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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
COMPANIA PETROLERA CARIBE, INC.,)	Docket No. II-
RCRA-UST- 97- 0310)	
)	
Respondent)	

ORDER ON COMPLAINANT'S MOTION
FOR ORDER COMPELLING PRODUCTION OF DOCUMENTS

On December 22, 1998, Complainant filed a motion to compel Respondent to produce by January 19, 1999 all documents that Respondent intends to rely on in support of its claim of inability to pay the penalty proposed in the Complaint, and financial information which may have an impact on Complainant's analysis of Respondent's ability to pay (Motion). In the event that Respondent does not produce the requested documents, Complainant requests an order finding an inference adverse to Respondent as to its ability to pay, and for an order precluding Respondent from later introducing evidence on this point.

The time provided by the Rules of Practice, 40 C.F.R. Part 22, for responding to a motion is fifteen days from the date of service of the motion, including five days where the motion was served by mail. 40 C.F.R. § 22.16(b), 22.07(c). Respondent's response to Complainant's Motion was due on January 6, 1999. No such response has been filed to date. The Rules of Practice provide, at 40 C.F.R. § 22.16(b), that "if no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion." Although the Motion may be granted on the basis that Respondent has waived any objection to the Motion, it will be considered on its merits.

In its prehearing exchange, Respondent submitted documents to support its position that it is unable to pay the proposed penalty. Respondent stated in its prehearing exchange statement (p. 18) that "There is additional information upon which Caribe will rely in support of its inability to pay analysis that is not available as of this date and will be submitted, with the Court's permission, when it becomes available at the end of [1998] and the beginning of [1999]." Respondent explains as follows:

. . . [C]ompliance with the 1998 UST upgrade requirements . . . will be completed by December 23, 1998. Until the completion of the [UST] tanks upgrades, [Respondent] will not know, for purposes of its ability to pay analysis, the total dollar expenditure for the upgrades and the effect of that expenditure on its financial condition. In addition, [Respondent] has committed to spending hundreds of thousands of dollars beginning in January 1999 for necessary UST repairs, removals and replacements. A cost estimate for this expenditure will be available at the beginning of [1999]. Moreover, [Respondent] is in the process of renegotiating several of its supply contracts with its customers, Depending upon the results of these negotiations and the terms of the new contracts, [Respondent's] cash flow beginning January 1999, could be adversely impacted. Finally, the Government of Puerto Rico has considered reinstating cost control regulations on wholesale gasoline distribution beginning January 1999.

Respondent requested permission "to amend its submission of inability to pay data when that additional information becomes available." Respondent's Prehearing Exchange at 19.

Complainant seeks to restrict the time within which Respondent may produce such information, and seeks to compel Respondent to produce certain additional information that may impact Complainant's ability to pay analysis. By letter dated December 17, 1998, Complainant requested Respondent to submit such information voluntarily (Motion to Compel, Appendix 1). Complainant states that it needs the information by January 19, 1999 in order for it to have sufficient time before the hearing, scheduled on March 1, 1999, to review and analyze the information, and evaluate the impact of the information on Respondent's ability to pay. Complainant suggests that it may need to retain one or more additional witnesses to address issues raised in Respondent's submittal.

The criteria for allowing discovery of documents are that such discovery will not in any way unreasonably delay the proceeding, that the information is not otherwise obtainable, and that it has significant probative value. 40 C.F.R. § 22.19(f)(1). The information with which Respondent would amend its prehearing exchange would be in Respondent's possession and thus not otherwise obtainable, and, according to Respondent's prehearing exchange statements, should become available during January 1999, which would not unduly prolong this proceeding. Seeking production of such information, neither party challenges its probative value. The additional information Complainant seeks is a "detailed breakdown of current versus long-term liabilities" for 1992 through 1994, a clarification or reconciliation of 1995 and 1996 "net income after taxes" on tax returns with audited income statements, an explanation of 1996 interest expenses and current debt, 1997 income statements, and timing and amounts of pollution control/UST capital upgrade investments made in 1997 and 1998. This information appears to be probative and not otherwise obtainable, and it will not unduly prolong the proceeding in light of the fact that the hearing is scheduled to begin on March 1, 1999, and production of the information will be required in advance of the hearing.

As to the timing of the production of documents, although Respondent indicates that the information with which it seeks to amend its prehearing exchange would be available in January or the beginning of 1999, it is not clear that it would be available in time for filing on January 19. Complainant believes that it needs six weeks before the hearing to analyze and evaluate the information, but does not explain why such a long period of time is necessary. The Environmental Appeals Board has stated that "in any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of [the] hearing," but did not elaborate on how far in advance of the hearing such records must be produced. *New Waterbury, Ltd.*, 5 EAD 529, 542 (EAB 1994). The Rules of Practice provide that the parties must be allowed "reasonable opportunity to review new evidence." 40 C.F.R. § 22.19(b). Three weeks in advance of the hearing should provide such a "reasonable opportunity." Therefore, Respondent is allowed until February 8, 1999, to submit the documents requested by Complainant. If Complainant cannot complete its ability to pay analysis based upon those documents

in time for the hearing, Complainant may move to reopen the hearing under 40 C.F.R. § 22.28 to submit such analysis.

In the event Respondent fails to produce all of the requested documentation, Complainant requests an order precluding Respondent from later producing evidence as to ability to pay. Such a restriction on Respondent, without an equal restriction on Complainant's right to amend its prehearing exchange, would result in unequal treatment of the parties. Either party may amend its prehearing exchange upon the granting of a motion for leave to do so. The Rules of Practice do not provide a standard for granting such motions, so the presiding judge rules on such motions based upon the grounds stated in the motion and the circumstances of the case, including timeliness of the motion and any prejudice to the opposing party. The undersigned is not inclined to rule in advance of any such motion that it will be denied. Thus, Complainant's request for such an order is denied.

In addition, in the event Respondent fails to produce all of the requested documentation, Complainant requests that an inference be drawn adverse to Respondent with respect to ability to pay. The Rules of Practice provide that, when the information sought is within the control of one of the parties, failure to comply with an order granting discovery may lead to an inference that the information to be discovered would be adverse to the party from whom the information was sought. It would be premature at this point in time to rule that any such adverse inference will be drawn, so Complainant's request is denied. Complainant may renew its request as necessary.

Order

Accordingly, **IT IS ORDERED THAT on or before February 8, 1999**, Respondent shall file the documents requested in Complainant's Motion for Order Compelling Production of Documents.

Susan L. Biro
Chief Administrative Law Judge

Dated: January 13, 1999
Washington , D.C.

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