

**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
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In the Matter of:	)	March 2, 2009
	)	
U.S. Department of Energy	)	
	)	Docket No. 63-001
(High Level Waste Repository	)	
Construction Authorization Application)	)	
	)	

**ANSWER OF THE U.S. DEPARTMENT OF ENERGY TO
TIMBISHA SHOSHONE TRIBE’S AMENDED MOTION FOR EXTENSION OF TIME**

I. Introduction

In accordance with 10 C.F.R. § 2.323(c), the U.S. Department of Energy (DOE or the Department) hereby opposes the “Timbisha Shoshone Tribe’s Amended Motion for Extension of Time and Finding of Good Cause for Late Filed Motion,” (Amended Motion), filed on February 27, 2009.¹ As the Atomic Safety and Licensing Board (Board) is aware, approximately two and a half hours after the deadline for filing the Timbisha Shoshone Tribe’s (Tribe) Reply to DOE and the NRC Staff’s Answers, the Tribe filed its original motion for extension of time. On February 27, 2009, the Board denied the Tribe’s original motion. On that same day, three days after the deadline for filing the Tribe’s Reply, the Tribe filed its Amended Motion.

¹ The Tribe’s Amended Motion is dated February 26, 2009 but was filed and served on February 27, 2009.

In its Amended Motion, the Tribe seeks an extension of time “in order to fully address issues raised by both the DOE and NRC Staff as to the appropriate representatives of the Tribe for affected Indian tribe (AIT) status in the proceeding, and to ensure a thorough and complete response to both the DOE and NRC [sic] substantive issues.” Amended Motion at 1. The Tribe also argues that its limited resources (which the Tribe asserts were diverted by the need to address the dispute over the Tribe’s leadership) constitute good cause for granting its request for an extension of time to file its Reply. *Id.* at 1, 5.

Section 2.307(a) of Title 10 of the Code of Federal Regulations states:

Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer *for good cause*, or by stipulation approved by the Commission or the presiding officer.

Emphasis added.

The Tribe’s Amended Motion should be denied for failure to demonstrate good cause. Among other things, the apparent dispute over Tribal representation in no way prevented the Tribe from substantively responding to DOE and the NRC Staff’s arguments on standing, LSN compliance, and admissibility of contentions in a timely manner. Moreover, that dispute has apparently been ongoing for an extended period of time and the Tribe clearly could have anticipated the need for an extension request long before it filed its recent motions. Given the statutory deadlines for the completion of this proceeding and its inherent scope and complexity, DOE encourages the Board to require discipline among the prospective parties (all of whom are represented by counsel) in adhering to established schedules and deadlines, and in making sincere efforts to comply with the Rules of Practice.

II. Argument

The Tribe first asserts that it requires the extension of time “in order to fully address issues raised by both the DOE and NRC Staff as to the appropriate representatives of the Tribe for Affected Indian Tribe (AIT) status” Amended Motion at 2. Neither DOE nor the NRC Staff raised any such issues, but instead both essentially recognized that there can be only one entity designated as the AIT, and deferred any judgment on that matter pending further developments. *See* Answer of the U.S. Department of Energy to the Timbisha Shoshone Tribe’s Petition for Leave to Intervene in the Hearing (DOE Answer) at 7, 29; NRC Staff Answer to Intervention Petitions (NRC Staff Answer) at 29-32. DOE stated that it had no objection to the Tribe’s standing if the Board determines the Tribe is the official representative of the AIT. *See* DOE Answer at 7. On the other hand, DOE argued that if the Board determined that the Tribe was not the official representative of the AIT, the Tribe’s Petition should be denied because the Tribe failed to establish organizational or representational standing and also did not meet the standards for discretionary intervention. *See id.* at 7, 29. Similarly, the NRC Staff simply stated that each petitioner asserting its right to represent the Tribe “should be required to specifically establish its authorization to represent the Tribe *or* address whether it, as a non-governmental entity, meets the NRC’s standing requirements.” NRC Staff Answer at 32 (emphasis added). The Tribe is using the “ongoing dispute” between two different entities on the Tribal representation issue as an excuse for not having filed its Reply in a timely manner, but that dispute had no bearing on the Tribe’s ability (and obligation) to file a timely Reply.

Furthermore, the Tribe asserts that it requires the extension to provide “a thorough and complete response to both the DOE and NRC substantive issues.” Amended Motion at 1. The Tribe’s argument in this regard is a red herring.

DOE's Answer specifically addressed the legal elements for demonstrating organizational standing, representational standing, and for discretionary intervention — *assuming* the Tribe was ultimately determined to not be the AIT. DOE Answer at 29-33.² The Tribe could and should have addressed DOE's arguments that the Tribe failed to demonstrate organizational standing because its allegations of injury were vague and hypothetical. DOE Answer at 7, 29-31. The Tribe also could have addressed its failure to demonstrate that it satisfies the criteria governing representational standing (DOE Answer at 7, 31), and the argument that the Tribe failed to demonstrate that it should be afforded discretionary intervention (DOE Answer at 7, 31-33). The dispute regarding Tribal representation in no way impaired the Tribe's ability to respond to these arguments.

Second, the dispute over Tribal leadership should not have had any impact on the Tribe's ability to respond to DOE's arguments as to whether it was in "substantial and timely compliance" with the applicable LSN requirements at the time it filed its Petition to Intervene. DOE Answer at 3-6. Whether the Tribe is the legitimate representative for this proceeding should not hinder its ability to address its silence about LSN compliance, its failure to make the required certification to the PAPO Board within 90 days after DOE's initial LSN certification, or its failure to make monthly supplemental productions and certifications as required by the PAPO Board's Second Case Management Order. *Id.*

Third, the Tribal representation dispute should have had absolutely no impact on its ability to respond to DOE and the NRC Staff's positions with respect to the admissibility of its

² To the extent that the Tribe is concerned about protecting its rights, should it be determined that it is the Affected Indian Tribe (AIT), it could have explicitly stated its reservation of those rights in its Reply. As the Tribe itself notes, the AIT determination only affects the Tribe's ability to demonstrate "standing as an AIT." Amended Motion at 3. The AIT determination does not affect the Tribe's ability to demonstrate organizational standing, representational standing or to demonstrate that it should be afforded discretionary intervention.

contentions. DOE Answer at 33-120; NRC Staff Answer at 1472-1511. Thus, the Tribal representation dispute does not provide good cause for granting the Tribe's Amended Motion.

The Tribe also asserts that it should be granted an extension of time based on its "limited resources."³ See Amended Motion at 2-3, 5. The Commission has interpreted the good cause standard in 10 C.F.R. § 2.307 to require more than an assertion that petitioners are facing difficulties due to limited resources that must be used to address multiple proceedings. See *Detroit Edison Co.* (Fermi Unit 3), CLI-09-04, 68 NRC __ (slip op. at 2) (Feb. 17, 2009). The Tribe attempts to distinguish its circumstances from those in the *Detroit Edison Co.* case by stating that *Detroit Edison* "dealt with a non-profit entity that had no rights or entitlements under the NWPA." Amended Motion at 3. Although the *Detroit Edison Co.* case was a combined operating license application (COLA) proceeding unrelated to the Nuclear Waste Policy Act (NWPA) and the *Detroit Edison Co.* petitioners were non-profit entities, see *Detroit Edison Co.*, CLI-09-04, 68 NRC __ (slip op. at 1), these facts do not distinguish the Tribe's *basis for good cause* for an extension of time from the one asserted by the *Detroit Edison Co.* petitioners.

In *Detroit Edison Co.*, the petitioners argued that they had good cause for seeking an extension of the deadline to file hearing requests, petitions to intervene and contentions. See *Detroit Edison Co.*, CLI-09-04, 68 NRC __ (slip op. at 2). The petitioners argued that "difficulties in coordinating action among volunteers and large public interest organizations and the challenge of simultaneously preparing for an environmental scoping meeting on the COLA while drafting contentions," were good cause for granting an extension of the deadline. *Id.* The Commission, however, found "no special circumstances amounting to good cause for an extension," because "many, if not most groups that seek to intervene in NRC proceedings are

³ Despite the assertion that it has limited resources, the Tribe has been represented by counsel in this proceeding beginning from, at least, December 12, 2008. See Notice of Appearance of Darcie L. Houck.

organizations that rely on volunteers and must draft contentions *while also balancing other obligations.*” *Id.* (emphasis added).

Here, the Tribe argues that the Board should find good cause to grant its Amended Motion because it “has had to spend significant resources in addressing the internal dispute concerning its leadership” during the time period it was supposed to draft its Reply and that the “internal tribal dispute has caused a significant diversion in resources.” Amended Motion at 2, 5. The Tribe also asserts, like the *Detroit Edison Co.* petitioners did, that it needs additional time to “coordinate with other entities of the Tribe that may have important information relevant to these proceedings.” Amended Motion at 5. Regardless of what rights the Tribe is entitled to under the NWPA, its argument that it was forced to balance its obligations between this and other proceedings, while dealing with limited resources, does not demonstrate good cause for its failure to file its Reply in a timely manner. *See Detroit Edison Co.*, CLI-09-04, 68 NRC __ (slip op. at 2). Nor does the Tribe explain why it waited until *after* the due date for Replies to file its original motion, when it must have recognized before that late date that it would need to seek such relief. The Tribe is represented by counsel and the mere pendency of various legal proceedings is an insufficient basis for missing Commission-prescribed deadlines in this proceeding.

Finally, in its Amended Motion, the Tribe erroneously relies on the factors applied by the Commission in determining whether to accept nontimely requests for hearing or petitions for intervention pursuant to 10 C.F.R. § 2.309(c), as additional bases for “good cause” to grant its Amended Motion. *See* Amended Motion at 3-4. Those factors are entirely inapposite to the Amended Motion for extension to file a Reply. The Tribe’s Amended Motion is governed by the

good cause standard set forth in 10 C.F.R. § 2.307, not the criteria set forth in 10 C.F.R. § 2.309(c).⁴

III. Conclusion

The Tribe has not established “good cause” warranting an extension of time, as required by 10 C.F.R. § 2.307. The dispute over Tribal leadership should not have had any impact on the Tribe’s obligation to adhere to established schedules and deadlines, and to make sincere efforts to comply with the Rules of Practice. Accordingly, its Amended Motion should be denied.

Respectfully submitted,

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Dated in Washington, DC
this 2nd day of March 2009

⁴ DOE recognizes the Board’s statement that it “will not grant any motions that would adversely affect the procedural schedule already established in this case,” February 27, 2009 Board Order Denying Timbisha Shoshone Tribe’s Motion for Extension of Time at 2. DOE strongly endorses that view but also believes that, even in the absence of an obvious impact on the procedural schedule for the hearing, motions for extensions may not be granted absent a demonstration of good cause.

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U.S. Department of Energy	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the “**ANSWER OF THE U.S. DEPARTMENT OF ENERGY TO TIMBISHA SHOSHONE TRIBE’S AMENDED MOTION FOR EXTENSION OF TIME**” have been served on the following persons this 2nd day of March 2009 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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