue contention obviously need not allege 'facts.'" Id.*** However, there is no exception to the admissibility requirements in 10 C.F.R. § 2.309(f)(1)(v) for legal contentions. Further, section 2.309(f)(1)(v) requires a petitioner to "[p]rovide 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

8 All mining operations cause the release of naturally occurring Radon from the rocks disturbed by mining. DOE's Supplemental Environmental Impact Statement for the repository shows radiation doses much higher from the natural radon than from the handling of used fuel and high level waste. The SEIS reflects that the estimated annual radiation dose caused by repository construction and operations (***7.6 millirem***) will be as a result of naturally occurring radon and its decay products being emitted as a result of repository construction and normal operations.

> petitioner intends to rely at hearing . . . ." Merely because a contention raises a legal issue does not excuse a petitioner from having to allege the facts that show *why* resolution of a legal question implicates the Commission's licensing decision that is the subject of the proceeding. See 10 C.F.R. § 2.309(f)(1)(iv).

NRC Brief at 8 (emphasis added). Although mentioning it, the NRC Staff's argument ignored a critical aspect of the CABs' decision in order to reach this conclusion. The May 11 Order notes that every admitted contention satisfied each of the six (6) admissibility requirements of Section 2.309(f)(1). May 11 Order at 102. Moreover, the CABs specifically stated that their contention admissibility ruling was based upon their rejection of the specific arguments raised in opposition to each such contention by the NRC Staff and DOE:

> The Boards' decisions to admit a large proportion of proffered contentions is driven by our resolution of the overarching issues that formed the major portions of the DOE and NRC Staff opposition to the proffered contentions. It also involved the Boards' determination that in many respects the opposition to contentions was based on an attempt to address the underlying factual merits, a step that comes at a later stage in the proceeding. ***Implicit in each Board's rulings on contentions, as well, is the rejection of the specific arguments raised in opposition to that contention***.
>
> The contentions proffered by petitioners that have demonstrated standing, and that satisfy the foregoing admissibility standards, are set forth in Attachment A, which identifies the rulings made by each of the three CABs. ***Each contention listed in Attachment A satisfies the six requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi), does not improperly challenge a rule or regulation of the Commission in violation of 10 C.F.R. § 2.335, and otherwise complies with the admissibility standards discussed above.*** The contentions listed in Attachment A are admissible.

May 11 Order at 102 (footnotes omitted, emphasis added).

The NRC staff opposed the admissibility of Nye Safety # 4 below, arguing that it did not satisfy the admissibility requirements of Section 2.309(f)(1).[9] NRC Staff Answer at 1038-1040. Nye County responded to each of these arguments in its Reply Brief, asserting why Nye County had met the admissibility standards of that Section. CAB #1 reviewed the NRC Staff's arguments as well as Nye County's Petition to Intervene and its Reply Brief, and found that Nye

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9 The NRC Staff argued that Nye Safety # 4 was not material, does not provide alleged facts or expert opinions, and does not demonstrate that a genuine dispute exists with the applicant. NRC Staff Answer at 1038. The Staff also argued that the NRC does not have jurisdiction to regulate naturally occurring radon and that the wording of 40 C.F.R. Part 197 (and the conforming wording of 10 CFR Part 63) does not apply to the radon released during repository storage activities because the definition of radioactive material in those regulations and the AEA does not include naturally occurring radon. NRC Staff Answer at 1039-1040.

County had satisfied each of the six admissibility requirements of Section 2.309(f)(1)(i)-(vi). *Id.*; 10 C.F.R. § 2.309(f)(1)(i)-(vi)(2009).

The NRC Staff's reliance upon the CAB's statements that legal contentions need not allege facts to be admissible[10] in order to deny admissibility of Nye County Safety #4 misses the point, because Nye Safety # 4 was supported by a discussion of the facts and circumstances concerning that contention. *See*, Nye County Petition to Intervene and Contentions at 44-55, and Nye County Response to the Answers of NRC Staff and the Department of Energy at 26-40. On appeal the NRC Staff does not articulate any alleged factual deficiency of Nye Safety # 4 that would justify reversal of the CABs' decision below. Instead, the NRC Staff generically argues that the CAB statement somehow justifies reversal of the CABs admission of Nye Safety # 4. NRC Staff Brief at 7-8.

The NRC Staff's generic attack, without any discussion specific to alleged deficiencies' within Nye County Safety #4, is insufficient to overcome the CABs' previously stated finding that "[e]ach contention listed in Attachment A satisfies the six requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi), does not improperly challenge a rule or regulation of the Commission in violation of 10 C.F.R. § 2.335, and otherwise complies with the admissibility standards discussed above." May 11 Order at 102. Accordingly, the NRC Staff's appeal seeking to reverse the Boards' decision admitting Nye County Safety # 4 must fail, and the contention should be set for further briefing on the merits.

B. Briefing on the merits of Nye County Safety # 4 need not take place during the contentions admissibility phase of the proceeding.

The NRC Staff's second reason for discarding Nye County Safety # 4 is based upon the following portion of the CABs' May 11 Order:

> NYE-SAFETY-004 alleges that DOE has inadequately considered the radiation doses to members of the public from naturally occurring radon and its decay products emitted as a result of repository construction and normal operations. The threshold legal issue of what authority, if any, the NRC has to regulate radon and its daughters will require further briefing.

May 11 Order at 126. The NRC Staff asserts that the CABs' statement demonstrates error, as "[t]he "threshold legal question" that the Board believes requires further briefing *is* whether the contention is within the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii). By admitting the

10 NRC Staff Appeal at 7, citing the May 11 Order at 61.

contention, the Board effectively resolved the very question that it believes requires further briefing." NRC Staff Brief at 9 (emphasis in original). The NRC Staff 's argument is erroneous on its face; the May 11 Order, by its very terms, resolved nothing about Nye Safety # 4 except to set that contention for further briefing on the merits. *See,* May 11 Order at 62 ("Briefing schedules for legal issue contentions will be set forth in a subsequent order."). NRC Staff's argument, taken to its logical conclusion, would render all "legal" contentions inadmissible.

Staff seeks to convert the contention admissibility process into one where the participants are compelled to brief and the CABs would be required to render a decision ***on the merits*** for all contentions that have been either pled by the petitioner or determined by the CAB to be a legal contention. As the CABs noted in their May 11 Order, such a result is contrary to the Commission's rules:

> the Commission's rules formerly made clear, "[i]f . . . the presiding officer determines that any of the admitted contentions constitute pure issues of law, those contentions must be decided on the basis of briefs or oral argument according to a schedule determined by the . . . presiding officer"' [10 C.F.R. § 2.714(e) (2003). In 2004, the Commission codified the requirements of former section 2.714, together with rules regarding contentions set forth in Commission cases, in section 2.309. See 69 Fed. Reg. 2182.] Although this explanation was dropped from the regulations in 2004, the reason was merely to simplify the rules, not to change them. [See 69 Fed. Reg. at 2182 (Commission amending regulations to make them more 'effective and efficient').]"

May 11 Order at 62 (footnote citations inserted into text). Thus, the NRC's contention pleading requirements were not intended to compel a petitioner to fully brief the merits of a contention during the contention phase of the proceeding. As with other, non-legal contentions, briefing on the merits and oral arguments concerning legal contentions were to occur ***after*** admission of the contentions. *Id*. The NRC Staff is, in essence, seeking to have the Commission reverse this policy. The CAB Order, in essence, simply acknowledged that the admitted legal contentions raise important, and as yet unresolved, legal issues, some of which are of first impression. Those issues require further briefing before a final decision is rendered. Such action is clearly within the CABs' authority.

NRC Staff's reliance upon *Tenn. Valley Authority,* (Bellefonte Nuclear Plant, Units 3 & 4), CLI-09-03, 69 NRC ___ (Feb. 17, 2009) (Slip op.)("*Bellefonte*") to reverse the CABS' decision concerning Nye Safety # 4 in this case is misplaced. *Bellefonte* provides no basis to support reversal of the admission of Nye Safety # 4.

In *Bellefonte*, the intervenors based their contention solely upon Part 61 of the NRC regulations, and the Board denied the proposed contention on that specific basis. The Board then:

> …concluded, without elaboration, that the Intervenors' safety contention was nonetheless sufficiently supported "to warrant further inquiry into the safety-related matter of whether the TVA FSAR [Final Safety Analysis Report] has failed to include necessary information concerning TVA plans for on-site management of Class B and C waste. In support, the Board simply cited a multifaceted discussion of a similar contention in the *North Anna* decision, *supra*. The *North Anna* Board had rejected the same Part 61 argument, but had admitted the intervenors' low-level waste contention on other grounds. We cannot tell from the *Bellefonte* decision which of the remaining grounds the *Bellefonte* Board was relying upon.
>
> ***3** Although the *Bellefonte* Board was free to view Intervenors' support for Contention FSAR-D in the light most favorable to Intervenors, the Board was not free to ignore the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Because Intervenors failed even to raise any of the grounds on which the *Bellefonte* Board relied in admitting the contention, Intervenors perforce failed to satisfy the admissibility requirements. The Board should therefore have found Contention FSAR-D inadmissible, and its failure to do so constitutes reversible error.

Bellefonte, at 2 (citations omitted). Thus, in *Bellefonte*, the intervenor had failed to raise any of the grounds upon which the *Bellefonte* Board relied while admitting the contention. In effect, the Board manufactured a rationale as the basis of its admission of the contention in question. Therefore, the NRC was completely correct in reversing the Board's admission decision, but upon grounds that are not controlling here.

In the instant case, Nye County provided significant explanation of the basis for inclusion of Nye Safety # 4 in not only its Petition to Intervene but also its Reply to the NRC Staff's Answer and that of DOE. Nye County properly referred to the documents in the LSN, and articulated the factual basis in the record that supported its contention as required by 10 C.F.R. § 2.309(f)(1). The CABs here have created no rationale for Nye County. To the contrary, the Boards reviewed the appropriate pleadings and concluded that Nye County had raised and properly supported a contention. The Boards apparently determined that there was no dispute regarding any of the material facts documented by Nye County and determined it was appropriate to treat the contention as a legal one. No party has filed an appeal that this specific

action by the CAB was improper. The *Bellefonte* decision offers no support for the NRC Staff in this case.

IV. CONCLUSION

The appeal filed by NRC Staff to Nye County Safety #4 is generic, lacks merit, and should not be accepted by the Commission as a basis for finding the contention inadmissible. The County's detailed petition to intervene and its replies to the DOE and NRC Staff responses demonstrate that Nye County Safety Contention # 4 is material to the proceedings and definitely is in dispute.

For all of the foregoing reasons, Nye County asks that the NRC Staff appeal of the admissibility of Nye County Safety Contention #4 be denied, and that the CABs' decision to admit Nye County Safety Contention # 4 be affirmed.

Respectfully Submitted,

_(Electronically Signed By)

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARDS

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	Docket No. 63-001-HLW
	)	ASLBP Nos. 09-876-HLW-CAB01
	)	09-877-HLW-CAB02
(High-Level Waste Repository)	)	09-878-HLW-CAB03
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing, Response To The Answers Of NRC Staff and Department Of Energy dated, this 1st day of June, have been served upon the following persons by Electronic Information Exchange.

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