



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)
)
TAPI Puerto Rico, Inc.) Docket No. CAA-02-2011-1204
)
)
Respondent.)

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2011 NOV 30 A 11: 30
REGIONAL HEARING
CLERK

PREHEARING ORDER

As you were previously notified, I am designated to preside over the above-captioned matter. This proceeding will be governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 et seq. (“Rules of Practice”). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. An informal Practice Manual, a Citizen’s Guide to proceedings before the EPA Office of Administrative Law Judges, and significant decisions issued by the Office are accessible on the world wide web at <http://www.epa.gov/oalj>.

U.S. Environmental Protection Agency (“EPA” or “Agency”) policy strongly supports settlement, and the procedures governing the documentation of settlement agreements are set forth in Rule 22.18 of the Rules of Practice. If the parties are pursuing settlement negotiations, they are commended for taking the initiative to resolve this matter informally and expeditiously. Each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. Each party should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. While a negotiated settlement allows the parties to control the outcome of the proceeding, a judicial decision eliminates that control.

With these considerations in mind, the parties are directed to engage in a settlement conference on or before **December 9, 2011**, and attempt to reach an amicable resolution of this matter. Complainant shall file a Status Report containing a brief report, without mentioning specific terms, on the status of settlement, on or before **December 16, 2011**. If the case is settled, a fully-executed Consent Agreement and Final Order shall be filed no later than **January 6, 2012**, with a copy sent to the undersigned.

Should a Consent Agreement and Final Order not be finalized on or before the deadline set forth above, the parties shall prepare for hearing and strictly comply with the prehearing requirements of this Order, as set forth below.

Prehearing Exchange. Pursuant to Rule 22.19(a) of the Rules of Practice, the parties are directed to engage in the following prehearing exchange:

1. Each party shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the undersigned as part of its Initial Prehearing Exchange:
 - (A) a list of names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of each witness's expected testimony, and a curriculum vitae or resume for each identified expert witness, or a statement that no witnesses will be called;
 - (B) copies of all documents and other exhibits intended to be introduced into evidence, identified as Complainant's or Respondent's exhibits, as appropriate, and numbered with Arabic numerals (e.g., "CX 1" or "RX 1"); and
 - (C) a statement explaining its views as to the appropriate place for the hearing and the estimated amount of time needed to present its direct case. See 40 C.F.R. §§ 22.21(d) and 22.19(d). Also, state whether translation services are necessary in regard to the testimony of any witness, and, if so, state the language to be translated.
2. In addition, Complainant shall file the following as part of its Initial Prehearing Exchange:
 - (A) a copy of any documents in support of each of the factual allegations in Paragraphs 35-47 of the Complaint, to the extent they have been denied or otherwise not admitted by Respondent in the Answer;
 - (B) a narrative statement explaining in detail how the proposed penalty was calculated, in accordance with the penalty factors and policies referenced in Part V of the Complaint; and
3. In addition, Respondent shall submit the following as part of its Prehearing Exchange, *except for a motion referenced in (B) below*, which, if made, shall be separately filed and served in accordance with the requirements of Rules 22.5, 22.16, and 22.20:
 - (A) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as inability to pay, provide a detailed narrative statement explaining the precise factual and legal basis for its position and a copy of any and all

documents upon which it intends to rely in support of such position; and

(B) if Respondent intends to pursue dismissal of this action, an appropriate motion, such as a motion to dismiss or a motion for accelerated decision, including detailed legal arguments and any supporting documentation.

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Prehearing Exchange as to provisions 3(A) and (B) above.

The prehearing exchanges called for above shall be filed in seriatim fashion, pursuant to the following schedule:

January 6, 2012 Complainant's Initial Prehearing Exchange

January 27, 2011 Respondent's Prehearing Exchange

February 10, 2012 Complainant's Rebuttal Prehearing Exchange

Rule 22.19(a) of the Rules of Practice provides that, except in accordance with Rule 22.22(a), **any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify.** Therefore, each party is advised to very carefully and thoughtfully prepare its prehearing exchange.

Supplement to Prehearing Exchange. Any addition of a proposed witness or exhibit to the prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

Default and Opportunity for a Hearing. The Complaint notified Respondent of the opportunity to request a hearing, in accordance with Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559. In the Answer to the Complaint, Respondent requests a hearing. Pursuant to Section 554(c)(2) of the APA, 5 U.S.C. § 554(c)(2), a hearing will be conducted in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA, 5 U.S.C. § 556(d), provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondent has the right to defend against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Respondent is entitled to elect any or all three means to pursue its defense. If Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, Respondent shall serve a statement to that effect on or before the date for filing its Prehearing Exchange. **Respondent is hereby notified that the failure either to comply with the**

prehearing exchange requirements set forth herein or to state that it elects only to conduct cross-examination of Complainant's witnesses can result in the entry of a default judgment against it. Complainant is notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.

The mere pendency of settlement negotiations or even the existence of a settlement in principle does not constitute a basis for failing to strictly comply with the prehearing exchange requirements. Only the filing with the Regional Hearing Clerk of a fully-executed Consent Agreement and Final Order, or an order of the judge, excuses noncompliance with filing deadlines.

Filing and Service. A document is "filed" when the Regional Hearing Clerk receives it. A document is "served" upon mailing or when placed in the custody of a reliable commercial delivery service. The parties are encouraged to send a courtesy copy to the Office of Administrative Law Judges by facsimile or email in addition to the mailed hard copy, as physical mail delivery is often subject to significant delay. The facsimile number for the Office of Administrative Law Judges is (202) 565-0044, and the email address is oaljfiling@epa.gov. A signed certificate of service must be attached to all filed documents.

All documents served on the undersigned shall be addressed as follows if sent by regular mail:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

All documents served on the undersigned via Federal Express or any commercial delivery service that x-rays packages as part of its routine security procedures may be delivered directly to:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, DC 20005

The parties are advised NOT to include, attach, or refer to any terms of settlement offers or agreements in any document submitted to the Presiding Judge, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted, to the Presiding Judge except those that are fully executed and filed with the Regional Hearing Clerk.

Contact Information. Telephone contact may be made with my legal assistant, Maria Whiting-Beale, at (202) 564-6259 to ask whether a document has been received or issued. Email or telephone contact may be made with one of my staff attorneys, Michael Wright, Esq., at (202) 564-3247 (wright.michaelb@epa.gov) or Roy Seidenstein, Esq., at (202) 564-9274 (seidenstein.roy@epa.gov) for other procedural questions.

Courtesy Copies. If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of substantive orders and decisions issued in this proceeding, the party shall submit a request for such copies by letter addressed to Maria Whiting-Beale at one of the addresses above. The letter shall include the case docket number, the party's e-mail address or facsimile number, and a statement as to whether the party requests expedited courtesy copies of (a) the initial decision and/or any orders on motions for accelerated decision or dismissal, or (b) all decisions and substantive orders. The undersigned's office will endeavor to comply with such requests but does not guarantee the party's receipt of expedited courtesy copies.

Motions. Prior to filing any motion, the moving party is required to contact the non-moving party to determine whether the non-moving party has any objection to the granting of the relief sought in the motion. The motion shall state the position of the non-moving party. The mere consent of the non-moving party to the relief sought does not assure that the motion will be granted. Furthermore, all motions must be submitted in sufficient time to permit the filing of a response by the non-moving party and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. Rules 22.16(b) and 22.7(c) allow a 15-day response period for motions, with an additional five days added thereto if the motion is served by mail. Motions not filed in a timely manner may not be considered. **If any party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under Rule 22.20(a), it shall be filed within thirty days after the due date for Complainant's Rebuttal Prehearing Exchange.**

Oral Argument. Pursuant to Rule 22.16(d), a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. The requesting party shall propose an appropriate location for the argument. The Office of Administrative Law Judges has access to videoconferencing technology and strongly encourages the parties to consider utilizing such technology for oral arguments on motions so as to minimize the expenditure of time and financial resources in connection with such arguments. A request for oral argument may be granted, in the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

SO ORDERED.

A handwritten signature in black ink, appearing to read "S. Biro", written over a horizontal line.

Susan L. Biro
Chief Administrative Law Judge

Dated: November 29, 2011
Washington, D.C.

In the Matter of TAPI Puerto Rico, Inc., Respondent
Docket No. CAA-02-2011-1204

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated November 29, 2011, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: November 29, 2011

Original And One Copy By Regular Mail To:

Karen Maples
Regional Hearing Clerk
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy By Regular Mail To:

Carolina Jordan-Garcia, Esquire
Office of Regional Counsel
U.S. EPA
Centro Europa Building, Suite 207
1492 Ponce de Leon Avenue
San Juan, PR 00907-4127

Gretchen Mendez-Vilella, Esquire
Goldman Antonetti & Cordova, P.S.C.
P.O. Box 7034
San Juan, PR 00936-8364