

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
VON ROLL AMERICA, INC.,) **Docket No. CAA-05-2004-0045**
)
)
Respondent.)

**ORDER GRANTING EXTENSION OF TIME
TO FILE PREHEARING EXCHANGE**

By Order dated December 3, 2004, Complainant was required to file its prehearing exchange on or before January 28, 2005. However, Complainant failed to do so. As a result, on February 1, 2005, a Show Cause Order was issued requiring that, on or before February 11, 2005, Complainant show good cause as to why it failed to timely submit its prehearing exchange as required by the Prehearing Order and why a Default should not be entered against it.

On February 3, 2005, the undersigned received by facsimile a two page document titled "Complainant's Status Report" that was filed on January 31, 2005, which reports that the parties are "close to reaching an agreement in principle." The final sentence of the Status Report states "Complainant hereby requests an additional time period until March 31, 2005 to reach a complete settlement, including preparing and filing with this Court a mutually agreed upon settlement document." Nowhere in the Status Report is Complainant's then overdue Prehearing Exchange mentioned.

On that same date, the undersigned also received by facsimile "Complainant's Rule to Show Cause" (Response) in response to the Show Cause Order. In its response, Complainant provides as its "good cause" for failing to file its Prehearing Exchange the fact that it filed the Status Report "inadvertently one day late on January 31, 2005" seeking an extension of time and that the parties are "close to reaching an agreement in principle." It acknowledges that "Complainant should have filed the Status, or a Motion requesting an extension of time to file Complainant's prehearing exchange, well in advance of the January 28, 2005 deadline."

The Complainant offering up as "good cause" for failing to meet the filing deadline the fact that the parties are "close to reaching an agreement in principle" is simply galling. The Prehearing Order issued in this case explicitly stated:

**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 HEARING CLERK OF A FULLY EXECUTED CONSENT AGREEMENT AND FINAL ORDER, OR AN ORDER OF THE JUDGE, EXCUSES NONCOMPLIANCE WITH FILING DEADLINES.

See, Prehearing Order dated December 3, 2004 (capital letters, underline and bold in original). It is difficult to imagine that one could be clearer or more forceful in expressing this point in writing. Thus, proffering such an argument does absolutely nothing to aid Complainant's request for relief from the possible penalty of dismissing the Complaint.

Complainant's argument that it "had duly requested [in its Status Report] that the Court modify the . . . Prehearing Order" is hardly a better excuse for missing the filing deadline on the Prehearing Exchange. First, in these proceedings, requests for relief, such as extensions of time, must be in the form of "*motions*" meeting the requirements of Rule 22.16 (40 C.F.R. § 22.16). Rule 22.7(b)(40 C.F.R. § 22.7(b))(The . . . Presiding Officer may grant an extension of time for filing any document: upon timely motion . . ."). Status reports are *not* appropriate pleadings for such requests because they are not docketed and processed like a motion.

Second, our Rules (40 C.F.R. Part 22) provide that requests for extension of time be "filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer . . . reasonable opportunity to issue an order." Rule 22.7(b) (40 C.F.R. § 22.7(b)). Thus, the Rules clearly indicate that a party may not simply grant itself an extension of time by filing for an extension right before, on, or, *as in this case*, after the filing deadline.¹ Third, the Prehearing Order explicitly required that:

Prior to filing any motion, the moving party is directed to contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion. The motion shall then state the position of the other party or parties.

See, Prehearing Order pp. 4-5. There is no evidence in this case that Complainant made any effort to contact the Respondent prior to requesting additional time in its Status Report. Fourth, the request for extension made in the status report makes no mention of Complainant's then already overdue Prehearing Exchange, but merely requests "an additional time period" to file settlement documents.

¹ The Prehearing Order explicitly gave the parties also notice of this requirement in that it indicated at page 4 that: "all motions which do not state that the other party has no objection to the relief sought must be submitted in sufficient time to permit the filing of a response by that party and the issuance of a ruling on the motion, before any relevant deadline set by this or any subsequent order. Sections 22.16(b) and 22.7(c) of the Rules of Practice, 40 C.F.R. §§22.16(b) and 22.7(c), allow a fifteen-day response period for motions with an additional five days added thereto if the pleading is served by mail. Motions not filed in a timely manner may not be considered."

Therefore it does not properly “set forth the relief sought” as required by Rule 22.16(a) for an extension of the deadline for filing the prehearing exchange. 40 C.F.R. § 22.16(a)(All motions . . . shall . . . Set forth the relief sought . . .”).

All in all, the Status Report hardly suffices as a motion for extension of time under the Rules, and even if it did, it was filed untimely.

This case has been pending since September 2004. If the parties wish to settle they certainly may. However, they may not delay the progress of this case by proceeding in the manner so far exhibited by Complainant. In light of the Complainant’s expression of contrition and that this is the first incident of this sort in this case, this case will not be dismissed at this time. **Complainant shall have until FEBRUARY 28, 2005 to file either its Prehearing Exchange or the fully executed Consent Agreement and Consent Order.** Respondent shall then have until **March 15, 2005** to file its Prehearing Exchange. Complainant if it wishes may then file a rebuttal to Respondent’s Prehearing Exchange on or before **March 25, 2005**.

Susan L. Biro
Chief Administrative Law Judge

Dated: February 8, 2005
Washington, D.C.