

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the matter of)
)
Environmental Protection Services, Inc.,) **Docket No. TSCA-03-2001-0331**
)
Respondent)

**ORDER DENYING RESPONDENT’S MOTION
TO EXTEND THE DEPOSITION OF DR. JOHN H. SMITH**

Pursuant to an order of this tribunal, Dr. John H. Smith of the United States Environmental Protection Agency (“EPA”) was deposed by counsel for Environmental Protection Services, Inc. (“EPS”), on May 16, 2003. This deposition of Dr. Smith took place in Washington, D.C. from approximately 10:00 a.m. until 5:30 p.m. Respondent submits that the deposition of Dr. Smith was not completed on May 16 and, accordingly, it moves for an additional five hours in order to complete the deposition. EPA opposes EPS’s request for more time. As explained below, the motion to extend the deposition of Dr. John H. Smith is *denied*.

Dr. Smith was identified by EPA as an expert witness in complainant’s “First Prehearing Submittal.” In this submission, EPA stated: “Dr. Smith is expected to testify as an expert as to: the regulatory requirements [of] 40 C.F.R. Part 761, including but not limited to, the self-implementing decontamination procedures, PCB classification of electrical equipment, 40 C.F.R. Section 761.79, and PCB scrap metal ovens, 40 C.F.R. Section 761.72.” *Id.* at 4. Thereafter, and over EPA’s objection, EPS was permitted to conduct the deposition of Dr. Smith which is at the center of the present dispute.

In seeking more time to question Dr. Smith, EPS asserts that despite counsel’s “best and diligent efforts,” it was “unable to depose Dr. Smith with respect to matters relating to EPS’s defense of Count III of the Administrative Complaint, which would cover 40 C.F.R. § 761.72, EPS’s operations of its scrap metal ovens, EPA’s batch testing rules and the rules’ applicability to EPS.” Mot. at 2. Respondent further notes that the majority of the fine proposed by EPA in this case relates to Count III. *Id.*

In support of its request for more time, EPS cites to the complexity of this case and the broad scope of Dr. Smith’s expected testimony. Furthermore, EPS asserts that given EPA’s objections to some of the questions, complainant’s instructions to the deponent not to answer a substantial number of the inquiries, and Dr. Smith’s failure to be direct in his answers, essentially prevented respondent from completing the deposition on time. Resp. Reply at 1-2.

EPA’s position, however, is that the more than seven hours already provided for the deposition of Dr. Smith satisfies the time requirements of Rule 30(d)(2) of the Federal Rules of

Civil Procedure. EPA further argues that, in any event, respondent's failure to complete the deposition was due to EPS's questioning Dr. Smith "exhaustively on matters beyond the areas of his expertise and completely outside the scope of the Administrative Complaint, including several hours of questioning on approximately forty-five exhibits primarily regarding Respondent's competitor, G & S Technologies." Compl. Resp. at 1-2. In addition, EPA submits that given the fact that this enforcement case involves only two PCB regulations, and given Dr. Smith's limited involvement in this matter, EPS was afforded a sufficient amount of time in which to question this individual. *Id.* at 3.

In sum, the parties offer competing views as to what exactly transpired at the deposition of Dr. John Smith on May 16, 2003. Neither party, however, offers any concrete support for its interpretation as to the events of May 16. Accordingly, in deciding against extending the deposition of Dr. Smith, this tribunal has weighed the narrative summary of Dr. Smith's expected testimony at hearing, the allegations made by EPA against EPS in the three-count complaint, and in particular, the fact that Dr. Smith was made available to respondent for approximately seven hours of questioning. It is the view of this tribunal that the time allotted to respondent to depose Dr. Smith was sufficient under the circumstances of this case. Respondent has not shown otherwise. Despite arguing for more time, EPS simply has not established that the approximately seven hours already provided was insufficient to adequately conduct this deposition.

Carl C. Charneski
Administrative Law Judge

Issued: May 27, 2003
Washington, D.C.