UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

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SECRETARY OF LABOR,

Complainant,

v.

NITRO ELECTRIC COMPANY,

Respondent.

OSHRC Docket No. 91-3090

ORDER

Commission Judge John H. Frye, III, denied Nitro Electric Company's motion for attorneys' fees under the Equal Access to Justice Act, 5 U.S.C. § 504 ("the EAJA"), because the net worth of Nitro's parent company, Concorp, Inc., exceeded the EAJA's stated amount for a qualifying corporation, *i.e.*, $7,000,000 or less, *see* 5 U.S.C. § 504(b)(1)(B). There is no Commission precedent on the issue of imputing to a subsidiary its parent's net worth, but Federal court precedent provides adequate guidelines, which Judge Frye applied. For the reasons given by him, which we discuss in this decision, we affirm the judge.

The purpose of the EAJA is to assist smaller businesses whose insufficient resources might inhibit them from contesting adverse governmental actions of such federal agencies as the Occupational Safety and Health Administration ("OSHA"), of the United States Department of Labor. *See National Truck Equip. v. Natl. Highway Safety Admin.*, 972 F.2d 669, 673, 674 (9th Cir. 1992); *Unification Church v. INS*, 762 F.2d 1077, 1082 (D.C. Cir. 1985). Accordingly, when a "small business" seeks recovery of attorneys' fees, it may be appropriate and necessary for a judge to ensure that it is the "real party in interest." *Unification Church v. INS*, 762 F.2d at 1082. The Secretary cites *Brock v. Gretna Machine and Ironworks, Inc.*, 1989 U.S. Dist. Lexis 280 (E.D. La. 1989) and *U.S.A. v. Lakeshore Termi-*

nal and Pipeline Co., 639 F.Supp. 958 (E.D. Mich. 1988) for the appropriate factors to be evaluated in applying the eligibility requirements.

Applying these factors to Nitro's case, Judge Frye made the following findings:

(1) Nitro points out that it is the entity against which action was taken.

(2) Nitro also points out that it is the entity with which the government dealt.

(3) The parties agree that Nitro is a wholly-owned subsidiary of Concorp and was a division of another subsidiary of Concorp, Union Boiler, until it was separately incorporated in 1991.

(4) Nitro maintains that it is autonomous . . . . The Secretary argues that Nitro is not autonomous . . . .

(5) The parties agree that the president of Concorp, Randall S. McDavid, is chairman and president of Union Boiler; Marion Ferguson, the president of Nitro, converses with Mr. McDavid on a daily basis. David Baxter, Concorp's in-house counsel, serves as secretary of Nitro and Union Boiler. Nitro emphasizes that the presidents of Concorp and Nitro are different individuals.

(6) The Secretary points out that Concorp performs various administrative, accounting, insurance, and auditing functions for Nitro. Nitro is included in Concorp's audited consolidated financial statement and consolidated tax return, and Concorp provides insurance, bonding, and a profit-sharing plan for Nitro. Union Boiler provides billing, bookkeeping, payroll, and other administrative services to Nitro, as well as leasing it office space. Union Boiler also maintains a safety department which is used by all Concorp subsidiaries, including Nitro. Nitro pays for the administrative services it receives. Nitro's accounts are maintained in the same bank as Concorp's. Concorp will advance cash to Nitro if necessary.

While Nitro does not appear to differ with these factual statements, it emphasizes that it is financially responsible for its entire operation. It also points out that it occupies separate office space, maintains an independent telephone system and

> office equipment, utilizes its own purchasing agent, and conducts it own labor negotiations.
>
> (7) The parties agree that the attorney for Nitro in these proceedings also represents Concorp in certain matters.
>
> (8) Nitro notes that it paid the attorney[s'] fees incurred in this case. Moreover, Nitro argues that it is eligible in view of the fact that it was the party inspected and cited by OSHA, that it prevailed, and that it paid its own attorneys' fees. Nitro states that "[s]urely a corporation like Nitro that is accountable for its own attorney[s'] fees would have been deterred by the prospect of defending this action and incurring legal fees and expenses that exceeded one-fourth of Nitro's net worth and nearly one-half of Nitro's 1991 income."

From these facts, the judge further found that, on the one hand, "Nitro is operated in a financially independent manner from Concorp," that Nitro "is expected to meet its own expenses and generate a profit for its owners," and that "the legal fees incurred in the defense of these [OSHA] citations constitute a significant burden" to Nitro. "If Congress intended to relieve small entities of such a burden in enacting [the] EAJA," the judge went on to note, "then it would be appropriate to consider Nitro's net worth separately from the assets of its related companies."

> If, on the other hand, Congress intended to benefit small entities which lack sufficient resources to mount a defense to charges brought by the government independently of the impact which that defense might have on the entity's balance sheet, it would not be appropriate to consider Nitro's net worth separately from the assets of its related companies. Here, it appears that Concorp had the financial strength to and was available to advance the necessary funds to mount a defense. Under this view, because the necessary resources were available to Nitro through its related companies, it would not fulfill Congress' purpose in enacting [the] EAJA to make an award to Nitro despite the fact that the impact on Nitro's balance sheet might be prohibitive.

We agree with the judge's reasoning. Nitro's relationship to Concorp, particularly Concorp's availability to advance to Nitro the funds required to mount a defense, demonstrates that Nitro is not the type of entity that the EAJA was enacted to compensate.

See Unification Church, at 1082. Accordingly, we affirm the decision of the judge. SO ORDERED.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: February 9, 1994

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SECRETARY OF LABOR, Complainant, v. NITRO ELECTRIC COMPANY, Respondent.	Docket No. 91-3090

NOTICE OF COMMISSION DECISION

The attached order by the Occupational Safety and Health Review Commission was issued on February 9, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

February 9, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-3090

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
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SECRETARY OF LABOR
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Respondent.

OSHRC DOCKET
NO. 91-3090

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 26, 1993. The decision of the Judge will become a final order of the Commission on September 27, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before September 15, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: August 26, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-3090

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
Complainant,	:	
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NITRO ELECTRIC CO.,	:	
Respondent.	:	

Appearances:

John M. Strawn
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pa.

For the Complainant

Ricklin Brown
Elizabeth D. Harter
Bowles Rice McDavid Graff & Love
Charleston, W.Va.

For the Respondent

Before: Administrative Law Judge John H Frye, III

DECISION AND ORDER

Respondent has filed an application for attorney's fees under the Equal Access to Justice Act (EAJA). The Secretary opposes the request on three grounds: first, that Respondent does not qualify for relief under the Act because, when Respondent's assets are consolidated with those of its parent, it does not meet the definition of a party set forth in 5 U.S.C. § 504(b)(1)(B);[1] second, that there was substantial justification for the Secretary

[1]This section defines party as a corporation with a net worth of $7,000,000 or less and 500 or less employees.

to bring the citations in question; and third, the attorneys fees and costs detailed by Respondent exceed allowable limits.

Eligibility under EAJA

Respondent, Nitro Electric Company, is a wholly-owned subsidiary of Concorp, Inc. There is no dispute that Nitro meets the standard of § 504(b)(1)(B) unless its assets are considered together with those of its parent. In that event, the parties agree that its net worth would be too great for it to qualify as a party under EAJA and hence it would be ineligible for an award of fees.

The Secretary argues that the EAJA was enacted to protect those entities whose lack of resources might inhibit them from contesting adverse governmental action. Consequently, in the Secretary's view, it is appropriate to aggregate the resources of Nitro and its affiliated companies in order to determine whether Nitro falls within the class protected by EAJA. Citing *National Truck Equipment v. National Highway Safety Administration*, 972 F.2d 669, 673 (9th Cir. 1992) and *Unification Church v. INS*, 762 F.2d 1077, 1082 (D.C. Cir. 1985) the Secretary states

> [t]he test used by the courts in determining whether to aggregate assets is not the traditional piercing of the corporate veil analysis nor does it require an examination of state corporate law. The purpose is not to seek individual lability of shareholders but rather to see if the corporations' interests are sufficiently aligned or if the corporations are not sufficiently independent. ... [T]he intent behind EAJA was to protect smaller businesses from the costs of litigation if they did not have sufficient resources to vindicate their rights.

See Secretary's Answer, p.6.

The Secretary cites *Brock v. Gretna Machine and Ironworks, Inc.*, 1989 U.S. Dist. Lexis 280 (E.D. La. 1989) and *U.S.A. v. Lakeshore Terminal and Pipeline Co.*, 639 F.Supp. 958 (E.D. Mich. 1988) for the appropriate factors to be evaluated in applying the eligibility requirements. These factors and the parties' application of them to Nitro are as follows.

1. Nitro points out that it is the entity against which action was taken.

2. Nitro also points out that it is the entity with which the government dealt.

3. The parties agree that Nitro is a wholly owned subsidiary of Concorp and was a division of another subsidiary of Concorp, Union Boiler, until it was separately incorporated in 1991.

4. Nitro maintains that it is autonomous, and points to the other factors. The Secretary, maintaining that Nitro is not autonomous, also points to the other factors.

5. The parties agree that the president of Concorp, Randall S. McDavid, is chairman of Nitro and chairman and president of Union Boiler; Marion Ferguson, the president of Nitro, converses with Mr. McDavid on a daily basis. David Baxter, Concorp's in-house counsel, serves as secretary of Nitro and Union Boiler. Nitro emphasizes that the presidents of Concorp and Nitro are different individuals.

6. The Secretary points out that Concorp performs various administrative, accounting, insurance, and auditing functions for Nitro. Nitro is included in Concorp's audited consolidated financial statement and consolidated tax return, and Concorp provides insurance, bonding, and a profit sharing plan for Nitro. Union Boiler provides billing, bookkeeping, payroll, and other administrative services to Nitro, as well as leasing it office space. Union Boiler also maintains a safety department which is utilized by all Concorp subsidiaries, including Nitro. Nitro pays for the administrative services it receives. Nitro's accounts are maintained in the same bank as Concorp's. Concorp will advance cash to Nitro if necessary.

While Nitro does not appear to differ with these factual statements, it emphasizes that it is financially responsible for its entire operation. It also points out that it occupies separate office space, maintains an independent telephone system and office equipment, utilizes its own purchasing agent, and conducts its own labor negotiations.

7. The parties agree that the attorney for Nitro in these proceedings also represents Concorp in certain matters.

8. Nitro notes that it paid the attorney fees incurred in this case. Moreover, Nitro argues that it is eligible in view of the fact that it was the party inspected and cited by OSHA, that it prevailed, and that it paid its own attorneys' fees. Nitro states that

> Surely a corporation like Nitro that is accountable for its own attorney's fees would have been deterred by the prospect of defending this action and incurring legal fees and expenses that exceeded one-fourth of Nitro's net worth and were nearly one-half of Nitro's 1991 income.[2]

It appears from the above and from the depositions taken by the Secretary that Nitro is operated in a financially independent manner from Concorp. Thus Nitro is expected to meet its own expenses and generate a profit for its owners. Viewed in the context of the net worth and profitability of Nitro, the legal fees incurred in the defense of these citations constitute a significant burden. If Congress intended to relieve small entities of such a burden in enacting EAJA, then it would be appropriate to consider Nitro's net worth separately from the assets of its related companies. In that circumstance, the impact of the

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[2]See Nitro's Reply, pp. 3, 6.

cost of the defense would be the same regardless of the financial strength of the related companies.

If, on the other hand, Congress intended to benefit small entities which lack sufficient resources to mount a defense to charges brought by the government independently of the impact which that defense might have on the entity's balance sheet, it would not be appropriate to consider Nitro's net worth separately from the assets of its related companies. Here, it appears that Concorp had the financial strength to and was available to advance the necessary funds to mount a defense. Under this view, because the necessary resources were available to Nitro through its related companies, it would not fulfill Congress' purpose in enacting EAJA to make an award to Nitro despite the fact that the impact on Nitro's balance sheet might be prohibitive.

The second view was adopted by Judge Tenney in his decision in *Williams Enterprises, Inc.*, 1986 OSAHRC Lexis 17 (No. 85-1415, 1986). In that decision, Judge Tenney noted that an essential purpose of EAJA was to make litigation resources available to small businesses which were targeted precisely because they lacked sufficient resources.

Nitro correctly points out that Judge Tenney's decision is not binding in this case and that the Commission indicated that the question of aggregation should be decided on a case-by-case basis. However, I find that Judge Tenney's view of the purpose of EAJA is persuasive and conclude that an award of attorney's fees and expenses to Nitro would not be in keeping with that purpose. In light of this conclusion, it is not necessary to address

the questions of whether the Secretary's position was substantially justified and whether the fees and expenses submitted are reasonable. Nitro's application for an EAJA award is denied.

It is so ORDERED.

JOHN H FRYE, III
Judge, OSHRC

Dated: AUG 24 1993
Washington, D.C.