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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the matter of:)	DOCKET NO. CWA 10-2003-0035
)	
ALEXANDER KOZNEK and AURORA)	
COMMUNICATIONS INTERNATIONAL,)	COMPLAINANT'S MOTION TO STRIKE
INC.,)	RESPONDENTS' MOTION FOR
)	PROTECTIVE ORDER
)	
Respondents.)	
)	

I. INTRODUCTION

Pursuant to Section 22.16(a) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the United States Environmental Protection Agency, Region 10 ("Complainant" or "EPA") hereby moves the Presiding Officer to strike Respondents' Motion for Protective Order which was filed with the Regional Hearing Clerk on February 20, 2004. Striking this document is appropriate because, although it is fashioned as a "motion," Respondents' request for a protective order is in fact a late-filed response to Complainant's December 23, 2003 Motion for Additional Discovery on Ability to Pay. Should this Motion to Strike be denied, Complainant requests that EPA be

provided an opportunity to respond substantively to the Motion for Protective Order, with the deadline for such response tolling from the date of the Presiding Officer's Order.

II. PROCEDURAL BACKGROUND

On November 14, 2003, the undersigned counsel for Complainant sent Respondents' counsel a letter listing the information EPA would need to properly evaluate Respondents' ability to pay and requesting that such information be submitted no later than December 5, 2003.¹

Having received no reply to this letter, Complainant filed on December 23, 2003 a Motion for Additional Discovery on Ability to Pay that requested the submission of this same information, which was served on counsel for Respondents by U.S. mail on the same day. *See* Certificate of Service accompanying Motion for Additional Discovery. As a result, pursuant to Sections 22.16(a) and 22.7(c) of the Part 22 Rules, Respondents' response to the Motion for Additional Discovery was due January 12, 2004. Respondents never filed a response to Complainant's Motion for Additional Discovery. Nor have Respondents submitted any of the financial information that was the subject of this motion. On February 20, 2004, more than three months after Complainant's initial written request and nearly six weeks after the deadline to respond to Complainant's motion had passed, Respondents filed their Motion for Protective Order.

III. DISCUSSION

Section 22.16(b) of the Part 22 Rules provides a 15-day deadline to respond to any written motion and states that "[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion." By failing to timely respond to

¹ Copies of this November 14, 2003 letter were attached as exhibits to Complainant's Motion for Additional Discovery on Ability to Pay and to Respondents' Motion for Protective Order.

Complainant's December 23, 2003 Motion for Additional Discovery, Respondents have therefore waived any objection to the granting of this motion. As such, in ruling on Complainant's Motion for Additional Discovery, the Presiding Officer should disregard Respondents' arguments for protecting from disclosure Alexander Kozned's personal financial records.²

As described more fully in Complainant's original discovery motion, the financial information EPA seeks from Mr. Kozned clearly satisfies the three-part test for other discovery found at Section 22.19(e) of the Part 22 Rules. First, providing the information will not delay the proceedings, and, contrary to Respondents' claims, will not unreasonably burden Mr. Kozned. Complainant's motion requests only that Mr. Kozned provide copies of three years of tax returns (which he has presumably already completed and filed with the IRS), sign an IRS Form 8821, and complete a questionnaire asking for a brief summary of his household income, living expenses, assets, and liabilities.³ Compiling this information should only take a matter of hours, not the months that have elapsed since EPA first requested it last November. Second, the information EPA seeks can only be obtained from Mr. Kozned, and Mr. Kozned has refused (repeatedly) to provide this information voluntarily. Finally, the information has significant probative value as to the disputed material fact of Mr. Kozned's claimed "inability to pay any fines or penalties." *See* Respondent's Initial Prehearing Information Exchange at p. 2.

² Although Respondents appear not to contest Aurora Communication International, Inc.'s obligation to provide the financial information requested by EPA's November 14, 2003 letter, this information has likewise never been submitted to EPA.

³ EPA has requested (and moved for additional discovery on) a broader range of information pertaining to Aurora Communication International, Inc.'s financial status. Respondents do not appear to contest their obligation to provide this corporate financial information, although, as explained in the previous footnote, they have not provided any financial information for either of the two Respondents.

IV. CONCLUSION

For all of the foregoing reasons, Complainant respectfully requests that the Presiding Officer disallow Respondents' untimely response to Complainant's Motion for Additional Discovery.

Respectfully submitted this 8th day of March, 2004.



R. DAVID ALLNUTT
Assistant Regional Counsel

CERTIFICATE OF SERVICE

In the Matter of Alexander Kozned, et. al., No. CWA-10-2003-0035, I hereby certify that copies of COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S MOTION FOR PROTECTIVE ORDER were sent to the following persons in the manner specified on the date below:

Original and one true and correct copy, by hand delivery;

*Carol Kennedy, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101*


True and correct copies, by Pouch Mail **and by facsimile** to:

*The Honorable William B. Moran
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460*

One true and correct copy, by first class U.S. Mail to:

*John R. Spencer
Spencer & Loescher, PLLC
1326 Tacoma Ave. S., Suite 101
Tacoma, Washington 98402-1983*

Dated: 3/8/04


Valerie Badon
Environmental Protection Agency