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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER RULING ON MOTION FOR RECONSIDERATION

On July 28, 1994, the Presiding Judge, in an Order Disposing of Outstanding Motions, dismissed Count 3 of the Complaint because the U.S. Environmental Protection Agency (EPA) had not complied with Section 3512 of the Paper Reduction Act (PRA), 44 U.S.C. §3512. Section 3512 of the PRA requires an information collection request to display a control number assigned by the Office of Management and Budget (OMB), and the July 28, 1994 Order held that the information request involved in Count 3 did not display the required OMB control number and that Count 3 was therefore barred by Section 3512. The ruling was noted to be without prejudice to the Complainant seeking reconsideration, if Complainant can establish that the form used following the May 1993 Federal Registration publication of an OMB control number for the Regulation involved, did contain an OMB control number.

On August 12, 1994, Complainant filed a Motion for Reconsideration of the July 28, 1994 ruling dismissing Count 3 of the Complaint. Complainant takes the position on reconsideration that the information requested to be supplied by the Respondent is a statutory certification requirement set out in Section

609(d) of the Clean Air Act (CAA), 42 U.S.C. §671(h)(d). Complainant argues that the PRA cannot be used to bar the collection of a penalty resulting from violation of a statutory requirement, despite what impact the PRA may have in blocking a penalty for the Respondent's failure to submit the certification as required by Section 82.42 of the EPA Regulations, 40 C.F.R. §82.42, the Regulation implementing Section 609(d) of the CAA. Complainant also asserts that the use of the PRA to bar Count 3 was overcome by the promulgation in the Federal Register on May 10, 1993, of an OMB control number for the Regulation involved. In support of its position, Complainant relies on a series of tax return cases where the courts have held that the PRA does not bar penalties for failure to file a tax return, since the need to file a return is required by statute, not regulation. See, in particular, U.S. v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991); U.S. v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990); and Salberg v. U.S., 969 F.2d 379, 384 (7th Cir. 1992).

Respondent opposes the Complainant's motion for reconsideration, and avers that Count 3 of the Complaint cites the Respondent with violation of the Regulation and that it is only the violation of the Regulation that is set out as a violation of the CAA. Respondent notes that the Complainant in its prehearing exchange acknowledged the applicability of the PRA to Count 3, as Complainant also did in its arguments relating to the Respondent's motion to dismiss, which led to the July 28, 1994 order dismissing Count 3.

In addition, Respondent seeks to distinguish the tax return cases relied on by Complainant by arguing that they are all criminal prosecutions in which the required form involved, the 1040, did display an OMB control number, even though the tax regulations and pamphlets associated therewith did not have such a number. Respondent further asserts that reconsideration should be denied because Complainant did not attempt to submit an information collection form showing a current OMB control number, but has made an entirely different argument on reconsideration, namely, that the violation is statutory in nature and stands independently from the alleged violation of the Regulation.

On September 22, 1994, Complainant filed a reply to the Respondent's opposition to the motion for reconsideration. In this pleading, Complainant restated its position that, even if the PRA does bar a penalty for violation of the regulation, Respondent would still be liable for a penalty for its violation of Section 609(d) of the CAA. Complainant does note in footnote 1 that, if a finding is made that the Complaint should specifically set forth the certification requirement of Section 609 of the CAA as a basis for the violation, it would move to amend the Complaint to incorporate the appropriate language. Complainant argues that administrative pleadings should be liberally construed and easily amended and in this regard relies on: Yaffe Iron & Metal Co., Inc. v. EPA, 774 F.2d 1008, 1012 (10th Cir. 1985); Asbestos Specialists, Inc., TSCA Appeal No. 9-23, p 11 (Oct. 6, 1993); and Port of Oakland & Great Lakes Dredge

& Dock Co., MPRSA Appeal No. 91-1, p. 41 (Aug. 5, 1992). Complainant contends that it is seeking to enforce the CAA independent of the status of the implementing regulations under the PRA and asks that the motion for reconsideration be granted and that Count 3 be reinstated.

On analysis, it should first be noted that the July 28, 1994 order did set out that the Complainant could seek reconsideration if it could show that a valid OMB control number was on the information collection form following the publication of that number in the Federal Register in May of 1993. As Respondent correctly notes, Complainant did not attempt to make such a showing but seeks reconsideration on the basis that Count 3 involves a statutory violation that should stand regardless of any regulation violation that might be barred by the PRA. Despite this, the request for reconsideration will be assessed on its merits, since the basis for reconsideration noted in the July 28, 1994 order was not intended to be exclusive of other valid grounds for reconsideration.

On the merits, Complainant does correctly argue that a statutory violation is not barred because a regulation violation might be precluded by the PRA. The case law cited by the Complainant supports this position and Respondent's attempt to distinguish the line of tax return cases is not persuasive. The tax cases establish the underlying principle that the PRA cannot be used to bar collection of a penalty for a statutory violation.

However, the Complaint must be appropriately framed so that

the Respondent is advised of the charge against it. It is, therefore, necessary to review the specific language of Count 3 of the Complaint. Paragraph 16 of Count 3 incorporates by reference paragraphs 1 through 9 of the Complaint, which set the context of the alleged violation. Paragraph 17 therein states that, under Section 82.42 of the Regulations, no later than January 1, 1993, any person repairing or servicing motor vehicle air conditioners must certify to the Administrator that such person has acquired and is using approved equipment and that each individual authorized to use the equipment is properly trained and certified in accordance with Section 82.40 of the Regulations. Paragraph 18 of Count 3 then alleges that, at the time the Respondent performed service on various motor vehicle air conditions as specified in paragraph 7 of the Complaint, Respondent had not submitted the certification required by Section 82.42 of the Regulations. Paragraph 19 of Count 3 next avers that the Respondent's repairing or servicing motor vehicle air conditioners for consideration after January 1, 1993, without submitting the certification required by Section 82.42, constitutes a violation of Section 609 of the CAA.

A careful reading of the above noted language of Count 3 indicates that Count 3 does not contain any allegations that the Respondent is guilty of a violation of Section 609 of the CAA as such for its failure to submit the required certification, since it makes the violation of the CAA dependent on the Respondent's failure to comply with the Regulation. Therefore, Count 3 as

currently framed is not sufficient to apprise the Respondent of the independent statutory violation of Section 609 of the CAA and the Count cannot stand as presently worded. Since the order of July 28, 1994 set out that Count 3 is barred by the PRA insofar as it seeks to levy a civil penalty for violation of the Regulation involved, the ruling to dismiss Count 3 must be upheld. Accordingly, the Complainant's motion for reconsideration is denied.

However, the denial of the motion for reconsideration is without prejudice to the Complainant seeking to amend the Complaint either to reframe Count 3 or to add a new count properly pleading the alleged statutory violation of the CAA. To ensure orderly process in this proceeding, Complainant is directed to file any motion seeking amendment of the Complaint as discussed above, within 30 days of the issuance of this order.

SO ORDERED.

Daniel M. Head
Administrative Law Judge

Dated: December 29, 1994
Washington, DC

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

CERTIFICATE OF SERVICE

I certify that the foregoing Order Ruling on Motion for Reconsideration, dated Dec 29, 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:

Counsel for Complainant:

Charles McPhedran, Esquire
Assistant Regional Counsel
U.S. EPA, Region 3
841 Chestnut Street
Phila. PA 19107

Counsel for Respondent:

William A. Kolibash, Esq.
Phillips, Gardill, Kaiser,
Boos & Altmeyer
61 14th Street
Wheeling, WV 26003

Aurora M. Jennings
Legal Assistant
Office of Administrative
Law Judges

Dated: December 29, 1994
Washington, DC