



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
Nicor Gas,) **Docket No. TSCA-HQ-2015-5017**
)
Respondent.)

**ORDER ON COMPLAINANT’S MOTIONS TO COMPEL COMPLIANCE AND FOR
EXTENSION OF TIME**

The United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Office of Civil Enforcement, Waste and Chemical Enforcement Division (“Complainant” or “Agency”) initiated this proceeding by filing a Complaint and Notice of Opportunity for Hearing against Nicor Gas (“Respondent”) on September 15, 2015. The parties subsequently completed their initial prehearing exchanges.

On August 31, 2016, the Complainant filed a Motion to Compel Compliance with Prehearing Order and Motion for Extension of Time (“Motion to Compel”). In its Motion to Compel, the Agency complains that Respondent’s prehearing exchange exhibits do not include information that tie each exhibit to the specific purpose for which it was exchanged, *i.e.*, to support denials made in the Answer, to support its affirmative defenses, or to support its penalty arguments. The Agency contends that “failure to include this information prejudices Complainant’s ability to adequately defend its position in this matter” and does not comply with the Prehearing Order issued April 18, 2016. Mot. to Compel at 1-2. The Agency requests that I order Respondent to provide this additional information. Mot. to Compel at 2. If I grant the Motion to Compel, the Agency asks for an extension to file its rebuttal prehearing exchange two weeks after Respondent complies. The Agency requests a four-week extension if I deny the motion. Mot. to Compel at 2. Respondent opposes the Motion to Compel, according to the Agency. Respondent has not yet filed any opposition to the Motion to Compel, however, given my ruling on these matters, I need not await a response.

After filing its Motion to Compel, on September 2, 2016, the Complainant filed a Motion for Extension of Time to Submit Complainant’s Rebuttal Pre-Hearing Exchange (“Motion for Extension of Time”). In that motion, the Agency asks for a seven-day extension to file its rebuttal prehearing exchange materials. The Agency offers no explanation as to the extent to which its Motion for Extension of Time supersedes its Motion to Compel. It does, however, indicate that Respondent does not oppose this extension.

The procedural rules that govern this proceeding, set forth at 40 C.F.R. Part 22 (“Rules”), provide that “each party shall file a prehearing information exchange” in accordance with an order issued by the presiding officer. 40 C.F.R. § 22.19(a)(1). In this regard, the Prehearing Order provides as follows with respect to Respondent:

3. In addition, Respondent shall submit the following as part of its Prehearing Exchange:
 - (A) a copy of any documents in support of the denials made in the Answer;
 - (B) a copy of any documents in support of the allegations in Respondent’s affirmative defenses, asserted in the Defenses section of the Answer, and an explanation of its arguments in support of such affirmative defenses;
 - (C) all factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation; and
 - (D) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, then provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.

Prehearing Order at 2-3. “Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion: (1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence; or (3) Issue a default order under §22.17(c).” 40 C.F.R. § 22.19(g).

After reviewing the prehearing exchange materials filed with this Tribunal, it is clear Respondent complied with both the Rules and the Prehearing Order. Respondent timely submitted more than 140 exhibits and in its prehearing exchange statements addressed all of the issues outlined in the Order. The Prehearing Order did not direct Respondent to categorize each exhibit in a particular way for the Agency’s convenience, nor did it require Respondent to produce exhibits pre-identified as supporting any particular aspect of its case. So long as the information Respondent provided supports the denials, affirmative defenses, and penalty arguments it has raised or intends to raise, and so long as Respondent does not later seek to rely on materials not produced through the prehearing exchange process, then its filings are sufficient. There is no indication Respondent has failed to provide any required information at this point.¹

¹ Complainant indicates that due to Respondent’s mailing error, it has not yet received certain documents for which Respondent has asserted business confidentiality claims. Presumably this will be corrected, and the information will be properly and timely shared. If not, relevant motions may be entertained as necessary.

Notably, however, Respondent has produced a significant amount of information in its prehearing exchange submission. In recognition that it will take the Agency time to review and analyze this information, I find it is reasonable to extend the time for the Agency to file its Rebuttal Prehearing Exchange. Between the Motion to Compel and the Motion for Extension of Time, the Agency has presented unclear and conflicting information as to how much additional time it truly needs. However, the Agency has asked for as many as four additional weeks, and despite Respondent's apparent opposition to the Motion to Compel, it does not appear any prejudice will result in allowing the Agency more time to review the documents Respondent has filed.

Accordingly, Complainant's Motion to Compel and Motion for Extension of Time are **GRANTED in part** and **DENIED in part**, as follows. No further action from the Respondent is necessary to comply with the prehearing exchange requirements of the Prehearing Order. However, Complainant's request for an extension of time to file its rebuttal prehearing exchange materials will be accommodated. The previously set deadlines in this proceeding are extended as follows:

October 7, 2016 Complainant's Rebuttal Prehearing Exchange

Dispositive motions regarding liability, such as a motion for accelerated decision or motion to dismiss under 40 C.F.R. § 22.20(a), must be filed within **30 days** after the above-referenced extended due date for Complainant's Rebuttal Prehearing Exchange. *Non-dispositive motions*, such as motions for additional discovery, motions for subpoenas, and motions in limine, must be filed no later than **60 days** prior to the scheduled hearing. *Motions not filed in a timely manner may not be considered.*

SO ORDERED.

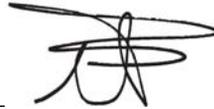

Christine Donelian Coughlin
Administrative Law Judge

Dated: September 7, 2016
Washington, D.C.

In the Matter of Nicor Gas, Respondent
Docket No. TSCA-HQ-2015-5017

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Order on Complainant's Motions to Compel Compliance and for Extension of Time**, dated September 7, 2016, and issued by Administrative Law Judge Christine Donelian Coughlin, were sent to the following parties on this 7th day of September 2016, in the manner indicated.



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Dated: September 7, 2016
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