

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

In the matter of:

U.S. DEPARTMENT OF ENERGY

**(License Application for Geologic
Repository at Yucca Mountain)**

Docket No. 63-001

**ASLBP Nos. 09-876-HLW-CAB-01
09-877-HLW-CAB-02
09-878-HLW-CAB-03**

**THE TIMBISHA SHOSHONE TRIBE'S REPLY TO THE DOE'S OPPOSITION TO
THE TRIBE' MOTION FOR CERTIFICATION OF LICENSING SUPPORT
NETWORK OUT OF TIME FOR GOOD CAUSE**

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Introduction

The Timbisha Shoshone Tribe (hereinafter "Tribe" or "TIM") hereby submits its reply to the Department of Energy's (hereinafter "DOE") Opposition to March 11, 2009 Motion of Timbisha Shoshone Tribe for Certification of Licensing Support Network ("LSN") Out of Time for Good Cause ("Motion"), which was submitted to this Board on March 23, 2009. Contrary to the DOE's contentions, the Tribe has (1) made a "sincere effort" to confer with the DOE and other parties to this proceeding prior to submitting the instant motion, therefore rejection under 10 C.F.R. § 2.232(b) is unwarranted; (2) the Tribe's certification complies with 10 C.F.R. § 2.102(b); and (3) whether the Tribe has demonstrated LSN compliance is irrelevant to the issue of whether this Board should grant the Tribe's motion for "good cause."

As with its moving papers, the Tribe is submitting this reply to the Atomic Safety and Licensing Board (hereinafter "Board"), and the Pre-Application Presiding Officer ("PAPO") as it still not clear procedurally which body would provide certification for the LSN at this time, notwithstanding the DOE's assertions to the contrary.

The Tribe Made A "Sincere Effort" to Confer With the DOE and Other Parties.

The Tribe has made a sincere effort to contact other parties pursuant to 10 C.F.R. § 2.232. DOE has been fully aware of the Tribe's intent to file for late certification of its LSN since mid-December 2008. The Tribe and DOE had several discussions as to the issue. The Tribe in good faith provided its procedures to DOE in hope of avoiding a frivolous and time consuming battle with DOE over certification of the LSN. Other parties in this matter including the Timbisha Shoshone Yucca Mountain Oversight Non-Profit ("TOP") have merely filed late certifications with Board without seeking to confer with DOE or provide any information as to their LSN, yet DOE has not openly contested such petitions with the outright hostility shown in its motion to

oppose the Tribe's certification. DOE is fully aware of the Tribe's situation, and DOE has played a major role in ensuring that the Tribe has not received the needed resources to adequately participate in the process. Despite these barriers faced by the Tribe it has created a proper LSN that was certified as in compliance with 10 C.F.R. § 2.1012 by its administrator. It has retained a national expert in this area to create and certify the LSN, and informed DOE of all of these things (as well as provided a copy of its procedures- voluntarily as nothing in the regulations requires the Tribe to do so). Yet DOE continues to oppose this certification, and make demands of the Tribe that it has not made of other parties. Once the Tribe received DOE's comments, it realized that DOE used the Tribe's good faith attempt to coordinate as a spring board to contest the issues to be presented as to the Tribe's certification, rather than resolve any of the issues. The Tribe informed DOE of its intent to file a late certification months before it filed, had several conversations with DOE, and specifically informed DOE of its intent to file certification prior to doing so on March 11, 2009. Therefore the Tribe has made a "sincere effort" to resolve the issues set out in the Motion for Certification of Licensing Support Network Out of Time for Good Cause. 10 C.F.R. §2.323(b).

The Tribe's Certification Addresses the Correct Time Period.

10 C.F.R. § 2.1012(b)(1) provides as follows: "A person, including a potential party given access to the Licensing Support Network under this subpart, may not be granted party status under § 2.309, or status as an interested governmental participant under § 2.315, if it cannot demonstrate timely compliance with the requirements of § 2.1003. at the time it requests participation in the HLW licensing proceeding under § 2.309 and 2.315." For the following reasons, the Tribe has complied with this regulation.

The Tribe worked diligently with its consultant, Loreen Pitchford, to develop and implement an LSN that substantially meets all regulatory requirements set forth in 10 C.F.R. § 2.1003. See *Certification of Timbisha Shoshone Tribe LSN Document Collection* dated March 11, 2009 filed on March 11, 2009 with the initial motion. The Tribe, however, did not meet the timing requirement for filing certification of its LSN within 90 days after DOE certification of compliance under 10 C.F.R. § 2.1009(b). See 10 C.F.R. § 2.1003.

DOE argues that the Tribe's LSN certification does not demonstrate compliance as of the date it filed its Petition to Intervene, and therefore is irrelevant to the Tribe's Petition to Intervene or any showing it must make therein. The Tribe disagrees, and cannot believe that the regulations were intended to prevent a party that as a matter of right has standing to participate in the proceeding, should be denied that right on a procedural technicality. If the Tribe demonstrates LSN compliance prior to the Board's decision on the Tribe's Petition to Intervene, it would be reasonable for the Board to find that the Tribe make the approach showing at the time it requested party status. If this were not the case there would be no ability to show subsequent compliance after a petition had been denied. The regulations allow for a showing of subsequent LSN compliance as set forth in section 2.1012(b)(2). It would be inefficient for the Board to deny the Tribe party status based on a failure to demonstrate LSN compliance, only to require subsequent briefing a matter that could be concurrently decided upon demonstration prior to a determination on the Tribe's petition. If the Tribe has demonstrated LSN compliance, it would be unfair to deny the Tribe's petition on that basis, only to require a subsequent demonstration of what it has already shown, when the matter is already before the Board. Therefore in order to meet the intent of the regulations, and ensure administrative efficiency the

Board has the discretion to address this issue now, and not needlessly wait until after issuance of an order as to the matters currently before the Board.¹

The Tribe Has Demonstrated LSN Compliance As Required by 10 C.F.R. § 2.1012.

First and foremost the requirement of demonstration set out at 10 C.F.R. § 2.1012, is a requirement as to the NRC or Board, NOT DOE, upon reasonable request, and not a prerequisite part of a petition to intervention. The Tribe has met the requirements of 10 C.F.R. §2.1009, and neither NRC, nor the Board have made a request for a showing by the Tribe of more than has been submitted to date.

The Tribe understands the requirements as set out in the regulations and has been careful to fully comply with 10 C.F.R.§2.1003, which is all that is required by 10 C.F.R. §2.1012. Section 2.1003 does not require an electronic file “be provided for acquired documentary material that has already been made available by the potential party, interested governmental participant or party that originally created the documentary material.” Additionally 10 C.F.R. §2.1005 states that “the following material is excluded from the requirements to provide electronic access, either pursuant to 2.1003 or through derivative discovery pursuant to

¹ DOE makes reference to an affidavit by Joseph Kennedy dated March 3, 2009 as to the TOP certification. This certification did not occur until December 22, 2008 the date that TOP filed its petition to intervene, not in January 2008. In fact TOP did not exist in January 2008. It does not appear that DOE has requested any procedures or information from TOP as it has from the Tribe. The only reason the Tribe did not file the certification of the LSN the day it submitted its petition to intervene was because DOE requested that the Tribe wait and provide it an opportunity to review the procedures first. Additionally the Tribal dispute has created great hardship as to the Tribe’s ability to participate in this proceeding. This dispute, contrary to Mr. Kennedy’s affidavit has existed as early as November 2007, as evidenced by the appeals concerning the November 2007 elections (two separate tribal councils claiming leadership each authorized a tribal election resulting in two different tribal counsels). The Bureau of Indian Affairs (BIA) to date has not recognized either of these elections, and continues to recognize the 2006-07 Tribal Council. Although Mr. Kennedy is listed as a member of this Tribal Council, he, nor TOP are acting pursuant to the BIA recognized Tribal Council as demonstrated by the tribal resolution submitted by TOP as exhibits to its petition to intervene. The recognized Tribal Council has also not authorized the creation of TOP. Therefore the record is clear that the tribal dispute pre-dates January 2008.

§2.1019(i)". The Tribe has only used such documents as references to date, and has not in any manner taken a *laissez faire* attitude toward LSN compliance. The Tribe has developed procedures and had no obligation to provide such procedures to DOE, in fact the regulations do not even require the Tribe to create written procedures.

DOE states that the language "documents generated or received in the future" somehow infers a violation of the regulations. The procedures were developed prior to the implementation and certification of the LSN, therefore the document refers to both the documents to be placed on the LSN and future documents to be placed on the LSN in compliance with section 2.1003(e). This argument by DOE does not make sense, unless DOE is arguing that it is impossible to demonstrate LSN compliance after the initial 90 day period, as any documents discussed prior to creation of the LSN would have to be placed on it in the future, as would any supplemental information.

The Tribe has made a good faith showing of LSN compliance. The NRC has not questioned such compliance, and DOE has not pointed to any actual example of non-compliance with the regulations. The petition to intervene specifically cites to material that is either located on the LSN or excluded from listing pursuant to section 2.1005. Any and all documents relied upon by the Tribe are or will be made available on a timely and good faith basis throughout the course of the proceedings on the LSN, or will be specifically excluded from such requirement pursuant to 10 C.F.R. §2.1005.

Conclusion

The Tribe respectfully requests that the Board or the PAPO Board allow certification of the Tribe's LSN out of time for good cause shown, notwithstanding the arguments contained in DOE's opposition.

March 29, 2009

Submitted by

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/s/Darcie L. Houck

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of) Docket No. 63-001
)
U.S. Department of Energy)
)
(High-Level Waste Repository))
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)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the **TIMBISHA SHOSHONE TRIBE'S REPLY TO DOE'S OPPOSITION TO THE TRIBE'S MOTION FOR CERTIFICATION OF LICENSING SUPPORT NETWORK OUT OF TIME FOR GOOD CAUSE** in the above-captioned proceeding have been served on the following persons this 29 day of March, 2009, by Electronic Information Exchange.

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