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CIVILIAN BOARD OF CONTRACT APPEALS

FOREST COUNTY POTAWATOMI)	
COMMUNITY,)	
)	
Appellant,)	
vs.)	CBCA 849-ISDA through 858-ISDA
)	
MICHAEL O. LEAVITT, SECRETARY,)	
U.S. DEPARTMENT OF HEALTH AND)	
HUMAN SERVICES; CHARLES GRIM,)	
DIRECTOR, INDIAN HEALTH)	
SERVICE; UNITED STATES OF)	
AMERICA)	
)	
Appellees.)	
)	

**COMBINED REPLY IN SUPPORT OF MOTION FOR STAY
 AND IN OPPOSITION TO APPELLEES' MOTION FOR LEAVE TO
 FILE DISPOSITIVE MOTION IN LIEU OF AN ANSWER**

For the many obvious reasons that have persuaded this Board *sua sponte* to extend stays in all other contract support cost cases through October 2007, this appeal, too, should be stayed.

The only new arguments IHS raises in opposition to the requested stay are that (1) the asserted lack of commonality for purposes of Fed. R. Civ. P. 23(a) (as found by the *Zuni* Court) is

somehow controlling on whether a stay should be issued here pending the outcome of the *ASNA*, *Metlakatla*, and *Coos* appeals; and that (2) alleged “releases” make this appeal different from the other CSC-related appeals.

On the first point, IHS improperly equates Rule 23’s standard for certifying a class with the CBCA’s “inherent power to suspend these proceedings.” *Appeals of Harddrives, Inc.*, 91-2 BCA ¶ 23769 (IBCA 1991). But the two standards have absolutely nothing to do with each other, and this Board certainly does not have to find “commonality” under Rule 23 before temporarily suspending proceedings in an appeal. To the contrary, there need only be “good cause” to do so,¹ such as a desire for “economy of time and effort for itself, for counsel, and for litigants.”² This standard is readily met here. The other CSC appeals all involve the Government’s liability for IHS’s failure to pay full contracts support costs in various years. So does this appeal. The other appeals all involve questions of timeliness, including various tolling principles. So does this appeal. The other appeals all challenge IHS’s contention that its published policies for underpaying contract support costs were not really at issue in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). So does this appeal. Nothing can be served in terms of sound management of this Board’s docket and the efficient use of the litigants’ time by breaking this one small appeal off from the nearly two dozen other CSC-related appeals now pending before this Board.

With regard to releases, this too is a common legal issue across some of the CSC appeals,

¹ CBCA Rule 6101.12(b).

² See *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), cited approvingly in *Harddrives*, 91-2 BCA ¶ 23769 (IBCA 1991); see also *In re Government Business Services Group, LLC*, 05-2 BCA ¶ 33059 (AGBCA 2005) (“The Board has the inherent authority to manage its docket and to stay or suspend proceedings in appropriate circumstances.”) (citation omitted).

and it is a merits defense which the Board can sensibly address after it first rules on IHS's several threshold (including so-called "jurisdictional") defenses. It makes no sense for Tribal contractors with CSC appeals to go through discovery, briefing, and argument on a merits issue such as the existence or validity of "releases" until after the Board first disposes of IHS's "jurisdictional" and other threshold defenses. Indeed, addressing non-jurisdictional issues first would be decidedly improper.

For the foregoing reasons, and those set forth in Appellant's opening brief, the request for a stay should be granted, rendering moot for the time being IHS's motion for leave to file a dispositive motion in lieu of an answer. A proposed Order accompanies this Reply.

Respectfully submitted this 17th day of August 2007.

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**ORDER GRANTING STAY AND DENYING MOTION FOR LEAVE TO
FILE DISPOSITIVE MOTION IN LIEU OF AN ANSWER**

Appellant’s Motion to Extend Stay of Proceedings is hereby GRANTED. The appeal is stayed until October 31, 2007.

Appellees’ Motion for Leave to File Dispositive Motion in Lieu of an Answer is DENIED without prejudice. Appellees are free to renew their request for leave once the Board lifts the stay.

SO ORDERED this 17th day of August 2007.

Honorable Candida Steel
Presiding Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed, or caused to be mailed by first-class mail, postage prepaid, true and correct copies of the foregoing **COMBINED REPLY IN SUPPORT OF MOTION FOR STAY AND IN OPPOSITION TO APPELLEES' MOTION FOR LEAVE TO FILE DISPOSITIVE MOTION IN LIEU OF AN ANSWER** together with a **PROPOSED ORDER** to the following parties of record this 17th day of August 2007:

C. Douglas Ferguson
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/s/ Lloyd B. Miller for DJS
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