UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Carol Cable Company, Inc.,	)	Docket No. TSCA-I-89-1031
	)	
Respondent	)	

ORDER DENYING MOTION FOR CERTIFICATION ON INTERLOCUTORY APPEAL

By an order, dated April 27, 1990, Counts I, II and VI of the complaint herein were, pursuant to Respondent's motion, consolidated into one count of unauthorized use. This had the effect of reducing the total penalty proposed to be assessed ($78,000) by $33,000. Count I charged Respondent with unauthorized use of ten PCB transformers in that records of quarterly inspections of the transformers as required by 40 CFR § 761.30(a)(1)(xii) were not maintained. Count II charged Respondent with unauthorized use of a PCB transformer in that combustible materials, namely wooden window frames and a cardboard container, were stored within five meters of the transformer in violation of 40 CFR § 761.30(a)(1)(viii). Count VI of the complaint charged Respondent with unauthorized use of the ten PCB transformers referred to in Count I in that the means of access thereto were not

marked with the large PCB mark (illustrated in § 761.45(a)) as required by 40 CFR § 761.40(j). [1/]

On May 8, 1990, Complainant filed a Request For An Interlocutory Appeal of the order of April 27 insofar as it required consolidation of "Counts I, II and IV" (sic) into one count of unauthorized use. In support of the request, Complainant argues that the decision that only one penalty may be assessed for the three separate violations described in Counts I, II and VI is inconsistent with § 16(a) of the Act (15 U.S.C. § 2615(a)) and that an interlocutory appeal is appropriate in view of the impact of the decision on this case and other cases involving violations of the PCB rule (40 CFR Part 761).

Acknowledging that the PCB Penalty Policy (45 Fed. Reg. 59776, September 10, 1980) addresses the assessment of multiple penalties for multiple violations of the regulations, Complainant asserts that the guidance is advisory and necessarily incomplete (Memorandum In Support Of Complainant's Request For An Interlocutory Appeal at 3, 4). Arguing that the issue of whether multiple penalties may be assessed for multiple use violations is an important question of law, Complainant says that TSCA cases often involve more than one violation of the various use authorizations involving a single item of PCB electrical equipment

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[1/] Although failure to mark the means of access to PCB transformers is contained in Part 761, Subpart C - Marking of PCBs and PCB Items, such a failure, as noted in the mentioned order, is regarded as unauthorized use and hence a use violation.

or several items grouped in one location, as in the instant case. Read broadly, Complainant asserts that the order under consideration would preclude the assessment of multiple penalties in such situations and thus impact many cases filed prior to April 9, 1990, the effective date of the current PCB Penalty Policy. According to Complainant, this result may prevent EPA from adequately considering the nature, circumstances, extent and gravity of the violations as required by § 16(a)(2)(B) of the Act and thus lessen the deterrent effect of EPA's enforcement program.

Asserting that there is a substantial ground for difference of opinion on this issue, Complainant points out that the order of April 27 recognized that the applicable PCB Penalty Policy considered multiple penalties from two standpoints: whether the violations alleged are in the same violation category and whether the violations present the same risk (Memorandum at 5). It is argued that the order allows little consideration of the risk factor, the effect of the ruling being that the penalty for one violation is the same as the penalty for all three use violations, notwithstanding that the violations pose separate risks. Complainant says this restrictive reading of the PCB Penalty Policy is inconsistent with § 16 of the Act and the general rule that environmental statutes are to be broadly interpreted to effectuate their purposes. Complainant contends that a more appropriate interpretation of the PCB Penalty Policy is that separate penalties may be assessed for multiple use violations where the violations pose separate and distinct risks.

As to the second prong of the requirement for certification of an interlocutory appeal, Complainant says that a final determination of this issue will facilitate settlement and save it and Respondent the costs of a hearing (Memorandum at 7).

D I S C U S S I O N

The grounds upon which the ALJ may certify a ruling for interlocutory appeal are set forth in Rule 22.29(b) (40 CFR Part 22) as follows:

> (b) Availability of interlocutory appeal. The Presiding Officer may certify any ruling for appeal to the Administrator when (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds or difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

Contrary to the implication of Complainant's motion, the order from which an interlocutory appeal is sought is neither novel nor unprecedented. See Ketchikan Pulp Company, Docket No. TSCA-X-86-01-14-2615 (Initial Decision, December 8, 1986), and Leon County School Board, Docket No. TSCA-IV-86-0428. [2/] While it is true that Ketchikan considered risk in determining the amount of the penalty, it did so only after concluding that under the Penalty Policy only one count of improper use could be charged. Moreover, a pertinent

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[2/] Docket No. TSCA-IV-86-0428 (Order Granting Motion To Amend Complaint and Affirming Initial Ruling, May 19, 1988). An order denying complainant's motion for certification of an interlocutory appeal in Leon County was issued on June 30, 1988.

page from a recent complaint issued by Region V, copy enclosed, reflect that an allegation of failure to register PCB transformers with fire response personnel as required by § 761.30(a)(1)(vi) and an allegation of storing combustible materials within five meters of a PCB transformer in violation of § 761.30(a)(1)(viii) were combined into one count of improper use. Although this may not establish the general practice of the Regions as to the issue here concerned, it is evidence that the interpretation adopted in the April 27 order has been adopted in other instances. In view thereof, and in view of the fact that the current PCB Penalty Policy (April 9, 1990) clearly provides for the assessment of penalties on the basis of one count for each violation regardless of categories (Id. at 12, 13), I am unable to find that the April 27 order involves an important question of law or policy.

Nor can I find that the April 27 order involves a ruling upon which there is a substantial ground for difference of opinion. In stating that the Penalty Policy appears to set forth two standards for assessment of multiple penalties, i.e., whether the violations alleged are in the same violation category and whether the violations present the same risk (order at 11), the order was more generous to Complainant's contention than warranted. The simple fact is that risk is mentioned as a criterion for assessing multiple violations (penalties) only in the context of repeated or

continuing conditions (violations). [3/] The context makes it clear that the language "(h)owever, the Agency can exercise its discretion * * to charge on a straight per day or per violation basis (GBP X number of days or violations) * *" is an exception to the normal use of the proportional penalty calculation for repeated or continuing violations as set forth in Table VI of the Policy. See the Policy at 59783 where the proportional penalty calculation is discussed. While it is possible to read the quoted exception as overriding the limitation in (1) above, i.e., the violations fall into more than one violation category, such an interpretation

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[3/] The Policy under "Multiple Violations" at 45 Fed. Reg. 59778 provides:

> Assess multiple violations against a single violator in any of the following circumstances:
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> (1) The violations fall into more than one violation category;
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> (2) The violations are in substantially different locations; or
>
> (3) There is evidence that the violation has been committed on repeated occasions or has continued for more than one day.
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> If multiple violations are charged because of evidence of repeated or continuing conditions, the penalty will normally be calculated using the proportional penalty calculation, which appears in Table VI, below. However, the Agency can exercise its discretion either to charge for only one day, or to charge on a straight per day or per violation basis (GBP X number of days or violations), depending on factors such as substantial actual harm, the unusual nature of risk presented, or other unique circumstances.

would render the limitation superfluous and be an instance of the exception swallowing the rule. That such is not a proper reading of the Penalty Policy would seem to be settled beyond peradventure by the examples of when not to assess multiple penalties set forth at 45 Fed. Reg. 59782, e.g., "(t)he first type of case where this [multiple violations] is not appropriate is where a single situation presents violations of many portions of the regulation which are all in the same violation category." As noted in the April 27 order at 13, the reference to separate and distinct risks on that page of the Policy refers to violations at separate locations.

Complainant is, of course, free to file a motion for leave to amend the complaint so as to increase the amount of the proposed penalty up to the statutory maximum, e.g., assess a penalty for multiday violations, provided the evidence so warrants, if it considers its ability to assess an appropriate penalty in accordance with statutory criteria has been impaired by the ruling at issue.

O R D E R

The motion for certification of an interlocutory appeal is denied. Respondent is directed to complete its prehearing exchange in accordance with the April 27 order not later than June 18, 1990. [4/]

Dated this 6th day of June 1990.

Spencer T. Nissen
Administrative Law Judge

Enclosure

[4/] Unless I am notified not later than June 29, 1990, that this matter has been settled, I will be in telephonic contact with counsel for the purpose of scheduling the matter for hearing.

culpability, and such other matters as justice may require, Complainant proposes that Respondent be assessed the following civil penalty for the violations alleged in this Complaint:

COUNT I

Improper Marking $5,000.00

15 U.S.C. §2614

40 C.F.R. §761.40(j)

COUNT II

Improper Use..... $20,000.00

15 U.S.C. §2614

40 C.F.R. §761.30(a)(1)(vi)

40 C.F.R. §761.30(a)(1)(viii)

TOTAL PENALTY $25,000.00

Respondent may pay this penalty by certified or cashier's check, payable to "Treasurer, the United States of America," and remitted to:

U.S. Environmental Protection Agency, Region V
P.O. Box 70753
Chicago, Illinois 60673

A copy of the check shall be sent to:

Branch Secretary
Pesticides and Toxic Substances Branch (5SPT-7)
U.S. Environmental Protection Agency
230 South Dearborn Street
Chicago, Illinois 60604

A transmittal letter identifying this Complaint shall accompany the remittance and the copy of the check.

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER DENYING MOTION FOR CERTIFICATION ON INTERLOCUTORY APPEAL, dated June 6, 1990, in re: Carol Cable Company, Inc., was mailed to the Regional Hearing Clerk, Region I, and a copy was mailed to each party in the proceeding as listed below.

Helen F. Handon
Secretary

June 6, 1990

Jeffrey S. Michaelson, Esq.
Michaelson & Michaelson
321 South Main Street
Providence, Rhode Island 02903

Michael P. Kenyon, Esq.
Assistant Regional Counsel
U.S. EPA, Region I
J.F. Kennedy Federal Building
Boston, Massachusetts 02203-2211

Ms. Marianna Dickinson
Regional Hearing Clerk
U.S. EPA, Region I
J.F. Kennedy Federal Building
Boston, Massachusetts 02203-2211