

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



BEFORE THE ADMINISTRATOR

IN THE MATTER OF TOWER CENTRAL, INC., Respondent))) Docket No. CAA-III-030)))

ORDER DISPOSING OF OUTSTANDING MOTIONS

On April 11, 1994, Respondent filed a motion to dismiss Count 3 of the Complaint on the basis that no penalty can be imposed under Count 3 because the Agency has not complied with the Paperwork Reduction Act (PRA), 44 U.S.C. §§3501 et seq. Specifically, Respondent alleges that the information request involved in Count 3 does not display the required control number assigned by the Office of Management and Budget (OMB).

Complainant opposes the motion to dismiss on the grounds that Count 3 involves a continuing violation and that a current OMB control number has been assigned to the underlying regulation, Section 82.42 of the EPA Regulations, 40 CFR §82.42. Complainant acknowledges that this number was not originally assigned, but states that it was published in the Federal Register on May 10, 1993, 58 Fed. Reg. 27,472, and avers that the non-filing violation continued after that date.

Respondent submitted a rebuttal to the Complainant's reply to the motion to dismiss in which Respondent argues that Section 3512 of the PRA bars any penalty if the information collection

request itself does not display a current OMB control number. Respondent also notes that it relied on the form published in the Federal Register on July 14, 1992, 57 Fed. Reg. 31,269, to submit the required information and states that that form did not contain the required OMB control number. Respondent asserts that Complainant should be estopped from relying on the May 10, 1993 Federal Register publication to preclude application of the PRA, and notes that, upon seeking advice from the Agency, Respondent was told to use the form published in the Federal Register in 1992 and no mention was made of the Federal Register publication in May 1993.

On analysis, Respondent's position is better taken and Count 3 of the Complaint is hereby dismissed as barred by Section 3512 of the PRA because the EPA information collection form did not bear a current OMB control number. It should be noted that the Complainant in its reply points out that only the Regulation shows the current OMB control number. However, there is no indication in the May 1993 Federal Register publication that shows that the form itself contains the current OMB control number. Since it is clear that the PRA requires not only the Regulation to have the current OMB control number but also the information request form display that number, no penalty can be imposed on the Respondent with regard to Count 3, since the form involved does not display such a number. This ruling is without prejudice to Complainant seeking reconsideration thereof if Complainant can establish that the form used following the May

1993 Federal Registration publication did contain the current OMB control number.

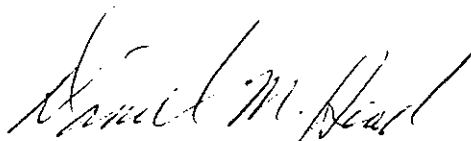
On January 21, 1994, Complainant filed a motion to strike the first defense raised by the Respondent in its Answer. That defense asserts that the Regulation involved does not apply to it since the Respondent is exclusively involved in the trucking business and is not in the business of repair or servicing motor vehicle air conditioners for consideration. Complainant takes the position that this defense is a challenge to the EPA Regulation involved and should be stricken since such challenge should have been made during the review period after the Regulation was proposed.

The Respondent opposes the motion to strike on the grounds that the motion was not timely filed since, under the Rule 12(f) of the Federal Rules of Civil Procedure, such motion should have been presented within 20 days after the Answer was filed. Respondent also notes that motions to strike are not favored and that, if there are questions of fact or law, the motion to strike should not be granted. Respondent further points out that it is not challenging the legality of the Regulation but is alleging that the Regulation does not apply to it based upon its interpretation of the language in the Regulation.

On analysis, the Respondent's position is better taken because the first defense in the Answer does not constitute a challenge to the Regulation, but contests the Complainant's interpretation of the Regulation. However this interpretation

conflict may ultimately be resolved in this proceeding, the Respondent should not be barred on a pleading basis from attempting to rely on this defense and the Respondent should be allowed to argue that its interpretation of the Regulation at issue should be accepted. Accordingly, the Complainant's motion to strike Respondent's first defense is hereby denied.¹

SO ORDERED.



Daniel M. Head
Administrative Law Judge

Dated:

July 25, 1994
Washington, DC

¹ The Respondent's argument that the motion to strike is untimely based on the requirement in the Federal Rules of Civil Procedure is rejected. The Federal Rules of Civil Procedure can be used for analysis and guidance purposes but they are not binding in EPA proceedings, particularly the time limitations set therein.

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CERTIFICATE OF SERVICE

I certify that the foregoing Order Disposing of Outstanding Motions, dated July 28, 1994, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

Lydia A. Guy
 Regional Hearing Clerk
 U.S. EPA, Region 3
 841 Chestnut Street
 Phila. PA 19107

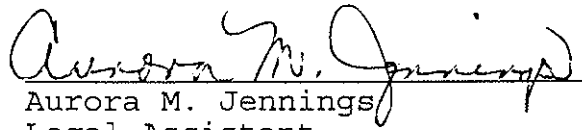
Copy by Certified Mail to:

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 Aurora M. Jennings
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 Office of the Administrative
 Law Judges

Dated: July 28, 1994
 Washington, DC