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Funding Public Participation in Department of Energy Proceedings

A Report Prepared by the Energy Policy Task Force
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EXECUTIVE SUMMARY

I. Introduction

This is an Executive Summary of a report by the Energy Policy Task Force (EPTF) on paid participation in DOE proceedings.

President Carter's recent Executive Order 12044 directed all agencies to ensure that opportunity exists for early public participation in the development of agency regulations.

In implementing E.O. 12044, DOE has published its proposals, noting that:

> "Options will be developed to provide DOE funding to pay the fees and expenses of lawyers or other experts who participate in DOE regulatory and policy development on behalf of consumers or other public interests."

The purpose of EPTF's report is to assist DOE's Office of Consumer Affairs design a comprehensive paid participation program in DOE's regulatory actions as well as in its policy development, i.e., policy analysis, R&D decisions and budgetary concerns. The report does not deal with the larger aspects of public participation (citizen educational and informational services, advisory councils)—only with financing the direct participation of outside groups and individuals in DOE's regulatory and policy decision-making processes.

In conducting its study, the EPTF report team contacted 146 persons, including most of the top DOE office heads and officials, knowledgeable paid participation experts in other federal agencies, and over 80 consumer groups and citizen organizations at the local, state and federal levels who have had experience with agency paid participation programs. The report team also examined the programs of other federal agencies and the voluminous literature on the subject.

II. Federal Paid Participation Programs

The report analyzes the two federal paid participation programs which have been in existence for more than one year. These are the Federal Trade Commission's (FTC), which has granted over $1.2 million to 38 organizations in 16 rulemakings during the last three years and the National Highway Traffic Safety Administration's (NHTSA) in DOT, which has obligated about $80,000 to 21 applicants in five rulemaking proceedings. The report also briefly discusses the paid participation programs of the National Oceanic and Atmospheric Administration (NOAA), launched on April 26, 1978; the Consumer Product Safety Commission (CPSC) which began May 31, 1978; the Environmental Protection Agency under the Toxic Substances Control Act (TOSCA); as well as the provisions of the Civil Aeronautics Board's (CAB) proposed rules; Senate Bill 270 ("Paid Participation in Federal Agency Programs"); and those paid participation efforts of U.S.D.A., FCC and others.

While most of these programs limit paid participation to agency rulemaking proceedings, the more recent ones in NOAA and CPSC also cover any proceedings in which there is a public hearing by "regulation, rule or agency practice." And as noted above, DOE's implementation of E.O. 12044 extends paid participation concepts to both regulatory actions and "policy development."

III. DOE Proceedings

The report next discusses the three instances of paid participation which DOE has authorized in its own proceedings to date, as well as DOE's Section 205 program under which it provides $2 million to state consumer services offices to assist consumer groups to participate in the proceedings of state public utility commissions.

In an overview of the key DOE offices (ERA, EIA, EV, CS, IR, IA, RA, ET, ER, DP, PE), the report identifies four major decision-making processes suitable for paid participation. These are regulation; policy analysis; outlay programs, including R&D and commercialization; and budgetary concerns (PPB). The essential consideration for determining which types of proceedings should be open to paid participation is not the legal form of the proceeding (rulemaking or adjudication), but rather the nature and importance to the public of the substantive issues involved in the decision to be reached.

Few agencies deal with matters of greater public moment than DOE. In selecting the kinds of proceedings for paid participation the report asks DOE to consider:

a. The nature and importance of the underlying issues and the extent of their impact on particular geographic regions or the public at large;

b. The precedent-setting effect of the decision on agency policies and new directions;

c. The advisability of involving the public at an early stage in order to enlist long-term broad public backing and confidence;

d. The desirability of securing representation of a fair balance of views in proceedings which already are being heavily lobbied by other interest groups or influenced by "institutional" staff concerns;

e. The availability of funds and potential for delay; and

f. The factors used by DOE in determining the "significance" of its regulatory actions.

In DOE's regulatory-type actions, there are at least two improvements which can be made to enhance public participation: first, public comment should be funded on DOE's semiannual agenda of "significant" regulatory actions; and second, public petitions leading to new DOE rulemaking proceedings also should be funded.

In policy analysis, R&D decisions and PPB concerns, the report recommends that DOE develop a more structured and open format for decision-making in these functional areas so as to allow for early notice and specific opportunities for public comment. We suggest publication of a "significant" policy decisions agenda and use of RFP-like competitive awards to consumer and citizen organizations for studies, reports and comment on agency drafts at key stages in these informal decision-making processes.

IV. Office of Paid Participation (OPP)

The report recommends creation of an independent, centralized OPP to administer a paid participation program on a Department-wide basis. OPP would be responsible for information, dissemination of materials, outreach, technical assistance, processing and evaluation of applications for funding (with appropriate comment and review by DOE technical offices concerned) and for actual funding decisions. It would also work with each DOE program office to identify paid participation opportunities in the decision-making processes of each office.

OPP should have a staff of approximately 8-10 persons with an administrative budget of around $300,000. It would be located as a separate unit in the Office of the DOE Secretary or Deputy Secretary (preferably) or within the Office of the Assistant Secretary for IR. In terms of independence, centralization, staffing, budget and decision-making, these recommendations follow the practice of most of the other federal agencies' paid participation programs, and also take account of the greater import, diversity and complexity of DOE's decision-making.

V. Resource Commitment and Priorities

The report suggests a Department-wide paid participation program funding level of between $5-7.5 million, again based on comparative figures available from other federal agencies. This is calculated on the hypothesis that each of 11 key DOE offices would open five to six proceedings for public participation and assign $100,000 to $150,000 for each. The total would amount to less than one-tenth of one percent of DOE's budget.

Ultimately, the agency, itself, will have to decide which particular proceedings should be open to paid participation. The report offers certain guidelines in making this decision. First, rulemaking actions, as well as policy analysis, R&D decisions and PPB concerns, should be equally considered based upon the nature, importance and impact of the substantive issues being decided. Second, DOE already has developed a process under E.O. 12044 for determining which of its regulatory actions are "significant" and ought to be included in its seminannual agenda published for public comment. This process should be extended into the policy development area as well. Third, public commentary on the semiannual agenda of significant issues and public petitions for initiating new proceedings will give DOE a good indication of which issues the public considers most important.

In order to assist the agency in determining its priorities for paid participation, the report develops the notion of a participation statement process (PSP) which institutionalizes participation concerns within each DOE office. PSP is the responsibility of OPP and requires that each office, with the assistance of OPP, develop a semiannual agenda of important decisions which that office would be considering in the forthcoming months.

The agenda (or participation statement) would give a succinct summary of the problem, a description of the major possible alternate solutions and an analysis of the economic and environmental consequences for consumers of each alternative. It also would describe the general timetable for making each decision and suggest appropriate opportunities in the decision-making process where public comment might be especially helpful.

Outside organizations could apply to OPP for limited funding of their comments on the agenda. Groups whose petitions successfully resulted in initiation of new proceedings also could be reimbursed. Once these comments and petitions had been analyzed by OPP, with technical assistance

from the DOE offices involved, the Director of OPP and the Administrator of each DOE office would jointly decide which particular proceedings would be open to paid participation. The actual decision on which applicant to fund and the amount of the award in each particular proceeding would be the responsibility of OPP.

Because each key DOE office has its own budget and will be in the best position to advise OPP on proceedings most suitable for paid participation, the report recommends that each office contribute a share of its budget to the total paid participation program. The assistant secretaries and office directors interviewed favored this kind of separate earmark rather than seeking an overall line-item appropriation for DOE's total paid participation program. However, each office head also would continue to be able to supplement earmarked paid participation funds with his or her own program monies, if, for example, he wanted to contract with outside groups for studies, reports and policy analyses as recommended above.

VI. Implementation Issues

The report then analyzes in detail the important administrative issues with respect to implementing any program of paid participation. It recommends:

1. Any applicant should be eligible for funding if it represents a particular interest or point of view that can reasonably be expected to contribute substantially to a full and fair determination of the issues involved in the proceeding, and does not have sufficient resources available to participate effectively in the proceeding in the absence of compensation. In reaching this determination, DOE should not make a judgment as to the value of an applicant's commitment of its own resources to other activities, but only whether the applicant has resources then available to participate in the instant proceeding.

2. Adoption of selection criteria which, while stressing the applicant's experience and expertise, also ensures that groups from all parts of the country benefit, that undue emphasis not be placed on building up a Washington constituency, and that repeated awards to the same applicant be avoided.

3. No contributions or matching share should be required from applicants who meet the eligibility tests noted in paragraph 1, above.

4. All costs of participation actually incurred should be reimbursed, including costs of preparing successful applications and petitions for initiation of new agency proceedings.

5. Compensation for applicant staff and outside consultants, experts and attorneys should be set at reasonable levels, taking into account prevailing market rates for similar services and comparable rates paid by the agency under personal service and procurement contracts.

6. Compensation funds should be awarded in time to enable applicants to adequately prepare their cases and that advance payments should be authorized.

7. Consumer groups and outside organizations should participate in the design and conduct of an evaluation of DOE's paid participation program.

These recommendations draw on the paid participation practices of other federal agency programs and the suggestions of the vast majority of persons and consumer organizations contacted by the report team.

I. INTRODUCTION

The expanding impact of energy related decisions on the daily lives of citizens and on their economic, physical, psychological, and environmental well-being has led to increased demands for public participation in the resolution and application of those concerns. In a vigorous democracy these demands often become translated into citizen group action aimed at influencing governmental decision-making in the energy field. This report examines one aspect of this phenomenon: the policy issues surrounding the Department of Energy's (DOE) provision of financial assistance to persons and organizations which seek to participate more fully in DOE's decision-making process.

The public's rising concern with decision-making in the energy field is an extension of the familiar pattern of citizen involvement launched by the civil rights and social action reforms of the 1960s. Today, the trend toward greater public participation has spread to the areas of law, education, health, the environment, business, and to institutional change in general.

The notion of public participation in governmental decision-making is deeply imbedded in our democratic process. It extends from the traditional New England town meeting to Presidential task forces and commissions. Congress and state legislatures historically have sought a wide range of opinion from their constituents through correspondence, informal meetings, and legislative-type hearings. Executive departments and agencies in their rulemaking and regulatory proceedings also have invited the views of the interested public.

Yet, as many have pointed out, the "interested public" which has participated most vigorously in governmental processes is usually dominated by business, industry, unions, and professional and trade associations with sufficient private resources to make their participation meaningful. There is a wide gap between the theoretical right of citizens to participate in decision-making and the financial means with which to make that participation effective. As the authors of S.270, "Public Participation in Federal Agency Proceedings," note:

> "In practice, access to the administrative process is frequently an exclusive function of a person's ability to meet the high costs of participation in Government proceedings."[1]

A. Background

The Carter Administration has repeatedly stressed the need for citizen participation in governmental decision-making. Most recently, Executive Order 12044 directed all agencies to ensure that opportunity exists for early public participation in the development of agency regulations.[2]

In implementing E.O. 12044, DOE has published proposals, noting that:

> "Options will be developed to provide DOE funding to pay the fees and expenses of lawyers or other experts who participate in DOE regulatory and policy development on behalf of consumers or other public interests."[3]

To help carry out its public participation responsibilities, DOE created an Office of Consumer Affairs located within the Office of Assistant Secretary for Intergovernmental and Institutional Relations. Also, over the past year, DOE and its predecessor agency, the Federal Energy Administration, have awarded compensation to citizen organizations for the purpose of ensuring that consumer interests were adequately represented in certain DOE proceedings. However, although awards were given on an ad hoc basis, no overall DOE program yet exists for compensating the public in appearances before the Agency.

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[1] "Public Participation in Federal Agency Proceedings Act of 1978," S.270 (hereafter cited as S.270), 95th Cong., 2d Sess. §558 a.(a)(1) (1978). S.270 is attached as Appendix D.

[2] Executive Order No. 12044, 43 Fed. Reg. 12661 (1978) (hereafter cited as E.O. 12044)

[3] DOE, Proposals for Implementing E.O. 12044, Improving Energy Regulations, 43 Fed. Reg. 18634, 18636 (1978). Indeed, the Department of Energy Organization Act specifies that one of the purposes of the act is " . . . to provide for, encourage, and assist public participation in the development and enforcement of national energy programs . . . ". Department of Energy Organization Act §102, 42 U.S.C.A. §7112 (15) (1977).

In order to develop a comprehensive and structured program for paid public participation, DOE let the instant contract to the Energy Policy Task Force.[4]

B. Purpose

The purpose of this report is to assist DOE develop a comprehensive paid public participation program. There are many facets to public participation. They range from creating citizen educational and information services to establishing advisory councils to financing actual intervention in formal agency proceedings and informal decision-making.

This report concentrates only on paid participation in the decision-making process. It does not deal with the broader spectrum of public participation such as forums, conferences, and workshops, or with advisory councils, peer review panels, or in-house public advisor or public counsel offices.

The report is aimed at the issues involved in financing direct public participation for persons and organizations who seek to participate in DOE's decision-making proceedings. We refer to this throughout the report simply as paid participation.

We recognize that much of the existing agency precedent for the paid participation program developed later in this report stems from compensating participants in formal agency rulemakings or adjudications. While this body of precedent will be utilized in making recommendations to DOE, we wish to make it clear that the program recommended herein is much more expansive and designed to cover not only rulemakings and adjudications but also significant informal policy-making and decisions in research and development (R&D)—two of DOE's most critical functions.

Many of the principles and processes applicable to paid participation in rulemakings and adjudications are equally suitable for participation in policy-making and R&D decisions. However, in the case of informal policy-making and R&D decisions, two additional considerations must be kept in mind.

First, since the decision-making process is now informal, it will have to become more structured and more open so that citizens can receive early notice and concrete opportunities can be presented for comment and preparation of views on the substantive issues involved.

Second, rulemaking and adjudications are evidentiary-type hearings often requiring expert witnesses and attorneys in a limited time-frame. On the other hand, informal policy-making and R&D decisions may argue for a different kind of presentation by outside groups—less legalistic and more dependent upon long-term use of consultants, perhaps in a report form or study format rather than specific testimony. This may in turn necessitate greater reliance on multi-year contracts with outside organizations or independent centers.

C. Contents

Following the Introduction, Chapter II briefly describes the paid participation programs of other federal agencies and the types of proceedings for which participants are funded. It also analyzes the two principal programs which have operated for over one year: the first administered by the Federal Trade Commission (FTC) and the other by the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation (DOT).

Chapter III then examines DOE's proceedings with an individual look at each of its main component administrations and set forth a rationale for public participation in each. Chapter IV develops suggestions for organizing, staffing and administering a DOE Office of Paid Participation, and Chapter V examines the question of DOE's commitment of resources and adoption of a suggested public participation planning or statement process (PSP).

Chapter VI then discusses the administrative issues associated with implementing a program of paid participation. It considers such questions as eligibility of applicants, criteria for selection, financial need, levels of compensation, expenditure responsibility and evaluation.

D. Matters Not Addressed

As noted above, the report concentrates only on paid public participation. It does not deal with providing funds to citizen organizations for their own scientific or technical research. Presumably, such organizations are already eligible for DOE's research grant programs. This is not to eliminate consideration of necessary funds for analyses and studies to be undertaken as part of a compensated participation. Rather, it means that scientific and technical research, done for its own sake and not for the sake of a public participation effort, is already an activity for which citizen organizations are eligible under other DOE offices.

[4]See Appendix A for a list of members of the Energy Policy Task Force.

Moreover, since the report deals only with paid participation within DOE, it does not cover provision of funds for lobbying purposes or judicial review of agency actions. Lastly, because of the semi-autonomous nature of the Federal Energy Regulatory Commission (FERC) and that agency's own development of a paid participation program, we exclude FERC's proceedings from this Report.

E. Methodology

The principal authors of this report are Ellen Berman, the Director of the Energy Policy Task Force, and Tersh Boasberg and James L. Feldesman, partners in the Washington Law firm of Boasberg, Hewes, Finkelstein and Klores. John Fitzgerald, Doug Hoffman and Dave Sampson assisted in the gathering of material, conduct of interviews, and analysis of data. Brief biographies of those participating in the study may be found in Appendix B.

Because the contract was not signed until April 26, 1978, we had less than two months to complete the final draft. However, during the course of this brief period we were able to interview and make contact with 146 persons. A list of those persons contacted can be found in Appendix C.

Our research for this report was concentrated in four areas. First, within DOE we interviewed Assistant and Deputy Assistant Secretaries and their staffs concerning DOE processes and their views about how a paid participation program should be developed. We also reviewed the paid participation initiatives already taken by DOE and its predecessor agencies.

The second area of research involved both operating and proposed paid participation programs of other federal agencies. We analyzed their procedures and met with agency officials and consumer groups to determine which aspects of these programs appeared to operate well, which were deficient, and what changes might improve them.

Our third area of concentration was on outside organizations. In order to develop the full spectrum of consumer and citizen group views, we mailed out an issues paper and brief comment form. This was followed up by telephone contact with nearly 50 persons knowledgeable about public policy and citizen action programs who were able to develop their suggestions much more thoroughly in a long phone conversation.

Furthermore, there were two mini-conferences in Washington during the course of the study. The first was held with representatives of citizen energy organizations and the second with delegates from consumer groups. There was also a meeting and helpful exchange with the full DOE Consumer Affairs Advisory Committee. A list of persons attending these half-day conferences and the Consumer Affairs Advisory Committee meeting is noted at the end of Appendix C. In this fashion, we were able to generate detailed responses from scores of energy and consumer organizations.

Lastly, we examined numerous statutes and Congressional initiatives, judicial decisions, and commentaries discussing paid participation in the administrative process.

Obviously, the personal investigator bias of the report team members could not be totally eliminated. Further, the short five-week data collection phase forced the investigators to rely heavily on their own expertise in the subject matter. Therefore, we have used extensive footnoting and appendices to allow readers to make their own judgments on the validity of the data selected.

We also would be remiss if we did not publicly acknowledge a special debt of thanks to those representatives of consumer groups, citizen organizations and government agencies interviewed during the course of our Report. Many were extremely busy people who could ill afford our lengthy interruption. Without exception, however, they contributed generously of their time, their insights and their experience.

We received excellent cooperation from DOE in scheduling and arranging for interviews of top-level officials and in making information available to us. Moreover, both our program officer, Jerry Penno, and the Director of DOE's Office of Consumer Affairs, Tina Hobson, have aided us immeasurably. Additionally, Fred Goldberg of the Office of Consumer Affairs has worked overtime with us on a daily basis. This study could not have been completed in such a short time without their help, guidance and timely suggestions.

II. FEDERAL PAID PARTICIPATION PROGRAMS

There is a good deal of literature on the background of government financed participation programs.[1] Professor Gellhorn, writing in the *Yale Law Journal,* summarizes as well as anyone the rationale for financing public participation:

> "The demand for broadened public participation in governmental decision making rests on the belief that government, like all other institutions, rarely responds to interests not represented in its deliberations. An administrative agency is usually exposed only to the views of its staff, whose position necessarily blends a number of discrete public interests, and of private persons with a clear financial stake in the proceeding. The emergence of individuals and groups willing to assist administrative agencies in identifying interests deserving protection, in producing relevant evidence and argument suggesting appropriate action, and in closing the gap between the agencies and their ultimate constituents presents an opportunity to improve the administrative process."[2]

A. Paid Participation Programs: An Overview

There were no paid public participation programs within the federal government prior to 1975. Since that date, paid participation has been authorized both by specific legislation and by agencies upon their own initiative.

1. Legislation

a. FTC

The FTC, under provisions of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, was the first federal agency to provide direct compensation for public participation in agency proceedings. Funding is limited to FTC rulemakings. As of March 1, 1978, FTC had obligated over $1,250,000 for paid participation in this program. The program will be discussed in detail in Section B, below.

b. TOSCA

The other major paid participation program authorized by specific legislation is the Environmental Protection Agency's (EPA) effort under the Toxic Substances Control Act of 1976.[3] This act provides compensation for reasonable attorneys fees, expert witnesses fees and other costs of participation in rulemaking proceedings, following criteria similar to that used by the FTC. EPA has issued temporary rules for the program.[4] However, EPA is providing funding only for the PCB rulemaking as of now. No funds have as yet been awarded.

c. S.270

On May 24, 1978, the Administrative Practice and Procedure Subcommittee of the Senate Committee on the Judiciary reported out S.270, entitled, "Public Participation in Federal Agency Proceedings Act of 1978". This bill, formerly known as S.2715, has had a number of hearings which provide a rich background on the subject of paid participation.[5] The bill authorizes all federal agencies to provide financing for any person in a variety of agency proceedings, including rulemakings, ratemakings, licensings, adjudications or "any other agency process in which there may be public participation pursuant to statute, regulation or agency practice . . ."[6]

A person is eligible to receive financing if such person is:

> (1) ". . . an effective representative of an interest the representation of which contributes or can be reasonably expected to contribute substantially to a fair determination of the proceeding . . ."
>
> and

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[1]For a disussion of paid participation, *see generally,* Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law In America* (Washington, D.C., 1976); T. Boasberg, "Report to the Nuclear Regulatory Commission", *Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings,* NUREG-75/071 (July 1975) (hereafter cited as Boasberg, NRC Report); T. Boasberg, "Report to the National Science Foundation", *Implications of NSF Assistance to Nonprofit Citizen Organizations,* No. PB266565/AS (February 1977) (hereafter cited as Boasberg, NSF Study); Rossmann, "Public Participation in the California Energy Resources, Conservation, and Development Commission: The Role of Administrative Advisor and the Funding of Public Participants" (Sept. 1975); Note, *Federal Agency Assistance to Impecunious Intervenors,* 88 Harv. L. Rev. 1815 (1975); Cramton, *The Why, Where, and How of Broadened Public Participation in the Administrative Process,* 60 Geo. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings,* 81 Yale L.J. 359 (1972) (hereafter cited as Gellhorn).

[2]Gellhorn, *supra,* II n. 1, at 403.

[3]Toxic Substances Control Act, 15 U.S.C.A. §2601, *et seq.* (1976); compensation authority is provided in §6(c)(4) of the Act, 15 U.S.C.A. §2605(c)(4).

[4]42 Fed. Reg. 60911 (Nov. 1977) (hereafter cited as TOSCA Rules). TOSCA Rules are attached as Appendix E.

[5]*Hearings on S.2715 before the Comm. on the Judiciary, Subcomm. on Administrative Practice and Procedure,* 94th Cong., 2d Sess. (1976); *Hearings on S.2715 before the Comm. on Government Operations,* 94th Cong., 2d Sess. (1976); *Hearings on S.270 before the Comm. on the Judiciary, Subcomm. on Administrative Practice and Procedure,* 95th Cong., 1st Sess. (1977) (hereafter referred to as S.270 and S.2715 Hearings).

[6]S.270, *supra,* I n. 1, at §558(a)(2)(b)(2).

(2) " . . . the economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding . . ."

or

" . . . the person does not have sufficient resources available to participate effectively in the proceeding in the absence of an award."[7]

The bill then goes on to describe other aspects of paid participation and sets forth recoverable costs in a liberal fashion.

2. Agency Initiatives

A number of federal agencies including DOE have decided to launch paid participation programs on their own initiative without waiting for specific legislative authority. A recent advisory opinion by the Department of Justice notes that each federal agency is required to interpret its own organic statute and any other relevant statutory provisions to determine whether Congress has implicitly or explicitly authorized paid participation.[8] DOE's previous awards are discussed in Chapter III, below. Here we take a look at what other agencies have done in order to set the DOE chapter in perspective.

a. NHTSA

Since January 13, 1977, the National Highway Traffic Safety Administration (NHTSA) of DOT has carried out a demonstration program to provide financial assistance to certain participants in NHTSA's administrative proceedings. Since this is the other federal program which has been operating for longer than a year, it is analyzed in detail in Sec. B., below.

b. CPSC

The Consumer Product Safety Commission (CPSC), on May 31, 1978, launched an extensive paid participation program on its own initiative.[9] This program has been in the process of development since 1977 when CPSC unanimously approved the creation of an Office of Public Participation (OPP) within the Commission. OPP provides funding for public participation in the agency's proceedings, supervises the review process, and participates in the final decision on all applications. It also provides potential applicants with technical assistance in filling out applications for funding and identifies interested citizen oganizations and encourages them to participate in the agency's proceedings. No awards have as yet been made.

CPSC's program is modeled on the FTC financing project discussed below and is quite broad in its application. It covers most proceedings within the Commission, important policy determinations as well as rulemakings and other more formal proceedings for which hearings are already mandated.

In compensating participants, CPSC pays for actual costs which have been authorized and incurred. Allowable costs are determined on a standard of reasonableness. Generally, the Commission considers market rates and rates normally paid by the Commission for comparable goods and services as appropriate. The compensation extends to salaries of participants or employees of groups participating, consultant fees and payments for experts, contracted services and attorneys, transportation costs, travel related costs, and other reasonable costs such as document reproduction, postage, and baby sitting.

c. CAB

The Civil Aeronautics Boad (CAB), on April 4, 1978, issued a notice of proposed rulemaking indicating its intent to establish a detailed program of paid participation in CAB proceedings.[10] In extending its program to practically all of its procedings, the CAB noted:

"We propose to consider applications for compensation in any type of proceeding."[11]

Eligibility for the program is based on the same general criteria contained in S.270 and in the FTC's program. Generally speaking, compensation would cover all reasonable services and costs incurred in the participation. While compensation is based on prevailing market rates for services, the CAB proposes a compensation ceiling no greater than salaries paid by the Board for comparable services.

The paid participation program would be administered by an "independent" Board consisting of the Managing Director, the Director of the Office of Economic Analysis and the General Counsel or

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[7] *Id.*, at §558(a)(2)(d).

[8] Letter from John M. Harmon, Assistant Attorney General, U.S. Department of Justice, to Linda Heller Kamm, Esq., General Counsel, DOT, March 1, 1978.

[9] Consumer Product Safety Commission Interim Regulations, 43 Fed. Reg. 23560 (May 1978) (hereafter cited as CPSC Interim Regs). CPSC Interim Regs are attached as Appendix F.

[10] Civil Aeronautics Board Proposed Rules, 43 Fed. Reg. 14044 (April 1978) (to be codified in 14 C.F.R. 304) (hereafter cited as CAB proposed Regs). CAB Proposed Regs are attached as Appendix G.

[11] CAB Proposed Regs, 14047.

their delegates. However, when any of the above persons is also a participant in the substantive proceeding at issue, then that member would delegate his position to a person who was not or would not become involved in such proceeding.

Deadline for comments on the CAB's proposed plan was June 5, 1978.

d. NOAA

In launching its paid participation program on April 26, 1978,[12] the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce, noted that:

> "NOAA . . . perceives a real danager that, in the absence of a financial assistance program like the one proposed, important interests and viewpoints that it should consider in formulating its actions will be inadequately considered because their proponents lack the financial resources to participate in the prescribed NOAA proceedings on a basis comparable to that of proponents of opposing views. Because this possibility has serious implications for the quality of NOAA's decision-making, NOAA has concluded that it is necessary to implement a financial assistance program like the one proposed on an indefinite trial basis."[13]

NOAA's program is also quite broad and extends to any NOAA proceeding which involves a hearing in which there may be public participation by statute, regulation or agency practice.

Eligibility criteria are substantially similar to the other programs we have already discussed. Any person is eligible for compensation if: (1) the person represents an interest which can reasonably be expected to contribute substantially to a fair determination of the proceeding, and (2) demonstrates that he does not have sufficient resources to participate effectively without compensation.

Compensation is provided for all costs that are reasonably incurred in the participation. While levels of compensation are based upon prevailing market rates for the kind and quality of similar goods or services, there is also a ceiling on payments to attorneys and experts which cannot exceed the highest rate of compensation for such persons with comparable experience and expertise "paid" by NOAA.

The NOAA program is administered through the General Counsel's Office and all final decisions are made by the NOAA Administrator. Since the program has just been launched, obviously no data is available on its operation as of the date of this writing.

e. Others

There are other federal agencies as well which have either announced plans to launch a paid participation program or which are examining the whole question of paid public participation. Notable among these are EPA, which is about to launch a detailed agency-wide public participation program including payment to participants. A Special Assistant to the EPA Administrator, Sharon Francis, has been assigned the task of helping to design such a comprehensive program.[14]

The Secretary of Agriculture has announced plans to establish a detailed program for public participation in all U.S.D.A. activities, operations and decision-making.[15] The Department created the position of Special Assistant for Citizen Participation, which office will work closely with the Public Participation Program Steering Committee to define and develop this program. It is clear that paid participation will be integral part of U.S.D.A.'s program.

In addition, the Food and Drug Administration is about to seek funding for a one-year pilot paid participation program. It would cover FDA rulemakings and generally be patterned after the FTC's procedure.[16]

The Federal Communications Commission, too, is currently reviewing a draft plan for a paid public participation program.[17] It, too, would be limited to rulemakings and generally follows the FTC procedures described above.

B. Analysis of FTC and NHTSA Programs

As we have noted, the only two structured paid participation programs which have been in actual operation for longer than one year, are those operated by the FTC and NHTSA. These will now be discussed in greater detail.

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[12]National Oceanic and Atmospheric Administration Rules, 43 Fed. Reg. 17806 (April 1978) (to be codified in 15 C.F.R. §904) (herafter cited as NOAA Rules). NOAA Rules are attached as Appendix H.

[13]NOAA Rules, 17807.

[14]Interview with Sharon Francis, Washington, D.C., May 17, 1978.

[15]U.S. Department of Agriculture, Secretary's Memorandum No. 1931, January 20, 1978.

[16]Interview with Alex Grant, Special Assistant for Consumer Affairs, Washington, D.C., May 22, 1978. Proposed regulations are now being circulated within the agency.

[17]Interview with Gus Guthrie, Office of General Counsel, Washington, D.C. June 2, 1978.

1. FTC

a. Operations

The pace-setting paid participation program of the FTC has now been operational for nearly three years. Since its inception, up to March 1, 1978, the FTC has obligated approximately $1.254 million spread among 38 organizations in 16 rulemaking proceedings.[18] The vast majority of recipients have been non-profit groups.

By statute, the FTC limits funding to rulemaking proceedings. Section 202(h) of the FTC Improvement Act states:

> "The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, and other costs of participating in a rulemaking proceeding under this section to any person who has, or represents, an interest which would not otherwise be adequately represented in such proceeding, and representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.
>
> "The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either, would be regulated by the proposed rule, or represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year."[19]

Eligible applicants include all individuals, corporations and public and private organizations other than agencies of the Executive Branch. Compensation is available for applicant development of substantive data, views and arguments; for participation at the hearing; and for preparation of rebuttal statements and post-hearing comments. Financing is not available for preparation of requests for rulemakings even though the petition may eventually result in a rulemaking proceeding.

b. Administration

The program is administered at the staff level by one part-time person located within the FTC's Bureau of Consumer Protection (the Bureau) known as the Special Assistant for Public Participation.[20] The Special Assistant works on each application, checks for compliance with FTC guidelines, contacts the applicant for additional information, secures the views of relevant FTC officials and asks the presiding officer of the rulemaking proceeding for his or her opinions on funding. The review process is quite informal.

Once the applications have been "worked-up," they are then formally submitted for decision to a five-person Evaluation Committee consisting of the Director of Operations of the Bureau, two persons from Policy Planning, one from the General Counsel's Office and the Special Assistant for Public Participation. There is no appeal from this decision.

No predetermined overall budget for paid participants is set for each rulemaking. The volume of appications generally determines the budget. To date, the FTC has had $500,000 appropriated each fiscal year. It is requesting $1 million, however, for next year.

c. Analysis

The FTC program generally receives high marks both from FTC officials themselves and from the groups who have participated in the proceedings. Persons interviewed liked the informality of the funding process and the flexibility of guidelines. There were four major criticisms of the program. Significantly, these were voiced by FTC officials as well as consumer organizations interviewed by us.[21]

First, there was a general acknowledgment that since the financing program was housed within the Bureau (which also had general responsibility for the conduct of the rulemakings) it gave at least

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[18]Charts prepared by the Federal Trade Commission entitled, "FTC Improvement Act Rulemaking—Total Obligated Compensation Per Rule", and "Attorney Fees and Costs Compared to Total Budget as of March 1, 1978"; attached as Appendix I.

[19]Magnuson-Moss Warranty—Federal Trade Commission Improvement Act §202(h), 15 U.S.C.A. §57 a.(h) (1978) (hereafter cited as FTC Improvement Act). The FTC has published two especially helpful pamphlets describing its paid participation program. They are *Rulemaking and Public Participation under the FTC Improvement Act* (hereafter cited as FTC Blue book) and *Applying for Reimbursement for FTC Rulemaking Participation* (hereafter cited as FTC Yellow book).

[20]Currently, Ms. Bonnie Naradzay, to whom all Novices go for wisdom.

[21]In Appendix K we have summarized the views of about 80 groups and organizations who addressed written responses to us or were interviewed in person or by telephone. When reference is made in the text to "groups interviewed" the reader can find further elaboration of their views by turning to Appendix K.

the appearance of a less than disinterested administration. This was partly cured by a majority of the evaluation committee being from outside the Bureau. However, the possible taint of potential conflict of interest remains.

Second, despite efforts to spread out the funded applicants—by geography and interest group—many believed that the program seemed to favor Washington-based organizations and consultants. While an examination of funded groups shows many to be located in other parts of the country, it is also true that national organizations based in Washington were well represented. As of March, 1978, Appendix I shows that the FTC had made 59 awards, of which 30 were made to groups outside of Washington, and 29 to Washington-based groups.

Most persons interviewed felt that significant Washington funding was inevitable given the location of most of the rulemakings and principal place of operations for many of the national organizations. However, greater outreach and technical assistance on the Bureau's part would enhance the ability of non-Washington organizations to participate.

Third, both FTC officials and consumers would like to see compensation extended to cover all or a portion of the costs of preparing successful funding requests and petitions for rulemakings. Currently, these costs are excluded by reference to the statute which speaks of reimbursing only actual costs of participation—not costs incurred in applying to participate or for petitions to initiate rulemakings.

Fourth, most consumer groups believed that FTC's levels of compensation for staff, attorneys and consultants were unrealistically low. The FTC has recognized this at least for staff attorneys. It has asked the Comptroller General for his opinion as to whether it can reimburse groups for their staff attorneys at a higher rate than the abnormally low salaries they generally receive.[22]

Outside attorneys are now limited to a maximum of $42 per hour. Even with an additional $6 for secretarial costs, many groups felt this was an arbitrary limit which should be replaced by a concept of "reasonable" attorneys fees attuned to the reality of prevailing market rates.

[22]Letter to Elmer B. Staats, Comptroller General, from Michael Pertschuk, Chairman of the Federal Trade Commission, April 11, 1978.

2. NHTSA

a. Operations

NHTSA established a pilot paid participation program for certain of its rulemaking on January 13, 1977. Since that date, it has approved 21 applications for a total of $83.8 thousand in five completed proceedings.[23]

Financing is limited to those rulemakings which are of substantial public interest. Generally, this decision is made personally by the NHTSA Administrator.

Eligibility of applicants largely follows FTC precedent. Funding is available if:

"(1) The applicant represents an interest whose representation contributes or can reasonably be expected to contribute substantially to a full and fair determination of the issues involved in the proceeding, taking into consideration the number, complexity, and potential significance of the issues affected by the proceeding, and the novelty, significance and complexity of the ideas advanced by the applicant;

"(2) Participation by the applicant is reasonably necessary to represent that interest adequately;

"(3) It is reasonably probable that the applicant can competently represent the interests it espouses, when assessed under the criteria of this regulation; and

"(4) The applicant does not have available, and cannot reasonably obtain in other ways, sufficient resources to participate effectively in the proceeding in the absence of funding under this program."[24]

b. Administration

The program has only one part-time staff person who handles applications, questions and correspondence. Generally, the application is sent to the appropriate technical person within NHTSA

[23]National Highway Traffic Safety Administration's *Evaluation and Recommendation of the Department of Transportation Program to Provide Financial Assistance to Participants in Administrative Proceedings,* (January 31, 1978), at p. 6. This evaluation was supplemented by memoranda attached and dated June 14 and August 10, 1977. The evaluation is cited hereafter as NHTSA Evaluation. The June 14 and August 10 memoranda are cited respectively as Attachments I and II to the NHTSA Evaluation.

[24]Department of Transportation, National Highway Traffic Safety Administration, "Financial Assistance to Participants in Administrative Proceedings Regulations", 42 Fed. Reg. 2864, 2867 (Jan. 1977) (hereafter cited as NHTSA Regs). NHTSA Regs are attached as Appendix J.

who "works-up" the application in the same informal process as the FTC's Special Assistant for Public Participation. It is the technical person, not the staff person, who then orally presents the application to an Evaluation Board which makes the final funding decision.

The three-person Board was originally composed of one representative each from the Offices of Assistant Secretary for Environment, Safety and Consumer Affairs, NHTSA Associate Administrator for Planning and Evaluation and the NHTSA Chief Counsel.[25] The representative from the Planning Board Evaluation Office has now been changed to a representative from the particular agency or office involved in the rulemaking.

c. Analysis

NHTSA has completed its first evaluation of the pilot project. The evaluation noted:

> "On the basis of our experience, we find that the financial assistance program has improved NHTSA rulemaking by providing decisionmakers with a wider understanding of the social, economic, environmental, political, and intellectual interests involved in their decisions. Despite the often insufficient time to apply for funds and prepare testimony, and the inevitable confusion and differing interpretations which accompany new regulations, many funded participants were able to make a meaningful contribution to the agency's rulemaking proceedings.
>
> * * *
>
> In conclusion, our evaluation of the program indicates that the idea of compensating participants in our administrative proceedings is not only feasible, but is a valuable adiunct to existing rulemaking procedures. We have determined that compensating participants to represent otherwise unrepresented or underrepresented interests can substantially assist the agency in promulgating fairer rules, and similarly assists informed and interested members of the public in playing an effective role in government."[26]

NHTSA has continued the program indefinitely and strongly recommends that it be extended to *all* agencies of DOT[27] with a greatly increased budget of up to $500,000 for each DOT agency.[28]

NHTSA's recommendations for improvement of its paid participation project are generally concurred in by consumer groups and organizations which have participated in the program. They include the following:

1. Publication of a six-month "agenda" of rulemakings in order to provide adequate notice to outside groups and provision of at least 45-60 days notice for submission of applications for individual rulemakings.
2. Maintainence of the Evaluation Board's independence by not having, as members, persons in the program office which is substantively involved in the proceeding. Staff for the Board should come from the Consumer Participation Office.
3. Provision of greater outreach and technical assistance to a wide variety of applicants to avoid the build-up of a limited group of specialists.
4. Compensation for preparing petitions which result in agency rulemakings.
5. Broadened eligible requirements for paid participation include proceedings other than just rulemakings.
6. Liberalization of the financial needs test.[29]

C. Proceedings and Forms for Paid Participation

This chapter has examined a number of paid participation programs—both proposed and operational. Most of the programs are all relatively similar in that they deal with the more formal rulemaking and adjudication processes.

1. Rulemakings and Adiudications

The programs discussed above concentrate on funding groups to develop their own views, present them in evidentiary-type hearings and prepare post-hearing comments. Federal agencies also have funded other mechanisms for obtaining the views of concerned citizens in similar proceedings. For example, comments do not have to be restricted to those proceedings which involve formal hearings. The FTC program, for example, extends to written submission of commentary as well as to oral presentations.

EPA also has given a number of grants to non-profit citizen groups to enable them to comment on specific EPA regulations. In one instance, EPA made approximately 13 grants to non-profit organizations which allowed them to retain scientific and technical experts to upgrade their comments on the agency's effluent guidelines to be issued under the Federal Water Pollution Control Act.[30]

[25]NHTSA Regs, §3(c).

[26]NHTSA Evaluation, at 1 and 3.

[27]*Id.*, at 3.

[28]NHTSA Evaluation, Attachment I, at 3.

[29]NHTSA Evaluation, 16-18.

[30]Boasberg, NSF Study, *supra*, II n. 2, at 85.

We have already noted the desire of FTC and NHTSA officials as well as consumer groups to extend compensation to those preparing petitions which result in agency rulemakings. This gives a chance for outside organizations to influence the agency's agenda of significant issues and does not limit outside comment only ot what the agency has predetermined to be important. This is a particularly effective way to open-up the decision-making process.

2. Policy and R&D Decision-Making

We have also drawn attention to the trend to expand the types of agency proceedings eligible for financial participation beyond formal rulemakings and adjudications. Agencies such as NOAA and CPSC now allow compensation for any proceeding which involves a hearing by statute, regulation or "practice". The problem, of course, is that an agency, by "practice," can refuse to hold a hearing and thus not pay participants even on those significant (but informal) policy decisions which affect millions of consumers and have an enormous impact on DOE's alloction of resources, consumer standards of living, etc.

The first consideration here is to encourage agencies to begin the "practice" of opening-up and structuring their informal policy, R&D, and budgetary decision-making. NOAA, CPSC and CAB are taking the first steps in this direction. As we discuss later in this report, this process will require:

a. Identification of significant issues and public participation in that process.

b. Early notice to the public to enable them to formulate their presentations.

c. Creation of opportunities in the decision-making process for reception of public views—i.e., briefings, hearings, comment on drafts, preparation of studies and reports and presentation of views at appropriate times.

In addition to opening-up and structuring the informal decision-making process, consideration should be given to encouraging alternative forms of paid participation. In the rulemaking and adjudication areas discussed above, these forms were generally limited to notice and comment procedures, presentation of views at evidentiary-type hearings, and filing petitions for rulemakings. While each of these forms is also appropriate for informal policy and R&D decisions, others may be even better suited to impacting informal decision-making. Use of study and report grants, multi-year contracts for sustained analyses, and development of independent centers bringing citizen organizations together with technical experts are strongly recommended.

Another effort at creating independent centers is the Legal Services Corporation's (LSC) funding of 12 independent "backup" centers, each of which generally specializes in a specific area of poverty law such as housing, migrants, consumer affairs, health, or education. LSC backup centers and local programs have been involved in the administrative decision-making process as well as in extensive litigation. They have commented on administrative regulations, negotiated with federal and state agencies on behalf of low-income clients, and appeared both for and against agencies in administrative and court proceedings.[34] Another LSC backup center, the National Consumer Law Center, has been an active participant in a number of FTC-financed rulemakings.

In conclusion, as DOE develops the content and structure of its own paid participation program, it should consider both the types of eligible proceedings and the forms of paid participation which would be most helpful to the agency and to interested citizens. It is imperative that DOE's program not be limited only to proceedings which currently involve public hearings, but extend to significant informal policy and R&D decisions which have an important impact on allocation of scarce resources and the economic, social and environmental well-being of millions of Americans. This will involve certain structural changes to open-up informal policy decision-making as well as consideration of other forms of paid participation such as studies and reports, long-term contracts for policy assessment and use or creation of independent centers.

Thus, there are a number of examples where other agencies have funded outside groups for their policy input in the absence of a formalized hearing procedure. For instance, on the vital issue of reactor safety, the National Science Foundation (NSF) funded a study team under the direction of the American Physical Society (APS) to provide a technical review of the Nuclear Regulatory Commission (NRC)-financed Rasmusen Report. [31] The APS study provided an outside look at one of the NRC's most sensitive and far-reaching policy issues.

The former Energy Research and Development Administration (ERDA) also has made grants to citizen critics of its own policies. One such example is the relatively recent ERDA grant to the

[31]Reactor Safety Study, "An Assessment of Accident Risks in U.S. Commercial Nuclear Power Plants," WASH-1400 (Aug. 1971).

Natural Resources Defense Council (NRDC) for a study on alternative energy sources. This longer-term study will be fed into the critical (but informal) policy decisions the agency will have to make on allocations of vital resources in nuclear, solar and alternative energy programs.[32]

One of the most significant programs to fuse scientific and technical know-how with citizen and consumer organizations is NSF's new Science for Citizens Program. NSF is now accepting proposals for independent regional "centers" and other types of mechanisms which would enable citizens to participate more effectively in scientific and technical governmental decision-making.

> "The primary goal of the Science for Citizens (SFC) program of the National Science Foundation is to increase the knowledgeable participation of scientists and nonscientists in the resolution of issues of public policy involving science and technology. For this purpose, citizens need access to timely, understandable, and objective scientific and technical information and expertise. We believe that this need can be served by the development of stable organizational structures and processes that will be responsive to problems as they arise in the communities addressed. We are now inviting proposals for planning studies that may lead to NSF support for mechanisms of this kind."[33]

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[32]There are a number of other examples of funding technical studies undertaken by non-profit organizations on important agency policy issues; e.g., Worldwatch, "Energy: The Case for Conservation," by D. Hayes (Jan. 1976) (funded by FEA); and Environmental Policy Institute, "Effects of Powerplant Unit and Site Size Upon Political Jurisdiction and Planning Authorities of State and Local Governments" (NSF Grant No. PRA-76-239333).

[33]NSF Public Mailing from Alexander Morin, Director, Office of Science and Society, entitled "Directorate for Science Education, Office of Science and Society," March 10, 1978.

III. DOE PROCEEDINGS AND FUNCTIONS

In this chapter we discuss the paid participations DOE has already funded and the particular kinds of proceedings in which the major DOE offices engage. Our purpose is to become as specific as possible about the various forms paid participation can take in the overall complex of DOE's decision-making processes.

A. Examples of DOE Paid Participation

In addition to a few grants which ERDA has made for independent studies and comment such as the one described in Chapter II, above, to NRDC for a report on alternative energy sources, the Federal Energy Administration (FEA) has established certain precedent-setting examples.

1. FEA/ERA Precedent

FEA was the first Executive Branch agency to authorize an award of funds to a non-profit applicant without specific legislative direction.[1] In this matter, the Consumers Union applied in the spring of 1977 to participate in a complex proceeding dealing with controversial requests by major oil companies for an exception to FEA's price regulations. Since this matter now has become enmeshed in court proceedings, there has not as yet been an award of funds by the agency to Consumers Union.

The next paid participation case considered by FEA was in May, 1977, upon the application of the Energy Policy Task Force (EPTF) of the Consumer Federation of America (CFA) to participate in FEA's proceedings dealing with decontrol of middle distillates, especially home heating oil.[2] This matter involved EPTF's extensive preparation and testimony at two national hearings as well as continued participation in the development of (by then) ERA's middle distillate monitoring system. DOE's awards to the EPTF were for a total of $31,000 covering expenses of EPTF's staff and fees paid to outside experts and attorneys during approximately a six-month period.[3]

As a result of the last mentioned case and the continuing controversy over decontrol of home heating oil, ERA issued guidelines for paid public participation in its ongoing monitoring effort in this area.[4] These guidelines specifically provide for payment of participation costs to non-profit organizations "... whose principle function involves the furtherance of consumer interests."[5] The guidelines cover, in very general terms, eligibility rules and application procedures for this one proceeding.

As a result of the last mentioned case and the continuing controversy over decontrol of home heating oil, ERA issued guidelines for paid public participation in its ongoing monitoring effort in this area.[4] These guidelines specifically provide for payment of participation costs to non-profit organizations ". . . whose principle funtion involves the furtherance of consumer interests."[5] The guidelines cover, in very general terms, eligibility rules and application procedures for this one proceeding.

Pursuant to these guidelines, DOE approved another petition in April, 1978 submitted by the EPTF to further participate in DOE's extended proceeding for assessing the impact of home heating oil decontrol.[6] This participation is just now getting underway.

The above awards have established certain basic principles for paid participation in DOE proceedings. These include: (1) recognition of the value of seeking the views of outside consumer organizations; (2) acknowledgment of the need to compensate such organizations at reasonable rates for their time and effort; and (3) acceptance of the notion that public participation extends to agency processes where formal public hearings are not required by the Administrative Procedure Act[7] or DOE's governing statute.

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[1]Consumers Union of United States, Inc., Washington, D.C., 5 FEA ¶87,014 (March 3, 1977).

[2]Consumer Federation of America, Washington, D.C., 5 FEA ¶87,040 (May 5, 1977), later amended in 5 FEA ¶87,051 (June 10, 1977).

[3]*Id.* See also letter dated February 17, 1978, from John O'Leary, Deputy Secretary, to Tersh Boasberg, Esq. and Case No. DSG-0014 (March 10, 1978).

[4]Economic Regulatory Administration, DOE, Notice of Adoption of Monitoring System, 43 Fed. Reg. 2917 (January, 1978) (hereafter cited as DOE Notice). DOE Notice is attached as Appendix L.

[5]*Id.*, at 2921, ¶5.

[6]Consumer Federation of America, Case No. DSG-0012 (April 27, 1978), later amended by Case No. DMR-0019 (May 5, 1978).

[7]Administrative Procedure Act, 5 U.S.C.A. §§551, *et seq.* (1977).

2. Section 205 Proceedings

Section 205 of the Energy Conservation and Production Act, passed in 1976, authorized the Administrator of the then Federal Energy Administration to make grants to states for state consumer offices to:

". . . assist consumers in their presentations before utility regulatory commissions . . .".[8]

State offices may either advocate such positions, themselves, or provide assistance to state and local consumer organizations to participate in the proceedings of utility regulatory commissions.

To carry out the purposes of §205, the Congress appropriated $2 million for a pilot program. These funds have been awarded to 10 states, Guam, and the District of Columbia. DOE officials are now seeking additional funds up to $10 million to expand the pilot program on a nationwide basis.

With guidance and assistance of ERA, these 12 state offices are in the process of drafting rules and regulations governing the administration of the program, including the award of up to 45 percent of their funds to consumer groups. Awards may cover all reasonable costs of such groups' participation in state utility ratemaking.[9]

ERA has now aproved a number of state offices' standards and criteria for awarding participation funds to outside consumer organizations. These plans, together with DOE's regulations and interpretive guidelines, are most helpful in providing guidance to the administrative issues discussed below in Chapter VI. Section 205 regulations, thus, are the first comprehensive attempt by DOE to design a paid participation program—at least for consumer groups at the level of state public utility commission proceedings.

B. DOE Functions

The DOE offices examined most closely by the report team were: Conservation and Solar Applications; Defense Programs; Economic Regulatory Administration; Energy Information Administration; Energy Research; Energy Technology; Environment; Intergovernmental and Institutional Affairs; International Affairs; Policy and Evaluation; and Resource Applications.[10]

There are a number of other DOE offices which have been excluded because their duties generally do not include direct dealings with the public. These are: Inspector General; General Counsel; Executive Secretariat; Administration; Controller; and Procurement and Contract Management. Also, we did not believe that the Office of the Secretary, including the Deputy Secretary and Under Secretary, should be considered the subject of a paid participation program since these officials are concerned with final approval of decisions from other offices which already should have involved the public in their processes.

Of the 11 included organizational components noted above, both Defense Programs and International Affairs deal with issues which frequently are classified for security purposes. Thus, any paid participation program should be directed at the non-classified proceedings in these two offices.

The principal activities undertaken by the 11 DOE offices we reviewed generally can be broken down into four functional categories: (1) regulation, (2) outlay programs: R&D and commercialization, (3) policy analysis, and (4) budget.

1. Regulation

By regulation, we refer to the authority of DOE to require or mandate certain rules or standards of conduct. Regulation does not include the grant or contract function. Of the 11 offices, only three undertake genuine regulatory activities: (1) the Economic Regulatory Administration (ERA), (2) the Energy Information Administration (EIA), and (3) the Office of Environment (EV).

Regulatory actions are implemented through rulemakings or similar processes, or through adjudications, which would include licensings. Both EIA and EV utilize rulemakings as well as similar processes which are not formal rulemakings in the sense of Administrative Procedure Act requirements. ERA, on the other hand, engages exclusively in formal rulemakings, adjudications and licensing processes.

The major participation problem in ERA's regulatory proceedings is that the public generally is excluded from the developmental stage prior to the actual rulemaking. This is because there is no established procedure for securing outside comment during this stage. Once a major policy decision is published as a proposed rule, many of the most important issues have already been decided.

What is needed here is an effort to involve the public at the developmental stage of the rulemaking process so that as policies become increasingly shaped, the public has had at least some op-

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[8]Energy Conservation and Production Act §205, 42 U.S.C.A. §6801, 6805 (1977).

[9]Grants for Offices of Consumer Services, 42 Fed. Reg. 35163 (1977) (to be codified in 10 C.F.R. §460) (hereafter cited as §205 Guidelines). Section 205 Guidelines are attached as Appendix M.

[10]As noted in the Introduction, FERC is not covered in this report.

portunity to participate in their formulation. Then, at the time of formal rulemaking, itself, the public will not see the proposed rule for the first time.

EIA's regulatory functions, often involving the development of complex data collection forms, sometimes is implemented through formal rulemaking, but also is handled informally without structured opportunities and advance notice for outside consultation. Even more so than ERA, EIA lacks a participation policy during developmental stages, and, often, during promulgation of the documents as well.

EV's rulemaking functions generally are implemented through the environmental impact statement (EIS) procedure. The EIS process, involving as it does an opportunity for public notice, comment and possibly hearings, bears a strong resemblance to formal rulemaking procedures. Since this process was originally intended to provide outside participation at an early date, it is one ideal form for utilizing the mechanism of paid participation.

2. Outlay Programs: Research, Development and Demonstration (R&D) and Commercialization

The offices with major outlay programs are: (1) Conservation and Solar Applications (CS); (2) Resource Applications (RA); (3) Energy Technology (ET); (4) Environment (EV); (5) Energy Research (ER); and (6) Defense Programs (DP).

Generally, R&D and commercialization functions are currently implemented through an internal decisional process, which is relatively inaccessible to the public. Unlike the regulatory area, there are few opportunities given to the public for comment or hearings at any point in the process. Rather, R&D decision-making is a continuum, beginning with an idea and proceeding through stages involving a decision to undertake preliminary research, developing a research plan, implementing the plan (usually through contracts with DOE labs or outside institutions), monitoring research, then assessing the research results, deciding whether to proceed to development and demonstration, and if so, formulating a demonstration or development plan, implementing the plan, itself, (usually through outside contracts), monitoring the implementation, and, finally, accepting or rejecting the development or demonstration.

At each of these key points in the continuum, decisions having important consequences for consumers, geographic regions and major segments of the public inevitably will be made. It is at these key points where opportunities should be structured for public participation.

3. Policy Analysis

Each of DOE's offices obviously makes significant policy decisions in the normal course of its activities. However, for the office of Policy and Evaluation (PE) and Environment (EV), policy analysis is perhaps their principal function.

In PE, policy analysis and formulation sometimes is made through a process similar to rulemaking. For example, the DOE Organization Act requires that National Energy Plans (NEP) (a responsibility of PE) be formulated every two years and that public participation be present in the process.[11] Yet, most of PE's vital policy analyses do not follow any structured format in which public participation is included.

The problem is not unlike that posed by the R&D functions of other DOE offices. It should not be overly difficult to pinpoint key stages of the policy analysis function at which public participation would be helpful to the formulation of ultimate decisions. Essential to securing greater public involvement in this process is early notice and an opportunity for comment.

4. Budget

Budget functions are undertaken by all the 11 offices described above. They, too, should not be totally immune from paid participation efforts.

DOE, like other agencies, employs a planning budgeting system (PPB) which is designed to set agency priorities and establish an annual budget. Public access to the PPB system is difficult to achieve since it requires some disclosure during periods when critical resource allocation decisions must be made, often under severe time pressures. However, the budgeting cycle is of particular importance because it is here that major financial decisions and commitments for resource allocation are made.

One mechanism for paid participation which appears feasible is provision for a limited number of public interest groups (on the basis of qualification and competition) to gain access to the early portion of the actual PPB process. A time certain in the cycle could be given these groups for presentation of their views (supported by their prepared analyses) to the Budget Review Committee or other decision-making bodies in the agency. Such a procedure would not destroy the principle of budget confidentiality because public comment would occur in those early phases of the

[11] 42 U.S.C.A. §7321(a)(2) and (b) (1977).

PPB system before actual budget preparation commences.

C. Proceedings Eligible for Paid Participation

We have stressed the need for DOE to seek public participation in its own decision-making beyond that which is required by formal rulemakings. The above examination of DOE functions discloses that only a few of the vital decisions made each week by DOE are undertaken in the context of a rulemaking proceeding.

In commenting on the breadth of its proposed rules for paid participation, the CAB noted:

> "We propose to consider applications for compensation in any type of proceeding. Although the other agencies' actual experience in this area is almost exclusively in rulemaking, there is nothing inherently inadvisable about compensation in other types of proceedings. Indeed, it is likely that a smaller fraction of the important issues are resolved through rulemaking at the Civil Aeronautics Board than in those agencies. Therefore, we would not limit our program to rulemakings. 'Proceeding' would be defined very broadly, to include any Board process in which there may be public participation."[12]

Indeed, DOE, in funding the petitions of the Consumers Union and the EPTF described in the first section of this chapter, went beyond any legal requirements for public participation in rulemaking proceedings. In these examples, petitioners not only prepared and gave testimony at public hearings (held in the agency's discretion) but they also helped to influence agency policy formulation through briefings, review of initial agency drafts and by written comment at important points in the decision-making process.

To state the obvious: the essential consideration governing which agency procedures should be eligible for paid participation is not the particular form of the proceeding, but rather the nature and importance of the substantive issues involved in the decision to be reached.

Few federal agencies deal with matters of greater significance to millions of consumers than DOE. Such issues range from development and utilization of nuclear, fusion, solar, fossil fuels and so-called "appropriate" technologies, to off-shore drilling, oil spills, LNG safety and power plant siting, to rationing, pricing, rate design and control of basic energy components. Regional problems also abound, from entitlements and the California oil glut to the northern tier pipeline and Canadian natural gas. These all have special impacts on geographical groupings as well as important consequences for the population as a whole.

Indeed, the major problem of paid participation in DOE proceedings is not so much how to select the kinds of proceedings which are most suitable for public comment; but how to *choose* from among so many significant matters. If the first question is one of selection, the second is how to structure the decision-making process in selected proceedings so that paid public participation is constructive and not unduly burdensome.

1. Selection of Proceedings

In deciding which proceedings should be eligible for paid participation, we have argued that DOE must go beyond its formal rulemaking processes as NOAA, CPSC and the CAB have done. Some of the factors which DOE should consider in selecting from among all its proceedings are:

a. The nature and importance of the underlying issues and the extent of their impact on particular geographic regions or the public at large;

b. The precedent-setting effect of the decision on agency policies and new directions;

c. The advisability of involving the public at an early stage in order to enlist long-term broad public backing and confidence;

d. The desirability of securing representation of a fair balance of views in proceedings which already are being heavily lobbied by other interest groups or influenced by "institutional" staff concerns;

e. The availability of funds and potential for delay; and

f. The factors used by DOE in determining the "significance" of its regulatorty actions.[13]

It is not terribly difficult for DOE and its offices to select which *type* of proceedings or what *kinds* of important issues (regulatorty, R&D, policy analyses or budgetary) should be open to paid par-

[12]CAB Proposed Regs, *supra*, II n. 10, at 14047. NOAA Rules provide for compensation:

> "... in any NOAA proceeding involving a hearing in which there may be public participation pursuant to statute, regulation or agency practice, whenever the Administrator determines that public participation in such a proceeding promotes or can reasonably be expected to promote a full and fair determination of the issues involved in the proceeding."

NOAA Rules, *supra*, II n. 12, §904.1.

[13]DOE, Proposals for Implementing E.O. 12044, *supra*, I n. 3, §V (A)(3).

ticipation. The real problem is in narrowing the choice and determining priorities. And since this involves the allocation of paid participation funds and the development of a paid participation planning process, it is properly the subject of Chapter V, below.

2. Structure of Proceedings

Once the decision is taken by DOE that proceedings involving significant issues of great public moment should be open to paid participation, the next hurdle to overcome is how to best design or structure these programs to involve outside groups.

a. Regulation

The discussion in Chapter II analyzed the paid participation programs of the FTC, NHTSA, NOAA, CPSC, CAB and other agencies. These generally take place in a regulatory or rulemaking setting. They are wholly apropriate for the regulatory-type functions, described above, of such DOE offices as ERA, EIA and EV. Moreover, the President's recent Executive Order[14] and DOE's implementing proposals[15] call for publication of a semiannual agenda of "significant" regulatory actions which will give the public badly needed advance notice of these important issues.

We would add to this format two other suggestions. First, that DOE's paid participation program extend to funding appropriate comment on the agency's semiannual agenda and second, that, as we discuss more fully in Chapter VI, below, paid participation extend to funding successful petitions of outside groups which result in agency rulemakings. In this regard, both FTC and NHTSA officials recommend broadening their paid participation programs to cover successful petitions.[16] This gives the public a chance to do more than simply react to an agency's own predetermined agenda.

b. Policy Analysis

Policy analysis, R&D and budgetary concerns often do not lend themselves to the same kind of paid participation efforts as regulatory-type proceedings. But many of these issues can be decided in a process which is so structured as to provide opportunities for advance notice and public comment.

If DOE can provide the public with a semiannual agenda of "significant" regulatory actions, why not of other significant issues involving policy analysis, R&D or budgetary concerns? The current ACTS assignment schedule now in use at DOE, may be one mechanism to utilize. Important issues of this type, like significant regulatory actions, also can be listed on a semiannual agenda, and opportunities provided for public comment at key points in the analyses, R&D and PPB decision-making processes.

Moreover, non-regulatory kinds of decisions, because they generally are made over a longer term and without evidentiary-type formal hearings, lend themselves especially well to a procedure like competitive RFP bidding on procurement contracts. This often would involve less legal wrangling and more opportunity for expert substantive analysis.

For example, one of the issues before the Office of Energy Research involves the future pace of development of fusion technology. Groups such as the Natural Resources Defense Council (NRDC) or the Union of Concerned Scientists (UCS) might be engaged by ER to assist it in developing an appropriate plan. Such groups, for instance, could be asked to prepare a study or report on the possible adverse environmental consequences of fusion and the research necessary to avoid or at least mitigate these consequences. They also could be requested to monitor the results of the fusion program and to prepare an assessment of the environmental hazards involved in development of the technology. Indeed, such organizations might be retained by DOE for a continuum of services at many points throughout the R&D process.

Selection of appropriate outside groups in this process would require an initial application, evaluation and a decision in much the same way as a procurement RFP. Funds could cover a long-term approach as well as a one-shot issue.

The point to be made here is that policy analysis, R&D decisions and even budgetary issues can be the subject of responsible paid participation efforts just as much as regulatory actions. While the latter proceedings generally have built-in opportunities for notice and public comment, the former, too, can be structured and opened so as to provide advance public notice and a chance for outside organization to comment, submit studies and reports and to review draft options at key stages in the decision-making process.

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[14] E.O. 12044, *supra*, I n. 2.

[15] DOE Proposals, *supra*, I n. 3.

[16] See discussion, *infra*, VI (D)(1) and (2).

Again, the purpose of a paid participation program is to be helpful to the agency by providing it with a range of public viewpoints and hard data. Business leaders undoubtedly are heard from on "informal" policy issues just as they fully participate in formal rulemakings. Paid participation can give the same opportunity to public interests. And as DOE, itself, noted in its proposals to implement E.O. 12044:

> "Options will be developed to provide DOE funding to pay the fees and expenses of lawyers or other experts who participate in DOE regulatory *and policy development* on behalf of consumers or other public interests."[17] (emphasis added)

[17]DOE Proposals, *supra*, I n. 3.

IV. A DOE OFFICE OF PAID PARTICIPATION

We envision establishing in DOE an office of (paid) public participation which we call OPP. As noted in the Introduction to this report, our contract did not embrace a description of all facets of public participation. It was limited to helping design only that portion dealing with paid participation in the decision-making process. Thus, the functions and staffing pattern of our recommended OPP must be viewed, for purposes of this report, in a somewhat narrower context.

A. Functions of OPP

This section considers the functions of OPP only as appropriate to the development and administration of a paid participation program.

1. Information and Materials Dissemination

Certain information about the availability of the paid participation program and the application process must be developed and disseminated. For example, the FTC has published and widely distributed two short, easy-to-read pamphlets describing public participation in its rulemaking proceedings and how to apply for reimbursement.[1] The actual contents of such an application are detailed in Chapter VI, below.

As the NHTSA evaluation recommended:

> "Guidelines, similar to those published by the FTC on how to apply for financial aid, should be developed and distributed to facilitate public participation. The guidelines should help applicants to understand the philosophy of the program and should also give practical data on completing applications and computing costs of participation."[2]

We concur in this recommendation and find that the FTC materials can easily be adopted for DOE use.

2. Outreach and Technical Assistance

From the experience of both the FTC and NHTSA programs, we believe a broad outreach and technical assistance effort will be necessary. Consumer groups interviewed stressed the need for adequate and early notice and technical assistance in preparing application forms.[3]

More than publication in the Federal Register will be required. OPP should make full use of publications put out by consumer organizations, citizen action groups and "appropriate" technology networks. Regional newsletters and even regional clearing houses could be employed as well. OPP should maintain and continually update a register of interested organizations. For the most important proceedings, television and radio coverage also should be considered. Further, OPP should review the possibility of its own weekly or monthly publication, giving exact dates and places of proceedings eligible for public participation, a brief description of such proceedings and how outside groups should apply.

In other words, OPP not only should respond to written applications but it should actively solicit public participation as well. As CPSC has said, the Commission:

> " . . . will actively solicit applications for funding in selected proceedings and will compensate participants in accordance with the interim regulation. (Under an existing ad hoc program the Commission merely considers whatever funding requests participants submit.)"[4]

Technical assistance to groups also will be an important function of OPP. This is especially necessary to facilitate the participation of newer and smaller organizations. Rosters of willing expert consultants, university professors and members of professional associations should be maintained since many of the applicant organizations may not have access to experts of their own. To be effective, OPP must reach out and become actively involved with many groups and organizations which never before have participated in governmental processes.

3. Application Review

Whether or not OPP makes the final decisions on selection of applicants (discussed below), it probably will have the principal processing, review and evaluation functions. This will involve, as FTC and NHTSA experience show, considerable informal contact between OPP and the applicant. Applications often require clarification and further information, financial statements may

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[1] FTC Blue and Yellow books, *supra*, II n. 19. See also the useful booklet, *Consumer's Guide to the Federal Trade Commission*, by the National Community Consumer Education Project of CFA's Paul Douglas Consumer Research Center, Wash., D.C. Sept. 1977).

[2] NHTSA Evaluation, *supra*, II n. 23, at 18.

[3] See Appendix K, §7.

[4] CPSC Interim Regs, *supra*, II n. 9, at 23560.

need greater specificity and work programs may be altered to meet new contingencies. We were greatly impressed in our interviews by the amount of informal contacts pursued, for example, by the FTC's Special Assistant for Public Participation.

Further, it is highly desirable for all final decisions on applications to be in writing. This tends to force agency decisionmakers to be more objective and lays the groundwork for any possible appeal. Thus, S.270 provides:

> "Upon receipt of such application, the agency shall make a written determination of the eligibility of the person for an award and the amount and computation of such award, if any, and shall state the reasons therefor. Such determination shall be made promptly, and prior to timely participation in the proceeding by that person unless the agency finds that a prior determination cannot practicably be made, and states in writing its reasons for a temporary deferral."[5]

As S.270 stresses, applications must be processed and reviewed in a timely manner in order to give ample notice to participating organizations. This, too, will mean an increased staff load on OPP.

OPP review process would include at a minimum:

— Logging of applications;
— Acknowledgment letter;
— Initial determination of eligibility;
— Consultation with applicant, as necessary for refinement and additional information;
— Contact for in-house technical and perhaps for accounting and legal review;
— Evaluation and assessment for final approval or rejection;
— Written determination letter;
— Possible appeal or reconsideration processing;
— Monitoring of awards and enforcing audit responsibilities; and
— Evaluation and follow-up procedures.

4. In-House Functions

We have examined the materials distribution, outreach and T.A. functions of a proposed OPP in relation to potential applicants. But OPP's activities within DOE are equally important. It must become, in effect, an early warning system throughout DOE for purposes of public participation.

The keys to effective participation are early notice and adequate funding. Without such notice, applicants cannot fully prepare their presentations. This is stressed in NHTSA's evaluation of its own program:

> "The need for adequate time for public announcement, submission of applications, agency evaluation, participant preparation and presentation cannot be overstressed. Unless the agency sets aside sufficient time for these activities, inviting the public to participate is unfair to both the applicants and the reputation of the program. Compensated participants do not have enough time to develop their positions fully, and have significantly less time to participate than uncompensated participants."[6]

Staff of OPP or a public participation officer within each of the DOE offices examined in Chapter II, above, will be required to ensure that the early warning system functions effectively. The person assigned to the ACTS schedule in each office may be one possibility.

The job of such a public participation officer or the OPP staff person assigned to cover a particular office would be to attend all important office staff meetings and consult with office technical and support persons to pinpoint those future policy issues and proceedings which would be most suitable for public participation. They also would assist in the preparation of the semiannual agenda of "significant" regulatory or other policy actions recommended in Chapter III.

The notion of a paid participation planning process is developed in the next chapter. However, any such process will need adequate staff and this invariably becomes a responsibility of OPP or of those persons assigned public participation duties in each office.

B. Staffing

Having discussed the major functions of OPP, we next turn to office staffing.

1. Job Descriptions

In addition to the OPP Director, the professional staff of the office should have people who are sensitive to the energy concerns of underrepresented interests such as consumers, citizen organizations, small business persons, etc. These persons should have a firm commitment to public advocacy and independent thinking.

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[5] S.270, *supra*, I n. 1, §(e)(2)(A). See discussion, infra, Chapter VI, G, for the regulations of other agencies on this point.

[6] NHTSA Evaluation, *supra*, II n. 23, at 16.

The OPP staff also needs to have some technical competence of its own in energy-related matters. While OPP undoubtedly will call for assistance in the application review process upon other in-house technical people, the OPP staff must be strong and independent enough to make general decisions on the technical proposal and qualifications of the application. For example, while the FTC Bureau of Consumer Protection makes the final decision on paid participants, its staff works closely with other FTC offices in the evaluation and comment stage of the application.

In addition to having technical expertise, OPP staff should be familiar with citizen groups and be able to communicate well with applicant organizations. It will need these qualities to perform its information, materials dissemination, outreach and technical assistance functions. Legal and accounting expertise also would be desirable.

2. Size and Budget

The FTC and NHTSA programs are both administered by one part-time staffer. This can probably be attributed to the limited number and extent of their funded proceedings. For example, only five rulemakings were funded during NHTSA's first year and the FTC provided awards only in six or seven proceedings a year for the past three years.

The CPSC contractors who helped design its paid participation program recommended an OPP staff for that agency of five persons with an administrative budget of $200,000 for the first year.[7] Forty thousand dollars of the $200,000 was earmarked for OPP consultants to augment the "small" initial staff.[8]

Given the size, complexity and scope of DOE's functions as compared to those of the CPSC, any centralized OPP in DOE would have to be at least twice as large with an administrative budget of $300-$400 thousand. This would mean a staffing pattern of around eight to ten persons, perhaps three to four of whom would have technical expertise in a variety of energy fields and the others would concentrate on outreach, technical assistance, publications and accounting and legal matters. In addition, two or three persons either on OPP's staff or "detailed" from the key offices identified in Chapter III, above, as their paid participation officer should be responsible for the participation planning and monitoring process (early warning system) within these major offices.

C. Location within DOE of OPP

1 Independence

All the agencies try to maximize the independence of their paid participation offices by administratively removing it from the substantive program offices which are directly involved in the proceedings at issue. Agencies are anxious not only to avoid the taint of subjective choice of applicants but also to allay even the appearance of possible conflict of interest.

The CAB, in proposing its public participation program, noted:

> "To help ensure objectivity of eligibility and authorization decisions it would appear best to exclude from the administering bodies those who may be participating as a party in the particular proceeding. The administering body could, however, consider the recommendations of the relevant involved staff members, bureaus or offices that do participate in particular proceedings."[9]

As we have noted above, the FTC does operate its paid participation program within the overall Bureau of Consumer Protection which is responsible for the rulemakings in question. However, both FTC officials and consumer groups were aware that this caused unnecessary "appearance" problems and it was one of the major criticisms of the program.

NOAA operates its program from the Office of General Counsel.[10] CPSC will establish an Office of Public Participation directly under the Commission, removed from any of its program offices.[11] NHTSA administers its paid participation program through an Evaluation Board, also independent of any one program office.[12]

Based on the experience of other agencies and the strong opinion of consumer organizations, DOE also should strive to make its OPP independent of any office with line, substantive responsibilities. Indeed, in establishing procedures for §205 funding of state consumer services offices, DOE insisted that such offices be completely independent from the state utility commissions before which they would appear. The §205 guidelines provide that any consumer office must be independent of a public utility commission with respect to the following:

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[7]Nancy Chasen and Robert Stein, "Report to the Consumer Product Safety Commission: CPSC's Office of Public Participation and Financial Compensation Program" (April, 1977) (hereafter cited as Chasen-Stein Report), at 6-11.

[8]*Id.*, at 11.

[9]CAB Proposed Regs, *supra*, II n. 10, at 14047.

[10]NOAA rules, *supra*, II n. 12, at 17810.

[11]CPSC Interim Regs, *supra*, II n. 9, at 23562.

[12]NHTSA Regs, *supra*, II n. 24, at 2866.

"(i) The Commission has no direct control over the Office's budget or its disbursement of funds;

"(ii) The commission has no authority over the hiring, management, or dismissal of the personnel employed by an Office; and

"(iii) Employees of the Office do not perform services for, report to, or act on behalf of, the commission."[13]

2. Centralization

While most of the federal agencies with paid participation projects are neither as large nor as diversified as DOE, the general administrative pattern has been to centralize paid participation rather than spread its administration around to each substantive program office within the agency. CPSC, for example, has opted for one central OPP to administer its entire paid participation program, rather than initiate separate funding efforts for its adjudications, petitions, major product-related regulatory actions, and regulatory issuances.[14]

NOAA, which has many diverse program activities, also has elected to centralize its paid participation efforts in its Office of General Counsel.[15] The Secretary of Agriculture's Public Participation Program Steering Committee also is inclined to staff one central departmental unit rather than spread the administrative functions among U.S.D.A.'s many "autonomous" administrations and agencies.[16] This Committee also is recommending that a full-time employee within each U.S.D.A. major program agency have public participation responsibilities within that agency.[17]

The NHTSA Evaluation Board, however, in recommending that its pilot paid participation program be extended throughout DOT, noted that each DOT program agency should establish its own Evaluation Board for "assessment" of applications for paid participation.[18]

The vast majority of consumer and citizen organizations contacted as well as virtually every top DOE official interviewed also agreed that the administration of DOE's paid participation program should be centralized. As the Administrator of EIA stated:

"We believe that management of and funding for such a [participation] system should be centralized within the Department. Centralized management and funding would provide for a continuing assessment of Department-wide priorities vis-a-vis public input, would facilitate public access to and understanding of the wide range of areas in which public input is needed or desired, would provide for a more consistent internal management approach, and would provide greater assurance that the intent of the system will be carried out effectively."[19]

Of course, this does not mean that the technical program office substantively concerned with the particular proceeding should have no input on individual funding applications. To the contrary, review and comment by technical offices would be quite desirable and has proven valuable to both the FTC and NHTSA programs. However, the overall administration, outreach, T.A., application review and decisional process should remain centralized in OPP.[20]

3. Location

Based on the above concepts of independence and centralization, this would argue for locating the OPP either in a separate office attached to the Office of DOE Secretary (or Deputy Secretary) or in a separate unit attached to the DOE Assistant Secretary for Intergovernmental and Institutional Relations (IR). Consumer organizations favored the former location as a mechanism for underlining the Office's independence, elevating its status (and the grade level of its Director) and utilizing the departmental authority of the Secretary's office.[21] Top DOE officials interviewed seemed divided but inclined toward the latter placement as a function properly belonging to IR.

A possible third option is to place OPP within the present Office of Hearings and Appeals. This office reports to the Deputy Secretary and now has authority over DOE adjudications. It also was the office which ruled on the three petitions granted to date by DOE to Consumers Union and EPTF.

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[13]§205 Guidelines, *supra,* III n. 9, §460.12(a)(3).

[14]CPSC Interim Regs, *supra,* II n. 9, at 23562.

[15]NOAA Rules, *supra,* II n. 12, §904.4(a).

[16]Public Participation Program Steering Committee, "A Public Participation Program in the Department of Agriculture" (February, 1978), at 5.

[17]*Id.,* at 6.

[18]NHTSA Evaluation, *supra,* II n. 23, at 3.

[19]Memorandum for Tina Hobson, Director, DOE Office of Consumer Affairs, from Lincoln Moses, Administrator, Energy Information Administration (June 1, 1978), p. 1. See Appendix K, §12. for comments of consumer organizations.

[20]This does not mean, of course, that individual DOE offices, as discussed in Chapter III, above, could not contract with outside groups for additional policy analysis, R&D functions or other work as they are authorized to do now.

[21]See Appendix K. §12.

Given the need for OPP's independence and strong support at the outset, we are inclined to recommend that OPP be created as a separate office attached to the DOE Secretary or Deputy Secretary. We are not unmindful of the possible organizational difficulties this choice may entail. However, OPP will need to muster all the authority it can and reliance on the Secretary or Deputy Secretary probably will be necessary.

D. Who Decides

1. Review Panels and OPP Director

Up to this point we have discussed the administration of a paid participation program in terms of its functions, staffing pattern and location within DOE. A number of agencies split the day-to-day administration of their programs from the entity which actually decides which applicants to fund.

For example, both the FTC and NHTSA leave the outreach and application review process in the hands of special staff but establish an evaluation or review panel to make the ultimate funding decision on applications. In the FTC's case, the special staff administrator also sits as one of the five decision-making panelists. In NHTSA's program there is an evaluation board which makes the final awards.[22]

NOAA administers its paid participation efforts through the General Counsel's Office but the NOAA Administrator makes the final decision.[23] The CAB proposes to establish an ultimate review panel consisting of the Managing Director, Director of the Office of Economic Analysis and the General Counsel or their delegates.[24] CPSC is going to make its final decisions through the Commissioners, themselves, although the OPP Director (as yet unchosen) will be " . . . actively involved in all major decisions . . . ".[25]

Whether the staff of a public participation program makes the final decision or it is made by some type of review or evaluation panel seems to be a reflection of the status and authority of those administering the paid participation program within each agency. Where administration is relatively low-level and performed by part-time persons—as in the FTC and NHTSA—the actual funding decisions are made by a higher-level panel.[26] Whereas, in the more structured OPP being established by CPSC, the OPP Director will play the major role.

So, too, if DOE establishes a strong, independent, centralized OPP, we believe funding decisions definitely should be made by that Office.[27] This has the triple advantage of ensuring independence from the technical office involved in the proceeding, enhancing the status of OPP (and thus of public participation in general) and building up management expertise in a central, permanent staff.

2. Role of Outside Groups

No agency currently involves outside groups or potential public participants in its review and selection of applicants for funding. While DOE's Office of Consumer Affairs favored use of outsiders, perhaps on some kind of review panel, most consumer organizations were strongly opposed to the idea. Use of outside representatives has a number of disadvantages.

First, real and apparent conflict of interest problems would be difficult to overcome;

Second, reliance on outsiders tends to shift responsibility away from the agency for its own decisions;

Third, the OPP must maintain an objectivity lacking in outside organizations whose very purpose is to press forward their own points of view;

Fourth, the agency, itself, should develop a strong, internal commitment to public participation which will be enhanced by administration of its own program;

Fifth, OPP's ongoing funding of applicants in a wide variety of complex DOE proceedings would necessitate the constant impaneling of scores of outsiders with relevant expertise, a virtually impossible job.

However, we do believe that outside organizations should play a role in the overall program evaluation and monitoring, and this is discussed more fully in Chapter VI, below.

E. Appeals

Few of the agencies which have established paid participation programs have formalized an appeals procedure in case an application is turned down or under-funded. The FTC said this issue had not arisen on many occasions but that when

[22]NHTSA Regs, *supra*, II n. 24, at 2866.

[23]NOAA Rules, *supra*, II n. 12, §904.3.

[24]CAB Proposed Regs, *supra*, II n. 10, at 14047.

[25]CPSC Interim Regs, *supra*, II n. 9, at 23560.

[26]In NOAA the final decision is made by the Administrator, Richard Frank, who also happens to be one of the leading advocates of public participation in governmental decision-making.

[27]With appropriate review and comments by technical program offices concerned.

an applicant was turned down, the FTC staff continued to work with and advise the applicant as to how it could improve its proposal.[28]

NOAA considered, but rejected, an appeal from the Administrator's final decision to the Secretary of Commerce, noting:

"In NOAA's view, this procedure would disrupt the administrative process without resulting in significant modification of financial assistance decisions."[29]

NHTSA is the only agency which does allow an appeal. It is really a reconsideration process and is both informal and simple. It has been invoked sparingly. NHTSA regulations provide:

> "Upon good cause shown by an applicant, the decision of the evaluation board regarding its application may be reconsidered."[30]

Along with most citizen organizations,[31] we favor some kind of appeals procedure. We recommend adoption of NHTSA's approach, a simple reconsideration process. This probably would not differ from how OPP would operate anyway. In effect, FTC uses such an informal reconsideration procedure by assisting turned-down applicants and helping them revise their proposals.

We believe that if an applicant can show good cause (i.e., abuse of discretion, arbitrary or capricious action) that OPP rules should provide for reconsideration along the NHTSA model.[32] We think a more formal appellate procedure can await the first year's evaluation of the program.

F. An Expanded OPP

As we noted in the earlier sections of this chapter, we see paid participation as an integral part of a larger and expanded public participation effort directed by OPP. Our own contract did not extend to assisting in the design of such a larger program. However, we believe such an expanded office should have the following public participation responsibilities, in addition to funding paid participants:

1. Acting as a consumer advisor throughout DOE, especially at the office levels discussed in Chapter III, and assessing all DOE's procedures to maximize public participation;
2. Ensuring that the citizen point of view is well represented on all DOE advisory councils and panels;
3. Developing a broad program of public education, training and outreach, including briefings, forums, conferences, workshops, films and publication materials; and
4. Coordinating the agency's response to public complaints, identifying prevalent problems affecting the public interest and seeking to ameliorate them through development of new response mechanisms such as a "hot line," special briefings and regional meetings and public hearings.

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[28]Interview with Bonnie Naradzay, Special Assistant for Public Participation, Bureau of Consumer Protection, FTC, May 23, 1978.

[29]NOAA Rules, *supra,* II n. 12, at 17810.

[30]NHTSA Regs, *supra,* II n. 24, at 2867 §6(h).

[31]See Appendix K, §12.

[32]Appeal could be to the Office of General Counsel or to the Deputy Secretary.

V. RESOURCE COMMITMENT AND PRIORITIES

Having examined the paid participation programs of other agencies, the types of DOE proceedings most suitable for participation, and the functions, staffing pattern and location of a proposed OPP, we now turn to the level of projected financial support for a Department-wide program and how a system of funding priorities can best be devised.

A. Total Funds

The obvious first question is approximately how much money DOE should budget for its paid participation program.

1. Funding Levels of Other Agencies

Funding levels of paid participation programs in other agencies can provide some guidance. The FTC has an authorization of $1 million but an appropriation of only $500,000 per year. Because of heavy demand, however, the FTC is requesting the full $1 million next year.[1]

The FTC funds are divided among only six or seven rulemakings per year. Amounts allocated per rulemaking vary from a few thousand to over $100,000.[2] Individual applicants in proceedings have received as little as a few hundred dollars to as much as $109,000 for the National Consumer Law Center's effort in the Credit Practices rulemaking.[3]

NHTSA, the other paid participation program which has actually made awards to applicants, has had five completed proceedings in which 21 approved applicants received $83,873.77.[4] Average awards were only about $4,000 although requests were far greater. Based on NHTSA's own evaluation, the agency believes its funding should be increased to $200,000.

> "We expect that the costs of participation in future years will rise as a result of the increased involvement of members of the public, submission of better formulated proposals, increased understanding of the aims of procedures of the program, and inflation. In addition, we have recommended that, when possible, that time for participation by compensated participants be substantially lengthened. This would increase the costs of the program, but we believe it would be certainly worthwhile. We, therefore, believe that the programs should be funded at $200,000 a fiscal year."[5]

However, it also should be noted that Richard Lorr, one of the principals in NHTSA's paid participation project, believes that each agency within DOT should budget at least $500,000 for a meaningful program.

> "Promulgation of final departmental regulations should be accompanied by appropriations of sufficient amounts of money. Each agency may need about $500,000 a year instead of the $250,000 which was allocated by NHTSA."[6]

The contractor for CPSC's paid participation program also thought that a level of $500,000 was reasonable.

> "On the basis of our interviews and our analysis of FTC materials, and in light of the number and nature of proceedings for which reimbursement can reasonably be expected to be requested in the OPP's first twelve months, we have determined that the OPP should be capable of assuring effective involvement in a variety of pending proceedings. We have concluded, therefore, that in its first year of operation the OPP should have a minimum of $500,000 in its Compensation Fund. Anything less will seriously impair the OPP's ability to facilitate the kind and level of public participation necessary to assure that this participation is effective."[7]

The CAB, in proposing its paid participation program, expected that approximately one percent of its $23 million annual budget would be available for funding.[8] (Translated into DOE figures, based on a $10 billion budget, this would mean a $100 million paid participation program!)

The People's Counsel Office in Washington, D.C., which participates in local utility investigations and ratemaking proceedings, is authorized to expend up to one-half of one percent of the

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[1] Interview with Bonnie Naradzay, *supra*, IV n. 28.

[2] See Charts prepared by the FTC, *supra*, II n. 18, attached as Appendix I.

[3] *Id.*, p. B4.

[4] NHTSA Evaluation, *supra*, II n. 23, at 6.

[5] *Id.*, at 7.

[6] *Id.*, Attachment I, at 3.

[7] Chasen-Stein Report, *supra*, IV n.. 7, at 34.

[8] CAB Proposed Regs, *supra*, II n. 10, at 14046.

value of the company being investigated.[9] In PEPCO's case, this would amount to one-half of one percent of $1.8 billion or $9 million.[10]

2. DOE Experience

In the two paid participations by the Energy Policy Task Force, described in Chapter III, above, DOE approved $31,000 for the first[11] and has given preliminary approval to EPTF's $70,000 budget for the second.[12] In both these proceedings, EPTF believes its participation substantially was underfunded and that its presentation would have been greatly enhanced by larger awards. Further, both EPTF's participations were in DOE's middle distillate monitoring proceedings—proceedings not nearly as complex nor as far reaching as other important DOE actions discussed in Chapter III which are expected to be opened to paid participation.

Under DOE's §205 Guidelines for funding state consumer services offices and participation by outside groups in state utility commission proceedings, only $2 million was appropriated for pilot programs in 12 states.[13] Should the program be extended on a nationwide basis, which DOE officials desire, almost $10 million would be required to maintain the same program level in all 50 states plus the District of Columbia and other U.S. possessions.

3. Experience of Private Parties

It is virtually impossible to gather accurate statistics on amounts paid by business and industry representation in agency proceedings. But the few figures available indicate that such spending dwarfs the amounts available to citizen organizations. As the CAB noted in proposing its paid participation program:

> "The Senate Committee on Government Affairs examined this effect in a July 1977 study. It found that in calendar year 1976, 11 trunk carriers alone paid nearly $3 million to outside counsel to represent them before the Board. One carrier alone spent $650,000. However, the only "public interest" group that participates substantially in Board proceedings—ACAP—had a total budget of $40,000 in 1976. Of that, only $20,000 was spent on Board matters. Even when augmented by the value of pro bono legal assistance that ACAP received from affiliated groups, this represents less than 1 percent of the amount spent by the trunk carriers. The contrast is sharpened if one considers that the trunks also paid for in-house counsel and the non-legal costs of participation."[14]

The ICC, for example, said that for only the Penn Central Reorganization proceeding it had approved $1,303,437 as fees for special counsel between November, 1972 and March, 1975.[15] One expert on citizen group financing noted that participation expenses in NRC licensing hearings a few years ago ran $50-75,000 per proceeding, while corresponding figures for utility companies ranged between one-half to one million dollars for a single powerplant licensing.[16]

B. A Suggested Amount for DOE

In determining how much DOE should budget for paid participation, the Department must consider:

1. The number of proceedings which are most suitable for public participation;
2. The nature and complexity of such proceedings (and, hence, the participation effort);
3. The potential number of applicants which might be funded in each proceeding; and
4. The reality of funding availability.

If we review again each of the 11 DOE offices as we did in Chapter III, each would have *at least* five or six suitable proceedings. This means a total of 50-60 DOE actions of great public importance and significance with which the Department

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[9] D.C.CODE Title 43, §412(a) (Supp. IV 1977).

[10] Interview with Brian Lederer, People's Counsel, Washington, D.C., June 15, 1978. Note also that CPSC has allocated $30,000 to its paid participation program for the last four months of fiscal year 1978. CPSC Interim Regs, *supra*, II n. 9, at 23562, D.

[11] See authorities cited, *supra*, III n. 2.

[12] See authorities cited, *supra*, III n. 6. Unfortunately, DOE will not approve the fees of EPTF's counsel until after actual expenditure—a practice recommended against in Chapter VI, F, below.

[13] See discussion in Chapter III, A, above.

[14] CAB Proposed Regs, *supra*, II n. 10, at 14045.

[15] As part of the hearings on S.2715 (S.270), Senator Kennedy asked all federal agencies for records of attorney's and witnesses' fees of business interests appearing before them. No agency was able to make even generalized estimates. S.2715 Hearings, *supra*, II n. 5, at 609-10 and 768-69.

[16] Memorandum to the Senate and House Conferees from Matthew Schneider, Senate Government Operations Reorganization Subcomm., 120 Cong. Rec. S.18724, 18727 (daily ed. Oct. 10, 1974). Experienced intervenors, Joe Tuchinsky of Michigan Citizens Lobby, and Ed Petrini of PIRGIM, estimate that major utilities may spend around $1 million for each major rate case in the late seventies. Testimony in Support of Michigan H.B.4971 and 5540 (utility-assessed funding for citizen intervenors) before the Michigan House Consumers Committee, February 6, 1978, and Telephone Interviews, June 1, 1978. *See also*, Study on Federal Regulation, Comm. on Governmental Affairs, U.S. Senate, Vol. III, pp. 16-21 (July 1977) for discussion of costs in FPC proceedings.

will be wrestling at a minimum. All of these are likely to be complex proceedings affecting many consumer and geographic interests in which more than a single group can be expected to apply for funds.

If we further assign a conservative amount of between $100,000 to $150,000 for each proceeding, the Department-wide figures would range from $5 to $7.5 million. This, indeed, would be a conservative estimate for initiating a Department-wide program.[17] It would be well in line with the program levels of other federal agencies and represents a sum which is less than one-tenth of one percent of DOE's own budget.

C. Assessing Priorities

Assessing the priority of proceedings for paid participation, obviously, cannot be separated from making the determination of how much money to allocate for each proceeding and for the program as a whole. The decisions are completely entwined.

We can offer no magic formula for telling DOE which of the scores of important decisions should be chosen for paid participation, but this report has suggested certain guidelines which might help the agency in this process.

First, in Chapter III we discussed the 11 key DOE offices whose decision-making seemed most appropriate for public participation. We also stressed that the legal form of the judgmental process was not nearly as important as the underlying substantive issues in determining which kinds of proceedings should be open to participation. Thus, we argued that rulemaking and adjudicatory actions as well as policy analysis, R&D decisions and budgetary concerns were entirely proper and desirable areas for public comment.

Second, we pointed out that DOE, itself, had formulated a process for determining which of its regulatory actions were "significant" and that this same rationale could be applied to informal policy decisions as well.[18] In addition, we enumerated four other factors which might be useful in this regard:

a. The nature and importance of the underlying issues and the extent of their impact on particular geographic regions or the public at large;

b. The precedent-setting effect of the decision on agency policies and new directions;

c. The advisability of involving the public at an early stage in order to enlist long-term broad public backing and confidence; and

d. The desirability of securing representation of a fair balance of views in proceedings which already are being heavily lobbied by other interest groups or influenced by "institutional" staff concerns.

Third, we suggested in Chapter III that were the agency to publish its semiannual agenda of significant decisions under consideration, that both public comment thereon and petitions from outside groups for initiation of paid participation proceedings would give DOE a good indication of the principal concerns of the public at large.

Beyond this, the ultimate choice of opening any one particular proceeding would have to be the agency's, taken in the context of available funds and manpower. Once again, the purpose of paid participation is to help the agency receive a balance of public viewpoints. It must make the final decision on which issues are most appropriate in the light of the factors discussed above.

D. Participation Statement Process

What could be most helpful to DOE in determining the priority and suitability of its proceedings for paid participation is a formal written procedure for ensuring public comment. We call this the Participation Statement Process or PSP. It outlines a procedure for enhancing paid participation in DOE proceedings similar to the PPB process for ensuring consideration of budget priorities.

PSP would be the responsibility of OPP. The OPP Director, together with the persons assigned public participation responsibilities for the 11 key DOE offices, would help each office develop a semiannual agenda of important decisions which that office would be considering in the forthcoming months. This process does not differ significantly from DOE's current use of its ACTS schedule or implementation procedures under Executive Order 12044, discussed above.

The semiannual agenda of "significant decisions," as the semiannual agenda of "significant regulatory actions" under E.O. 12044, should provide a succinct statement of the problem, a description of the major possible alternate solutions and an analysis of the economic and environmental consequences for consumers of each alternative.[19] The agenda (i.e., the participation

[17]To this would be added an administrative budget of $300-400 thousand as noted in Chapter IV, above.

[18]DOE, Proposals for Implementing E.O. 12044, *supra*, I n. 3.

[19]E.O. 12044, *supra*, I n. 2, §3(b).

statement) also would describe the general timetable for making each decision and suggest appropriate opportunities in the decision-making process where public comment might be especially helpful.

Outside organizations could apply to OPP for limited funding of their comments on the agenda and groups whose petitions successfully resulted in initiation of new proceedings also could be reimbursed. Once these comments and petitions had been analyzed by OPP, with technical assistance from the DOE offices involved, the Director of OPP and the Administrator of each DOE office would jointly decide which particular proceedings would be open to paid participation. As discussed in Chapter IV, above, the actual decision on which applicant to fund and the amount of the award in each particular proceeding would be the responsibility of OPP.

Thus, PSP builds on the ACTS schedule and the process DOE has developed for implementing E.O. 12044, extending its semiannual agenda of significant regulatory actions to include significant decisions in other policy areas as well. Commentary and petitions from outside groups and organizations provide an opportunity for public participation at an early point in the decision-making process. OPP staff institutionalizes the PSP in each of the key DOE program offices.

E. Budgeting

In section B of this chapter, we suggested a total amount for DOE's paid participation program. Sections C and D then described a process for establishing priorities among proceedings eligible for funding.

Because each key DOE office has its own budget and will be in the best position to advise OPP on proceedings most suitable for paid participation, we recommend that each office contribute a share of its budget to the total paid participation program, earmarked for participation efforts in its own processes. The exact amount would be agreed upon by joint decision of the office head and OPP Director. The assistant secretaries and office directors interviewed favored this kind of separate earmark rather than seeking an overall line-item appropriation for DOE's total paid participation program.

As we pointed out before, however, each office head also would continue to be able to supplement earmarked paid participation funds with his or her own program monies. For example, in Chapter III we discussed the possible utilization of outside groups through an RFP-type process to conduct studies and assessments, comment on draft reports and undertake policy analyses. The adoption of a paid participation program in no way would restrict DOE's offices from contracting with such groups as they are authorized to do now.

VI. ADMINISTRATIVE CONSIDERATIONS ON IMPLEMENTATION

Having already examined (a) the paid participation programs of other agencies, (b) DOE's own internal organization and the range of important energy-related issues with which it deals, (c) the function, location and staffing of OPP within DOE, and (d) the commitment of DOE resources and a suggested PSP system for assessing priorities, it now is appropriate to consider some of the administrative issues associated with implementation of a paid participation program.

A. Eligibility

Eligibility guidelines for paid participation are quite similar for all federal agencies having such programs. Most are built upon the FTC's pilot 1975 legislation. Generally, eligibility questions are divided into two major categories: non-financial requirements and financial limitations.

1. Non-Financial Requirements

DOE's guidelines for its home heating oil proceeding provide that an applicant for funding must describe why its

> ". . . involvement in the hearing will substantially contribute to a full and fair determination of the complex and important issues to be considered in that proceeding."[1]

The FTC legislation simply provides that funding can go to any person:

> ". . . who has, or represents, an interest which would not otherwise be adequately represented in such proceeding and representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole . . .".[2]

The non-financial requirement in S.270 is:

> "(d) Any person is eligible to receive an award under this section for participation (whether or not as a party) in an agency proceeding if—
> "(1) the person is an effective representative of an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding, taking into account—
> "(A) whether the interest is adequately represented by another person in the proceeding,
> "(B) the number and complexity of the issues presented,
> "(C) the importance of public participation, in consideration of the need to encourage participation by representatives of segments of the public who, as individuals, may have little economic incentive to participate, and
> "(D) the need for representation of a fair balance of interests . . . ".[3]

The CPSC language is the simplest of all:

> "The participant represents a particular interest or point of view that can reasonably be expected to contribute substantially to a full and fair determination of the issues involved in the proceeding."[4]

The FTC, by construing its statutory language broadly in its guidelines, really does not differ from the others in defining non-financial eligibility requirements. Indeed, there seems to be general agreement on this matter also among citizen and consumer organizations interviewed.[5]

There are some obvious definitional problems within these flexible standards of eligibility. Some are:

— how to define "adequate" or "effective" representation?

— what "interests" are "important"?

— when is there "duplicative" representation?

Agency representatives interviewed in the FTC and NHTSA noted that sometimes these issues raised certain problems. But they did not seem to be significant and no consumer organization had difficulty with the agencies' interpretation. Most persons preferred to retain these general eligibility standards.

In administering its general non-financial eligibility standard, the FTC considers the following seven "factors:"

> "1. *Point of view.* Key issues in rulemaking proceedings often involve sophisticated questions about the true nature of different consumer interests. Evidence that an applicant has a point of view, not already represented by the FTC staff attorneys or any other party, that would help illuminate these issues can be favorable.

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[1] DOE Notice, *supra,* III n. 4, 2921. This is also the test used by DOE in its §205 Guidelines, *supra,* III n. 9, 35164.

[2] FTC Improvement Act §202(h), *supra,* II n. 19.

[3] S.270, *supra,* I n. 1, §(d)(7). Other agencies tend to track S.270 more than the FTC. *See,* NHTSA Regs, *supra,* II n. 24, 2867; NOAA Rules, *supra,* II n. 12, §904.3; TOSCA Rules, *supra,* II n. 4, 60911; CAB Proposed Regs, *supra,* II n. 10, 14053.

[4] CPSC Interim Regs, *supra,* II n. 9, §1050.4(b)(1).

[5] See Appendix K, § 10a.

"2. *Specificity.* The more clearly an applicant sets forth the particular issues in the proceeding it intends to address, the point of view of the interest it represents, the nature of the information it intends to develop or introduce, and the identities and qualifications of the personnel working on the project or serving as experts, the more likely it is to be funded. Without such information, the Bureau cannot make the required findings.

"3. *Relation between the applicant and the interest.* The statute does not establish any criteria for determining whether an applicant truly represents the interest involved; however, the Bureau must examine the bona fides of the representation in examining adequacy. An industry trade association that claims to represent consumers would be viewed skeptically, and vice versa, for example.

"4. *Constituency.* It can be a favorable factor if the applicant is a membership organization or is supported by cash contributions from the public or from a particular constituency. The willingness of individuals to support the applicant provides some evidence that the organization is indeed responsive to their interest and raises a presumption that the group will continue to represent its constituency's interest in the future.

"5. *Experience and expertise in the substantive area.* If an applicant has been involved in the subject area in some fashion and has developed some competence on the issues presented by the rulemaking proceeding because of this involvement, there is better reason to think that its contribution will be valuable than if it has shown no prior interest in the area.

"6. *Experience in trade regulation matters generally.* If an applicant has not been involved in a substantive area but has been involved in analogous problems and has demonstrated competence in procedure and general approach, its experience should be taken into account.

"7. *General performance and competence.* If the applicant has not been active in the subject area or in analogous proceedings, demonstrated ability in other activities is relevant, as is evidence that the applicant has the technical capability to perform the activities it proposes. An applicant requesting funds to perform survey research should prove its competence in conducting surveys, or in knowing whom to hire for survey work. A request for funds for cross-examination should establish the expertise of the proposed cross-examiner."[6]

We would recommend the broad CPSC or S.270 eligibility language and endorse as well the FTC's seven "factors" as an implementation guideline. This also would accord with DOE's home heating oil announcement.

2. Financial Limitations

There is also virtually unanimous agreement by the agencies involved on financial eligibility standards. S.270 provides that assistance can be provided to any person who meets the representation and substantial contribution test (i.e., paragraph 1, above) and:

> "(2)(A) the economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person, or whenever the person is a group or organization, the economic interest of a substantial majority of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceeding, or
>
> "(B) the person does not have sufficient resources available to participate effectively in the proceeding in the absence of an award under this section."[7]

The CPSC takes S.270's alternatives and combines them into one requirement so that applicants must have both a small stake in the proceedings *and* insufficient resources to participate.[8]

The FTC has only the latter requirement, i.e., a person must be "unable effectively to participate [without financial assistance];" but incorporates the test of a "small economic stake as compared to the costs of participation" as one of the factors for determining whether a person is or should be able to participate.[9]

NOAA, too, provides only that the applicant:

> ". . . does not have sufficient resources available to participate effectively in the proceedings in the absence of compensation . . ." [10]

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[6]FTC Blue book, *supra,* II n. 19, at 12-14. An eighth FTC factor will be discussed, *infra.*

[7]S.270, *supra,* I n. 1, §(d)(2)(A) and (B).

[8]CPSC Interim Regs, *supra,* II n. 9, §1050.4(b)(1) – (2). The CAB follows the CPSC approach. *See,* CAB Proposed Regs, *supra,* II n. 10, §304.7(a)(4) and (5).

[9]FTC Blue book, *supra,* II n. 19, at 15.

[10]NOAA Rules, *supra,* II n. 12, §904.3(a)(2).

In rejecting the CAB and CPSC approach, NOAA observed:

> "One commenter suggested that the criterion of small economic interest in the outcome relative to the costs of participation be *added* to the criteria of substantial contribution to a fair determination and financial need that are provided for in the proposed rules. In this way, prospective participants having comparatively great economic interests in the outcome would not be eligible for financial assistance even if they faced immediate difficulty in financing their participation. In view of NOAA's position that the public interest requires the broadest possible participation, rather than the participation or nonparticipation of any particular type of entity, this suggestion will not be adopted."[11]

We, along with most citizen organizations, prefer the FTC or NOAA language on financial limitations. This was also the tack taken by DOE in its home heating oil proceeding.[12] But the actual differences between these and the CPSC, CAB or S.270 approach is small in comparison to establishing the basic principle of need.

However, what is important to consumer and citizen groups is how this provision is administered—especially for those organizations which have some resources of their own but not nearly enough to participate in all the proceedings they wish to enter. Such groups strongly urge that it would be unfair to "force" them to make a contribution of staff or monetary resources if these resources have been otherwise committed.[13]

It is not the point of a paid participation program to force public oriented organizations to reorder their own internal budget priorities. Rather, such a program is designed to help the agency receive effective and valuable public comment. The question of an organization's general sources is relative only to the applicant's need for compensation on a per proceeding basis—not on the wisdom of an applicant's choice to devote its resources to other general purposes.

A group with substantial resources of its own should be eligible for funding if it is unable to participate in a particular proceeding because its resources are already committed to other areas or if it has undertaken to cover other activities.

We would agree with NOAA's comments in this regard:

> "In considering applications for assistance, NOAA will attempt to confine its evaluation of the program and policy priorities of any applicant to the process of determining the applicant's comparative ability to contribute substantially to a fair determination of the proceedings. Once an applicant has been determined to be eligible under the substantial contribution criterion, its program and policy priorities will not be considered in determining its eligibility under the financial need criterion."[14]

3. Persons Eligible

The paid participation programs of other agencies generally do not restrict the applicant by form of legal organization if it meets the twin tests of "substantial contribution" and "financial need." Thus, FTC allows any "person" to apply for funds other than an agency of the U.S. Government.[15] This includes an individual, partnership, corporation, association, or public or private organization.

CPSC also would allow any "person" to apply, a term flexible enough to include any "public . . . organization."[16] NHTSA's definition of an "applicant," while similarly broad, would not embrace any public body.[17] NOAA and CAB also have quite flexible definitions of an eligible "applicant."[18]

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[11] *Id.*, at p. 17809.

[12] DOE Notice, *supra*, III n. 4; but see the liberal use of the alternative S.270 approach by DOE in its §205 Guidelines, *supra*, III n. 9, 35164-35165.

[13] See Appendix K, § 8 and 10.

[14] NOAA Rules, *supra*, II n. 12, 17809. *See also*, Letter to Ms. Margery Waxman Smith, Acting Director, Bureau of Consumer Protection, Federal Trade Commission, from Senator Edward M. Kennedy, co-author of S.270, and Chairman of the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary and Senator Warren G. Magnuson, co-author of the Magnuson-Moss Warranty-FTC Improvement Act and Chairman of the Commerce Committee, October 27, 1976 (hereafter referred to as the Kennedy-Magnuson FTC letter) at p. 5:

> "The [FTC] statute, by its very language is concerned solely with the necessity for representation of a particular interest or interests in a given proceeding. It does not require the Bureau to make judgments as to the value of an applicant's commitment of its own resources to *other* issues or endeavors. All the Bureau is required to do, once it has determined that an applicant represents an interest that would not otherwise be adequately represented and which is necessary for a fair determination of the proceeding, is to judge whether or not the applicant is able—based on its resources then available—to afford the costs of effective participation." (emphasis original)

[15] FTC Blue book, *supra*, II n. 19, at 9.

[16] CPSC Interim Regs, *supra*, II n. 9, §1050.3(c).

[17] NHTSA Regs, *supra*, II n. 24, 2866 §2.

[18] NOAA Rules, *supra*, II n. 12, §904.2(c); CAB Proposed Regs, *supra*, II n. 10, §304.4(c).

We also would support applicant eligibility on an all-inclusive basis provided the tests in paragraphs 1 and 2, above, are met. While some consumer groups wished to see the program limited to non-profit organizations, they were very concerned that small businesses and public agencies not dominate the funding.[19]

It is difficult to rationalize "public" participation as applying only to non-profit organizations. Valuable contributions undoubtedly can be made as well by individuals, associations, business persons and public bodies. Further, were the program open to all it would serve to blunt possible criticism as another "give-away" to "public interest" groups. The important consideration here is not to restrict eligibility but to enforce the financial needs test and "pierce the veil" of any organizations set up by wealthy interests merely as a shell for participation.

4. Other Eligibility Limits

In addition to the tests in paragraphs 1 and 2, above, a few programs contain other types of limitations.

The FTC, for example, limits compensation by statute to those persons who would be regulated by proposed rulemaking proceedings to 25 percent of the total funds available.[20]

S.270 provides:

> "In determining whether a person is eligible for an award, the agency shall give no preference to persons who support views of agency staff."[21]

NOAA comments, similarly:

> "Under no circumstances will assistance be denied or its amount affected on the ground that an applicant opposes NOAA or a position supported by NOAA in another proceeding."[22]

We believe the NOAA comment, in a DOE guideline, rather than a specific regulation, is the best way to handle this matter.

B. Selection Criterion

A few agencies have established broad criteria for selection of participants to be funded among eligible applicants.

1. More Than One Applicant

No agency, however, limits its selection process to choosing just one applicant. As NOAA observed:

> "Should the number of participants who may be subsidized in any one proceeding be limited? If so, what should the number be?
>
> "Most of the commenters on this question stated that there should be no limitation in the final rules on the number of participants in any proceeding who might receive asistance. Two commenters urged that a limit of one award of assistance in any proceeding should be established. NOAA does not believe it has sufficient information at this time to establish a numerical limit on those receiving assistance in a proceeding, and will therefore refrain from incorporating such a limit in the final rules."[23]

2. Selection Criteria

The CAB's proposed rules set forth the following selection criteria:

> "In selecting among applications representing the same or similar interests, the Evaluation Committee will consider and compare the applicants' skills and experience and the contents of their proposals. In particular, the Committee will consider and compare;
>
> (1) The applicants' experience and expertise in Civil Aeronautics Board matters generally and in the substance of the proceeding particularly;
>
> (2) The applicants' prior general performance and competence;
>
> (3) Evidence of the applicants' relations to the interest they seek to represent;
>
> (4) The specificity, novelty, relevance, and significance of the matters the applicants propose to develop and present; and
>
> (5) The public interest in promoting new sources of public participation."[24]

The other agencies have not adopted specific selection criteria, relying instead on their own experience with the program and the general eligibility tests noted in paragraphs A1 and 2, above.

As we noted in paragraph A 1, above, the FTC's use of eight eligibility "factors" is really equivalent to the adoption of selection criteria. We recommend this approach to DOE with certain changes.

Relevant selection criteria would be:

1. Point of view (novelty, relevance significance);

[19] See Appendix K, § 10. It is interesting to note that DOE also limited its paid participants to non-profit organizations in its home heating oil hearing. DOE Notice, *supra*, III no. 4, 2921.

[20] FTC Improvement Act, 15 U.S.C.A. §57a(h)(2)(b) (1978).

[21] S.270, *supra*, I n. 1, §(e)(2)(B).

[22] NOAA Rules, *supra*, II n. 12, 17809.

[23] *Id.*, at 17810.

[24] CAB Proposed Regs, *supra*, II n. 10, 14053. The NHTSA Regs track the CAB proposal. NHTSA Regs, *supra*, II n. 24, p. 2867, §6(e) (1) – (4). See also the criteria spelled out by DOE in its §205 Guidelines, *supra*, III n. 9, 35168.

2. Specificity and clarity of proposal;
3. Bona fide representation;
4. Constituency representation;
5. Experience and expertise in the substantive area of the proceeding;
6. Experience in energy-related matters overall; and
7. General performance and competence.

To these "FTC" factors we would add an eighth:

"The public interest in promoting new sources of public participation."

3. New Sources of Public Participation

Many agency officials and most citizen organizations vigorously support efforts to spread out available funds to ensure: (a) that groups from all parts of the country benefit; (b) that local, state, and regional organizations do not suffer at the expense of national groups; (c) that undue emphasis not be placed on building up a Washington-based constituency; and (d) that steps be taken to avoid "kept" critics, i.e., repeated awards to the same applicant.

These concerns were expressed by a number of the public interest groups interviewed.[25] Some groups felt that state and local organizations generally had a more difficult time obtaining funding than Washington-based groups. They urge that DOE try to "regionalize" its proceedings as much as possible to help state and local groups participate more effectively.

4. Multiple Applications

Lastly, when multiple applications are submitted, DOE's OPP ought to have authority, in the words of S.270, to:

> "(A) require consolidation of duplicative presentations;
> (B) select one or more effective representatives to participate;
> (C) offer compensation only for certain categories of expenses, or
> (D) jointly compensate persons representing identical or closely related viewpoints."[26]

C. Contributions or Matching Share

A number of commentators and agency rules suggest that the degree to which an applicant can contribute its own resources to the proceeding (i.e., match the award) should be a factor in determining eligibility or selection of applicants. The rationale for this seems to be that such a contribution or match is an indication of an applicant's bona fides or serious interest. Thus, the only factor we omitted in paragraph A1, above, is factor 8 in the FTC's eligibility guidelines:

> "8. *Contributions.* Another consideration is the applicant's willingness to spend some of its own money on the proceeding. This indicates that the applicant believes the problem is significant to the interest it represents and that its participation is important. This applies only if an applicant's financial state would permit it to finance partially, but not entirely, the cost of participation. An applicant will not be penalized if it cannot afford any contributions."[27]

This provision almost begs the very question it tries to answer.

In commenting upon this, Senators Kennedy and Magnuson wrote to the FTC:

> "While we recognize that an applicant's willingness to expend some of its own funds may indicate that it believes the issue in which it seeks to become involved is significant to the interest it represents, we think this factor bears little relevance to its overall commitment. The limited funds on which most citizen groups operate hardly make their willingness to contribute some of these funds a dispositive indication of their seriousness of purpose. Indeed, this situation was a primary factor in motivating Congress' establishment of an FTC compensation program in the first place. An applicant should not, in effect, be penalized for stating that it would be wholly unable to participate without receiving full compensation from the Commission."[28]

Consumer groups and citizen organizations were virtually unanimous in their opposition to any contribution or matching requirement. Such a provision obviously favors the better financed organizations over the smaller, less funded groups and individuals. It also tends to work against the need to ensure that participant funding is spread out equitably among a variety of organizations—large and small, new and old, and local, state, and national. And, as we noted above, this was a key consideration of groups interviewed.

We agree with Senators Kennedy and Magnuson that contributions or a matching share should not be employed as a separate factor for selecting among applicants. Rather, the feasibility of contributions by an applicant should be considered only as one of the factors in determining financial eligibility—with the caveat, as noted in

[25]See Appendix K, §10b.

[26]S.270, *supra,* I n. 1, §(e)(3).

[27]FTC Blue book, *supra,* II n. 19, at 14.

[28]Kennedy-Magnuson FTC letter, *supra,* VI n. 14, at p. 6. Note also that DOE itself does not require any contributions or matching share from consumer organizations funded by state offices under its §205 Guidelines, *supra,* III n. 9.

paragraph A2, above, that a group not be "forced" to re-order its own organizational priorities.

In this connection, a prior DOE decision needs reconsideration. In approving the last petition of the Energy Policy Task Force (EPTF) of the Consumer Federation of America, DOE held that only two-thirds of the portion of the Director's time devoted to the particular proceeding would be compensated. This, despite the EPTF Director's assertion that she would not have spent any time in the particular proceeding in the absence of a compensation award. DOE reasoned:

> "In the previous Decision and Order in this matter we stated that CFA should make some contribution to the intervention effort by itself sustaining a portion of the salary expenses of full-time employees of the organization who would be participating in the intervention effort . . . This conclusion was based on the DOE's belief that intervenors should as a general rule contribute a share of the overall expenses involved in an intervention effort. As we stated on a previous occasion, the salaries of an organization's existing employees are already fully budgeted and would be paid by it regardless of whether the organization intervenes in the proceeding. Moreover, at least a portion of the time which an organization's employees will expend on an intervention project is presumably a part of their overall responsibilities especially where the intervention directly furthers the objectives of the organization . . ." [29]

In effect, DOE was re-ordering the priorities of the EPTF. The agency unaccountably assumed that EPTF's participation in DOE's proceeding was "presumably a part of their overall responsibilities"—despite EPTF's direct evidence to the contrary. This presumption is completely unwarranted and results in the funding agency forcing an applicant to make a contribution to a proceeding which would have been expended in other efforts.

1. Maintenance of Effort

However, a concept we do support is "maintenance of effort." This will deal effectively with both the "contributions" issue and the "priority re-ordering" problem.

What is at the root of both these concerns is the often inarticulated notion that organizations should not be permitted to use federal participation awards to subsidize their general operations or to enter a proceeding which they would have gone into in the absence of such an award. We believe that federal participation funds should properly be used only for new or expanded efforts; and that applicants must "maintain" their other activities with their own funds.

Such a "maintenance of effort" provision is common in federal grant programs. For example, Community Services Administration's funds to community action agencies (CAA) cannot be used to diminish or replace the non-federal funds of such agencies already being devoted to CAA activities.[30]

So, too, with participation awards. If an applicant has already entered a proceeding or has funds available for the proceeding, then its award should cover only its new or expanded efforts. Funding should not replace the contribution which applicant would otherwise have made if compensation had not been available. Hence, the applicant must "maintain" its level of effort—not substitute the award for its own funds already being expended in this regard.

D. Reimbursable Expenses

There is considerable agreement among agency paid participation programs and outside organizations that awards should cover all reasonable costs authorized and *actually incurred* in participating in the proceeding. As the NOAA regulations comment:

> "While many commenters argued that any cost incurred as a result of participation in a NOAA proceeding should be considered for reimbursement, other commenters suggested that one or more kinds of costs should be excluded. NOAA did not find the reasons given for the proposed exclusions to be sufficiently strong to warrant adoption of the exclusions, at least until they have been substantiated by experience. The inclusive provisions of pro-

[29] Case No. DMR-0019, *supra*, III no. 6, at p. 2. *C.f.* NOAA's statement:

> "Once an applicant has been determined to be eligible under the substantial contribution criterion, its program and policy priorities will not be considered in determining its eligibility under the financial need criterion."

NOAA Rules, *supra*, II n. 12, at 17809 (¶3).

[30] *See*, Regulations of the Community Services Administration, 40 Fed. Reg. 27668 (July 1975). The intent of a maintenance of effort provision is to ensure that a grantee does not use the federal grant funds to replace funds of its own being devoted to the same purposes for which the grant was made. Thus, if a school system is already providing pre-school services for poor children, it cannot use a Head Start grant to replace these monies and divert them to an audio-visual program for high school students. It must, instead, use the grant to expand its ongoing early childhood program for low-income youngsters.

posed section 904.5(d) are, therefore, retained in the final rules."[31]

CPSC also provides broad categories for reimbursement. For example:

> "The Commission may compensate participants for any or all of the following cost:
> (1) Salaries for participants or employees of participants;
> (2) Fees for consultants, experts, contractual services, and attorneys that are incurred by participants;
> (3) Transportation costs;
> (4) Travel-related costs such as lodging, meals, tipping, telephone calls, etc.; and
> (5) All other reasonable costs incurred, such as document reproduction, postage, babysitting, etc."[32]

Consumer organizations also believed that reimbursement ought to extend to any audit, bookkeeping or accounting expenses incurred as a result of a participation award.[33] Also, transcripts, copying and distribution costs of proceedings should be eliminated by the agency or reimbursed to applicants.

1. Successful Applications

One cost which many consumer organizations believed should be reimbursed is the cost of completing a successful application resulting in a participation award.[34] While no agency regulation currently provides for this, most agency application processes were deemed by agency officials to be relatively simple and not time consuming.

However, a number of the DOE proceedings can be expected to be highly complex, requiring great applicant preparation time and even use of outside experts and consultants. In such proceedings, we would concur with outside groups that compenstion for successful applicants should be considered. Some federal agencies, for example, compensate the top finalists in procurement bids. This practice recognizes the often large expenditure of funds incurred by potential contractors in the RFP process.

2. Successful Petitions

As we have discussed before, we strongly favor the position of most community groups and consumer organizations[35] (and a number of agency officials) that successful *petitions* leading to selection of issues for agency rulemakings, hearings or public comment also ought to be reimbursed on the same reasonable costs standards as proposed for other participation awards. Further, such petitions should be responded to by agencies within a reasonable but definite time frame.

Petitions offer an important opportunity for outside groups to influence the agenda of agency actions. They are a significant facet of public participation and, if successful, should be reimbursed like any other form of participation.

In fact, reimbursement for successful petitions was one of the recommendations of the NHTSA evaluation team:

> "If an agency commences a proceeding as a result of a petition for agency action by members of the public, the costs of generating the petition is (sic) compensable if the petitioners meet the other criteria of the rule governing compensation of participants."[36]

E. Levels of Compensation

The two most important areas of concern here involve: (1) whether there should be any maximum limitations placed on market rate levels of compensation; and (2) whether there should be different treatment for compensating applicant staff vis-a-vis retained outside experts.

1. Reasonable Compensation

There is general agreement that compensation of authorized expenses should be *reasonable* based on prevailing market rates for goods, services, salaries, and fees of outside experts and attorneys. Thus, the FTC statute provides compensation for ". . . reasonable attorneys' fees, expert witness fees, and other costs of [participation] . . "[37]

However, the FTC by regulation has imposed a maximum on "reasonable fees:"

> "Fees for consultants and experts are limited to the maximum rates the Commission can pay its own consultants and experts."[38]

The FTC also has devised an elaborate rate schedule for compensating applicant staff and outside attorneys.[39]

Other agencies are divided over the question of maximum limits and none has spelled out an ac-

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[31]NOAA Rules, *supra,* II n. 12, 17810.

[32]CPSC Interim Regs, *supra,* II n. 9, 23563-23564. See also, FTC Blue book, *supra,* II n. 19, at 6-7.

[33]See Appendix K, §11.

[34]*Id.,* at §3.

[35]*Id.*

[36]NHTSA Evaluation, Attachment I, *supra,* II n. 28, p. 2, ¶1.

[37]FTC Improvement Act, 15 U.S.C.A. §57a(h)(1)(1978). For an interpretation of this provision by the FTC, see FTC Blue book, *supra,* II n. 19, at 9.

[38]FTC Yellow book, *supra,* II n. 19, at 4.

[39]*Id.,* at 11-12.

tual rate structure like the FTC. Thus, the CAB rules provide:

> "Compensation is limited to reasonable services and costs of participation that have been authorized and actually incurred. In no case, however, will compensation be greater than salaries paid by the Board for comparable services or the amounts normally paid by the Board for comparable goods."[40]

And NOAA:

> "The amount of reasonable attorneys fees, fees and costs of experts, and other costs of participation awarded . . . shall be based upon prevailing market rates for the kind and quality of the goods and services, as appropriate, furnished, except that no attorney, expert or consultant shall be compensated at a rate in excess of the highest rate of compensation for attorneys, experts, consultants, and other personnel with comparable experience and expertise paid by NOAA."[41]

It is unclear from the CAB and NOAA treatment exactly how those agencies would translate comparable government salaries (fringe benefits, pensions, vacation time, etc.) into equivalent applicant salaries; or whether they are talking in terms of government agency rates paid on personal consulting contracts or under procurement contracts to outside firms who then are allowed to compensate their own staff and outside experts at rates greatly exceeding personal service contract rates. For instance, there are numerous examples of the government hiring outside attorneys at the latters' normal market rates and of procurement contracts to firms which retain experts and attorneys at rates higher than the same person would receive on a personal service contract or at a "comparable" G.S. schedule.[42]

Rather than become trapped in the "maximum" rate thicket, we prefer the simpler CPSC approach. The CPSC provides:

> "The Commission shall compensate participants only for costs that it determines are reasonable. As guidelines in these determinations, the Commission shall consider market rates and rates normally paid by the Commission for comparable goods and services, as appropriate."[43]

This would establish the principal of "reasonable" compensation and utilize as one guideline for determining what is "reasonable" the yardstick of appropriate market rates or rates paid by the agency (under personal service or procurement contract) for comparable goods and services. Moreover, the principle of "reasonable compensation" already has been established by DOE in approving its paid participations to date both in its own proceedings and under §205 for payment to consumer organizations in state utility commission proceedings.[44]

The principle of "reasonable" rates encourages the applicant to retain the most qualified talent available in order to present its best possible case. Once again, the rationale for a paid participation program is to help the agency consider effective and well considered presentations—not to unduly hamper public participation efforts. And this is also the principle favored by most consumer groups interviewed.[45]

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[40]CAB Proposed Regs, *supra,* II n. 10, §304.8(b).

[41]NOAA Rules, *supra,* II n. 12, §904.5(c). S.270, *supra,* I n. 1, §(e)(6) provides:

> "The amount of reasonable attorneys' fees, fees, and costs of experts, and other costs of participation awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished or to be furnished, except that (A) no expert or consultant shall be compensated at a rate in excess of the highest rate of compensation for experts and consultants paid by the agency involved: and (B) attorneys' fees shall not be awarded in excess of $50 per hour for any such participation unless the agency determines that special factors, such as an increase in the cost of living or limited availability of qualified attorneys for the proceedings involved justify a higher fee."

[42]Federal Procurement Regulations, 41 C.F.R. Part 1, *et seq.,* contain no limits on contractor salary or consultant rates.

[43]CPSC Interim Regs, *supra,* II n. 9, §1050.7(d). *See also,* NHTSA Regs, *supra,* II n. 24, §7.

[44]In approving an award of $60 per hour for attorneys' fees to the Energy Policy Task Force of the Consumer Federation of America, DOE noted:

> "Moreover, the issues to be addressed and the conclusions reached in the evidentiary hearing are of unusual significance and complexity since the hearing concerns the future pricing of domestic home heating oil and will involve consideration of economic issues on a national, regional and local scale. In addition, the counsel whom CFA indicates it will retain for this purpose is skilled in this field and has considerable expertise with regard to both the procedural as well as the substantive issues that will be considered in the hearing."

Case No. DMR-0019, supra, III n. 6, at p. 3.

See also, §205 Guidelines, *supra,* III n. 9, §460.13(a)(6) which states:

> "Payments to [attorneys, expert witnesses and other consultants] shall not exceed the prevailing marketing rate for the level and quality of the personal service but not to exceed 75 dollars per hour exclusive of reasonable costs for travel and incidental disbursements such as mailing and photocopying."

[45]See Appendix K, § 4.

2. Staff vis-a-vis Outside Consultants

The FTC provides that applicant staff should be compensated at reasonable levels reflecting actual salaries and allowable overhead (at GAO approved rates or 25 percent of salaries) plus fringe benefits.[46] While the regulations of other agencies are not explicit on this precise point, all persons interviewed felt that reasonable compensation should include reimbursement for an organization's salaries, as well as for fringe benefits and actual overhead attributed to staff employees participating in the proceeding.[47]

Many groups believed, however, since non-profit staffs (and especially their in-house experts and attorneys) were notoriously underpaid, that compensation awards should exceed actual salaries, fringe and overhead so long as they were still reasonable.[48] For example, the FTC has requested such a ruling from the Comptroller General:

> "Compensation at a fair market value which is in excess of the rate actually paid or the expense incurred can be justified by the benefit to the public interest as a whole of persons participating in this proceeding. It was just such a concern, which should be equally applicable to §18[9](h), that motivated the court in *Consumers' Union,* [*Consumers' Union* v. *Board of Governors, Federal Reserve System,* 410 F. Supp. 63 (D.D.C. 1975)] to award reasonable fees in excess of those actually incurred."[49]

Although this seems to contradict the principle of not providing general support to an applicant organization via participation awards, so long as the compensation is still reasonable, we support this move. There is merit in the notion of upgrading the quality of applicant staff and closing the gap between the salaries of business and industry representatives and those of non-profit groups.

In recommending that NHTSA change its paid participation regulations from compensating an applicant's staff (lay, expert or attorney salaried employees) to paying reasonable market rates, the NHTSA evaluation noted:

> "We are not troubled if individuals or organizations manage to earn part of their livelihood from their participation in DOT proceedings. Encouragement of private spokesmen for the public interest is an important priority. Offering these spokesmen their market value, and not restricting them to their historically depressed earnings, is a valid approach to stimulating an informed and active public."[50]

F. Timing of Awards

All federal agencies with paid participation programs approve specific funding of applications prior to the commencement of proceedings in order to enable applicants to prepare their cases with the knowledge they will be funded. Many also provide that subsequent funding or increases, based on actual expenses, can be approved during or after the conclusion of proceedings. The FTC, however, seems to be the only agency which, in addition, explicitly authorizes advance payments up to 50 percent of the approved budget.[51] Agency programs generally provide for reimbursement of applicants' expenses against itemized vouchers submitted within 30 days (NOAA, CPSC), 60 days (FTC) or 90 days (NHTSA, CAB).

There is no agency program which forces an applicant to complete the whole proceeding or imposes conditions upon the quality of an applicant's performance in order to secure funding approval. As NOAA observed in this regard:

> "One commenter urged that NOAA incorporate in the proposed rules a provision for recovery of assistance provided a participant who engaged in dilatory tactics during the proceeding. This commenter also suggested a contractual provision under which those assisted would agree to compensate other parties that might be injured by their misconduct during the proceeding. The latter suggestion would put those receiving assistance on an unequal footing relative to other parties, and is not acceptable. In NOAA's view, the probability that a misbehaving participant would never again receive assistance is a sanction sufficient to obviate the need for adoption of the first suggestion."[52]

Consumer groups unanimously agree: (a) that approval prior to actual participation is mandatory

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[46]FTC Yellow book, *supra,* II n. 19, at 5.

[47]Note, however, the argument in Appendix K, § 6, that given the generally small salaries of non-profit applicants, overhead should not be computed as a flat percentage of salary expenses.

[48]See Appendix K, § 4.

[49]Letter to Elmer B. Staats, Comptroller General, from Michael Pertschuk, Chairman of the Federal Trade Commission, April 11, 1978, p. 2. CFA strongly urges this position too.

[50]NHTSA Evaluation, Attachment II, *supra,* II n. 23, at p. 2.

[51]FTC Yellow book, *supra,* II n. 19, at 7.

[52]NOAA Rules, *supra,* II n. 12, at 17811.

in any paid participation program; (b) that no conditions should be placed on "quality" of performance; (c) that adequate time must be allowed for case preparation, (d) that advance payments along the FTC model are highly desirable; and (e) that additional reimbursement against vouchers should be made as soon as possible (within 30-60 days).[53]

G. The Application Process

The essentials of an effective application process are early notice, simplified procedures, and written determinations by the agency on approval or rejection of applications. The giving of early and sufficient notice already has been discussed and is one of the prime objectives of the suggested PSP and of DOE's semiannual agenda. Written determinations on applicant requests are provided for in all federal agency paid participation programs.[54]

Each agency's program specifies how an applicant may apply for funds and the information required to be submitted.[55] They are all quite consistent. The only agency which has actually published an application guide with a proposed budget format is the FTC and it is simple, instructive, and easy to follow.[56] We would recommend a DOE application guide similar to the FTC's.

The FTC has not been able to solve the problem of disclosure of "confidential" information contained in applications for applicant funding. Generally, an applicant will not want to disclose its financial condition or give away its legal strategy in advance of the proceeding. On the other hand, federal funding of applications does open them to the public record and possible inspection under the Freedom of Information Act (FOIA).

We would endorse the FTC's efforts to allow applicants to mark certain portions of their applications "confidential." Whether confidentiality can be retained under certain exemptions to the FOIA or on lawyer-client, attorney work-product or proprietary data theories probably will have to be decided by the courts. However, we recommend that DOE initially resist disclosure of those portions of an application marked "confidential" until the matter can be resolved.

For example, on the question of financial need, we believe the applicant can satisfy eligibility guidelines by a general statement or affidavit of its presiding officer or director. Supporting detail on budgets, general fundraising efforts, or even an IRS form 990 can be marked "confidential." There is no compelling need for public inspection of the latter material.

So, too, with submission of legal strategies. These can be outlined in general form to satisfy eligibility requirements. Details can be supplied on a confidential form for DOE use but withheld from public inspection at least until after completion of the proceedings. In this way, the public's interest in open observation of federal funding can be balanced against the applicant's interest in not disclosing its whole legal strategy.

H. Expenditure Responsibility and Audit

The FTC guidelines specifically cover accounting, financial management, retention of records, and auditing standards for recipients of participation awards.[57] They are not unduly elaborate and we recommend them to DOE. Paid participants in agency proceedings, like other federal grantees, should have to account for their funds. Again, we stress that procedures should be kept simple and compensation awards should cover applicant accounting and audit costs.[58]

I. Evaluation

Few of the federal paid participation programs have established any formal procedures for evaluation. We already have referred at length to NHTSA's in-house evaluation effort completed after the program's first year.[59] We believe DOE also should make provision at the outset for evaluating OPP and all aspects of its paid participation program.

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[53]See Appendix K, §9.

[54]FTC Yellow book, *supra*, II n. 19, at 3; NHTSA Regs, *supra*, II n. 24, §6(g); CPSC Interim Regs, *supra*, II n. 9, §1050.6 (3)(i); CAB Proposed Regs, *supra*, II n. 10, §304.6(d); TOSCA's temporary rules are silent on this point.

[55]FTC Yellow book, *supra*, II n. 19 (in its entirety); NHTSA Regs, *supra*, II n. 24. §5. CPSC Interim Regs, *supra*, II n. 9, §1050.5; CAB Proposed Regs, *supra*, II n. 10, §304.5; TOSCA Rules, *supra*, II n. 4, III (2).

[56]FTC Yellow book, *supra*, II n. 19 (in its entirety).

[57]*Id.*, at 7-8.

[58]In addition to accounting requirements, Office of Management and Budget (OMB) circulars require that all grantees must also provide specific assurances that they will comply with applicable non-discrimination and other program requirements. See, OMB Circular A-102 (App. M), entitled "Uniform Administrative Requirements for Grants-in-aid to State and Local Governments" and OMB Circular A-110 (App. M), entitled "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations."

[59]NHTSA Evaluation, *supra*, II n. 23.

We suggest that this be done under contract to an outside, disinterested firm rather than completely in-house. Consumer organizations also feel strongly that they should have at least an advisory role in the design and conduct of any overall evaluation, perhaps through means of a temporary advisory panel to OPP.[60]

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[60]See Appendix K, § 13.

VII. CONCLUSION

It is encouraging that DOE is moving rapidly to enhance the public's ability to participate in its proceedings. Paid participation is a critical element of any plan to broaden the public's influence upon agency decision-making.

In conclusion, the important aspects of a strong paid participation program are:

1. An open and structured process for making important policy and R&D decisions as well as a regular format for the more formal rulemakings and adjudications;
2. A centralized, "independent" OPP with adequate staffing and a high level director;
3. Sufficient funding for meaningful participation in any proceeding which invites public comment;
4. Establishment of a PSP-type system to ensure adequate notice and consideration of public participation concerns at the earliest possible stage of policy development.
5. Fair, impartial, and flexible program administration; and
6. A demonstrated concern for public participation at the highest levels of DOE.

APPENDIX A

ENERGY POLICY TASK FORCE
MEMBER ORGANIZATIONS

ENERGY POLICY TASK FORCE
MEMBER ORGANIZATIONS

Adams Electric Cooperative, Inc.
AFL-CIO
Allegheny Electric Cooperative, Inc.
Amalgamated Clothing & Textile Workers Union, AFL-CIO
American Federation of State, County & Municipal Employees, AFL-CIO
American Federation of Teachers, AFL-CIO
American Public Gas Association
American Public Power Association
Association of Illinois Electric Cooperatives
Association of Texas Electric Cooperatives Inc.
Basin Electric Power Cooperative
Central Power Electric Cooperative, Inc.
Consumers Union
Cooperative League of the USA
East River Electric Power Cooperative, Inc.
Florida Electric Cooperatives Association
Hoosier Energy Division, Indiana Statewide Rural Electric Cooperative
Industrial Union Department, AFL-CIO
International Association of Machinists and Aerospace Workers, AFL-CIO
Kansas Electric Cooperatives, Inc.
Kansas Municipal Utilities
Lincoln (Nebraska) Electric System
Maritime Trades Department, AFL-CIO
Minnesota Farmers Union
National Farmers Organization
National Farmers Union
National Rural Electric Cooperative Association
North Carolina Electric Membership Corporation
North Dakota Farmers Union
Northeast Missouri Electric Power Cooperative
Northeast Public Power Association
Northwest Iowa Power Cooperative
Northwest Public Power Association
Oil, Chemical and Atomic Workers International Union, AFL-CIO
Pennsylvania Rural Electric Association
Rocky Mountain Farmers Union
Service Employees International Union, AFL-CIO
Southside Electric Cooperative
South Texas Electric Cooperative Inc.
Tennessee Valley Public Power Association
Texas AFL-CIO
Tillamook Peoples Utility District
United Auto Workers
United States Conference of Mayors
United Steelworkers of America, AFL-CIO
Valley Electric Cooperative
Washington Public Utility Districts' Association
Wisconsin State AFL-CIO

APPENDIX B

BIOGRAPHIES OF REPORT TEAM MEMBERS

BIOGRAPHIES OF REPORT TEAM MEMBERS

ELLEN BERMAN, Project Director of "Paid Public Participation in DOE Proceedings," was named Director of the Energy Policy Task Force (EPTF) in 1973. In this capacity, she directs the operations of a 50-member coalition of consumer, labor, farm, public power, rural electric cooperative and urban organizations concerned with national energy policy. She represents consumer interests before Congressional committees, where she is a frequent witness, and before federal agencies and public forums. Under her leadership, the EPTF has been a major participant in FEA/DOE's proceedings on middle distillate decontrol and has established DOE's precedent on paid participation. She has directed all energy-related research contracts to the Paul Douglas Consumer Research Center of CFA, including ones from OEO, CSA, and an FEA project to design a model State Energy Office to deal with problems of low-income consumers.

Ms. Berman serves as an active participant on numerous federal and public interest group advisory committees. She is a member of the Executive Committee of the recently formed Citizens/Labor Energy Coalition.

Prior to joining the EPTF, she served as assistant press secretary for a presidential candidate, was a research associate with the Washington poverty program for four years, held several legislative jobs in Congressional offices, and served as assistant to the President of a small private college in New York.

Ms. Berman is a 1964 graduate of Barnard College of Columbia University.

TERSH BOASBERG, graduated from Yale College, magna cum laude, in 1956 and from Harvard Law School in 1959. Since then, he has spent five years in private law practice in San Francisco

and four years at the Office of Economic Opportunity in Washington, occupying positions of Director of Field Operations for the Community Action Program and Director of Special Projects. Since 1968, Mr. Boasberg has been a senior partner of the law firm of Boasberg, Hewes, Finkelstein & Klores. He lectured at Yale University in 1971-72. Mr. Boasberg participated in the firm's studies for EPA, HEW, FEA, and OEO. His publications include numerous law review and other articles on federal grant programs and administration. He is also the author of "Report to the NRC", Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings, NUREG-75/071 (July 1975); "Report to the NSF", Provision of Federal Assistance to Nonprofit Citizen Groups Dealing with Scientific and Technical Aspects of Policy Issues (Jan. 1976); and "Report to the NSF", Implications of NSF Assistance to Nonprofit Citizens Organizations (Feb. 1977).

JAMES L. FELDESMAN, graduated from Wharton School of the University of Pennsylvania in 1961 and from Georgetown University Law Center in 1965. Mr. Feldesman spent five years with the Department of Labor in the Office of the Solicitor, the Bureau of Work-Training Programs, and the Office of the Assistant Secretary for Manpower. He served as General Counsel to the President's Council on Youth Opportunity in 1970. From 1970 to the present, Mr. Feldesman has been a partner in the law firm of Boasberg, Hewes, Finkelstein & Klores. He has been the Energy Policy Task Force's counsel and represented it in proceedings before FEA, DOE, and other federal agencies for the past five years. He is the author of numerous articles on energy issues and

on federal grants programs. His publications include "Consumer Legal Problems with the Continuing Energy Crisis", Urban Lawyer, Winter 1975, and Coping with the Energy Crisis, May 1974 (a report to OEO co-authored with Mr. Boasberg).

JOHN M. FITZGERALD, joined the Energy Policy Task Force in April, 1978, to coordinate the contacts with citizens groups on the DOE Paid Participation Project. He received his B.A. in political science from Earlham College in 1974 and his J.D. from Indiana University School of Law in 1977. His work at Indiana University included legal research for the Ohio River Basin Energy Study, an EPA-sponsored assessment of the impact of energy development in the midwest. Mr. Fitzgerald is author of Attorneys' Fees in Public Interest Representation: A Key to Citizen Participation. He founded and co-directed the Community Legal Education Project, which won the 1976-77 American Bar Association award for "The Most Outstanding Law Student Project". From 1973-77, he worked with the Indiana Public Interest Research Group (InPIRG) and was Chairman of the State Board and Secretary of the National PIRG (1976-77). He served as Director of Communications, Training and Technical Assistance for the National PIRG until 1978.

DAVID S. SAMPSON, has been an associate of Boasberg, Hewes, Finkelstein and Klores since June, 1977. Prior to that, he served as chief legislative assistant to then U.S. Representative H. John Heinz, III. Mr. Sampson has served as an Associated Press reporter, as Special Assistant to the Commissioner, New York State Department of Environmental Conservation, and as a staff member of the Commission on

Critical Choices for America.

Mr. Sampson is a 1965 graduate of St. Lawrence University and a 1973 graduate of the Albany Law School.

DOUGLAS HOFFMAN, has been an energy research analyst with the Energy Policy Task Force since September, 1977. In this capacity, Mr. Hoffman has conducted analyses of the impact on consumers of various aspects of President Carter's National Energy Plan and has had extensive contact with grassroots consumer organizations. He was a co-coordinator of a study on Energy and Low-Income Consumers, prepared by CFA for the OTA's Task Force on Residential Energy Conservation.

After graduating from Oberlin College in 1976 with a B.A. in government, Mr. Hoffman spent a year as a community organizer in Chicago.

APPENDIX C

PERSONS CONTACTED
BY THE REPORT TEAM

PERSONS CONTACTED BY THE REPORT TEAM

I. FEDERAL GOVERNMENT

A. DEPARTMENT OF ENERGY

1. Division Heads (or designated Deputies)

David Bardin
Administrator
Economic Regulatory Administration

Donald Beattie
Acting Assistant Secretary
for Conservation and Solar Applications

John M. Deutch
Director
Office of Energy Research

C. William Fischer
Deputy Administrator
Energy Information Administration

Sam Hughes
Assistant Secretary
for Intergovernmental and
Institutional Relations

Leslie Goldman
Deputy Assistant Secretary
for Policy and Evaluation

Melvin Goldstein
Director
Office of Administrative Review

James Liverman
Acting Assistant Secretary
for Environment

Walter McDonald
Principal Deputy Assistant Secretary
for International Affairs

George McIsaac
Assistant Secretary
for Resource Applications

Eric Willis
Deputy Assistant Secretary
for Energy Technology

2. Other DOE Staff

Worth Bateman
Deputy Director
Office of Energy Research

Douglas Bauer
Director
Office of Utility Systems,
ERA

Gene Burcher
Office of Industry and
Regional Operations,
ERA

Paul Burke
Director of Regional
Operations, Office of
Industry and Regional
Operations, ERA

Wendell Butler
Director
Office of Industry Relations and Regional
Operations, ERA

Larry Caseman
Branch Chief, Cooperative
Programs, Division of
Utility Regulatory
Assistance, Office of
Utility Systems, ERA

Bob Conly
Office of Transportation
Programs, CS

Nelson Durant
Office of Consumer Projects,
CS

Gerald Emmer
Office of Fuels Allocation
ERA

Charles Falcone
Director
Division of Policy Planning
and Reliability, ERA

Gregg Friedman
Major Emergency Programs
Division, Office of Regulations and Emergency
Planning, ERA

Douglas Harvey
Director, Industrial Energy
Conservation, CS

Georgia Hildreth
Acting Director
Office of Advisory Committees

Tina Hobson
Director
Office of Consumer Affairs,
IR

Judith Ittig
Office of Administrative
Review

James Janis
Director
Office of Planning and
Regulatory Evaluation, PE

Paul Johnson
Utility Regulatory Assistance Programs, ERA

Bob Kane
Office of Regulations and Emergency Planning, ERA

Larry Kelso
Industrial Energy Conservation, Agricultural and Food Branch, CS

Bill Lane
Director
Office of Competition, PE

Linda Lapin
Office of Natural Gas Regulations, Office of Regulations and Emergency Planning, ERA

Joseph Machurek
Office of Assistant Secretary for Conservation and Solar Applications

Steve Martin
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Dan Maxfield
Office of Transportation Programs, CS

Ingrid Nelson
Institutional Liaison and Communications, CS

David Pellish
Program Manager for Solar Applications, CS

Jerry Penno
Deputy Director
Office of Consumer Affairs, IR

B. CIVIL AERONAUTICS BOARD

Mark Schwimmer
Office of the General Counsel

Howard Perry
Utility Regulatory Assistance Programs, ERA

Walt Preysnar
Program Manager for Solar Applications, CS

James Smith
Assistant Director
Office of Consumer Products, CS

Grey Staples
Director of Regulatory Intervention, Office of Utility Systems, ERA

Steve Stern
Director of Coal Regulation, Office of Regulations and Emergency Planning, ERA

Lawrence Stewart
Director
Office of Education, Business and Labor Affairs, IR

Nancy Tate
Utility Regulatory Assistance Programs, ERA

Ken Wilson
Office of Transportation Programs, CS

Mary-Lynn Wrabel
Office of Building and Community Systems, CS

Barry Yaffe
Office of Short Term Emergency Planning, Office of Emergency Planning, ERA

Brian Siebert
Director, Office of Institutional Liaison and Communications, DP

C. CONSUMER PRODUCT SAFETY COMMISSION

Alan Shakin
Office of the General Counsel

D. DEPARTMENT OF AGRICULTURE

Jon Meyerson
Chairman
Office of Budget, Planning and Evaluation
Chairman
Public Participation Steering Committee

Don Tracy
Office of the General Counsel
Member of the Public Participation
Steering Committee

E. DEPARTMENT OF INTERIOR

Mark Guidry
Office of Public Affairs

F. DEPARTMENT OF TRANSPORTATION

Richard Lorr
Office of the General Counsel

Lee Gray
National Highway Traffic Safety
Administration
Review Panel for NHTSA Programs

G. ENVIRONMENTAL PROTECTION AGENCY

Sharon Francis
Special Assistant to the Administrator
for Public Participation

Ginger Patterson
Co-Chairperson
Public Participation Task Force

Bill Pedersen
Office of the General Counsel

H. FEDERAL COMMUNICATIONS COMMISSION

Gus Guthrie
Office of the General Counsel

I. FEDERAL TRADE COMMISSION

Bonnie Naradzay
Special Assistant for Public Participation

Barry Rubin
Office of the General Counsel

Michael Sohn
General Counsel

J. FOOD AND DRUG ADMINISTRATION

Alex Grant
Special Assistant for Consumer Affairs

K. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Pat Travers
Office of the General Counsel

L. WHITE HOUSE

Shelley Weinstein
Office of Public Participation

II. OUTSIDE ORGANIZATIONS

A. INDIVIDUALS AND ORGANIZATIONS INTERVIEWED FOR DOE PROJECT

Virtually all groups interviewed below have participated in state or federal agency proceedings. Those groups marked with an asterisk (*), however, have also participated in federal paid participation programs. In addition to the interviews, most of these groups also submitted detailed written comments to the Energy Policy Task Force on issues addressed in the report.

ORGANIZATION	CONTACT
*Americans for Democratic Action	Ed Comer (Counsel)
*Arkansas Consumer Research	Glenn Nishimura
*California Citizen Action Group	Michael Schulman
*California Public Interest Research Group	Miles Frieden
*Center for Auto Safety	Clarence Ditlow
Center for Law and Social Policy	Clifford Curtis
Center for the Study of Responsive Law	Ralph Nader
Congress Watch	Nancy Drabble
Connecticut Public Interest Research Group	Jack Hale
Consumer Association of Kentucky	Franklin Yudkin
Consumers League of Nevada	Geoffrey Stormson
Consumers League of New Jersey	Jane Bolodsky
Council for Public Interest Law	Barry Hunter
District of Columbia Office of People's Counsel	Brian Lederer
Environmental Action Foundation	Richard Morgan
*Environmental Defense Fund	Bill Butler
Environmental Law Institute and Reporter	Mike Wiegard
Georgia Office of Consumer Utility Advocate	Sidney Moore
Harlem Consumer Education Council	Florence Rice
Indiana Citizens Action Coalition	Fritz Weicking
Institute for Public Interest Representation	Charles Hill and Allan Schwartz
Iowa Community Action Research Group	Skip Laitner
League of Women Voters of Missouri	Lenore Loeb
Maryland Action Coalition	Mary-Jo Kerekes
Michigan Citizens Lobby	Joe Tuchinsky
Midwest Fraud Research	Ken Benner
Minnesota Public Interest Research Group	Jonathan Motl
National Audubon Society	Gene Stezer
*National Consumer Law Center	Richard Alpert
National Intervenors	Irene Dickenson
National League of Women Voters	Celia Epting
National PIRG Clearinghouse	Bob Chlopak
National Wildlife Federation	Bob Golten
Newark Office of Consumer Action	Louis Cappandona

ORGANIZATION	CONTACT
*New York Public Interest Research Group	Donald Ross and Nancy Kramer
Niagara Frontier Consumers Association	Kathy Ittig
Oregon Consumers League	Elson Strachan
Pennsylvania League for Consumer Protection	William Matson
*P.O.W.E.R.	Pam Piering
Public Advisor's Office, Energy Resources Conservation and Development Commission	Jay Long
Public Advocate Review of Texas	Jack Hopper
*Public Interest Economics Center/ Foundation	Alix Myerson and Barbara Skylar
Public Interest Research Group in Michigan	Ed Petrini
*San Francisco Consumer Action	Michael Hoffer
Union-Sarah Community Corporation	Ivory Perry
Urban Land Institute	Frank Schnidman
Toward Utility Rate Normalization	Tony Rossman

B. ORGANIZATIONS SUBMITTING DETAILED COMMENTS TO THE ENERGY POLICY TASK FORCE REGARDING ISSUES ADDRESSED IN THE REPORT (NOT INTERVIEWED).

Those organizations marked with an asterisk (*) have participated in federal paid participation programs.

Alliance for Consumer Protection
Alternative Sources of Energy, Inc.
Appalachian Research and Defense Fund
*Aviation Consumer Action Project
Carolina Action
*Center for Public Representation
Citizens Energy Project
Colorado Public Interest Research Group
Connecticut Citizen Action Group
Consumer Council of Maryland
Detroit Consumer Affairs Department
Emergency Assistance Coalition of Kansas City
Energy Consumers of New Mexico, Inc.
Idaho Consumer Affairs, Inc.
Institute for Local Self-Reliance
Iowa Energy Policy Council

Irate Consumers of Ulster County
Kansas Legal Services, Inc.
Labor Coalition on Public Utilities
Legal Services Corporation of Iowa
Long Island Citizens in Action
Maryland Citizens Consumer Council, Inc.
Massachusetts Public Interest Research Group
Metropolitan Dade County Consumer Advocate's Office
Montana Consumer Counsel
National Consumers League
New Jersey Federation of Senior Citizens
New York Statewide Senior Action Council, Inc.
Oklahoma Coalition for Older People, Inc.
Pacific Legal Foundation
Texas Public Interest Research Group
Washington Public Interest Research Group
West Virginia Citizen Action Group, Inc.
Winter Garden Project, Texas Rural Legal Aid, Inc.

PARTICIPANTS IN MINI-CONFERENCES WITH PROJECT STAFF

A. CONFERENCE OF PUBLIC INTEREST ENERGY LEADERS

Becky Bogard
National Rural Electric Cooperative Association

Bob Brandon
Tax Reform Research Group

Frank Collins
Oil, Chemical and Atomic Workers International Union, AFL-CIO

James Flug
Energy Action

Larry Hobart
American Public Power Association

Alan Novins
Lobel, Novins and Lamont

Alex Radin
American Public Power Association

Anthony Roisman
Natural Resources Defense Council

B. CONFERENCE OF CONSUMER LEADERS

Tom Cohen
Common Cause

Alan Davis
National Consumer Law Center

Nancy Drabble
Congress Watch

Michael Lemov
Leighton and Conklin

Ann McBride
Common Cause

Alan Novins
Lobel, Novins and Lamont

Marty Rogol
Food Policy Center

Mark Silbergeld
Consumers Union

C. MEMBERS OF CONSUMER AFFAIRS ADVISORY COMMITTEE AT MEETING WITH PROJECT STAFF

Warren Alexander
Metro Denver Urban Coalition

Tyrone Brook
Southern Christian Leadership Conference

Michael Burgess
Lewis, Jefferson Weatherization Program
CAPS Council

Dennis Cannon
Southern California Rapid Transit District

Mark Caplan
Connecticut Citizen Action Group

Frank Collins
Oil, Chemical and Atomic Workers International Union, AFL-CIO

Mary Anna Colwell
Unaffiliated Citizen Representative

Emmitt J. Dennis
Opportunities Industrial Center

Pauline Eisenstadt
Energy Consumers of New Mexico, Inc.

Steve Ferry
National Consumer Law Center, Inc.

Cliff Hayden
Energy Conservation Manager

Vella Hill
Oklahoma Coalition for Older People

Paul Howells
Unaffiliated Citizen Representative

Mark Ingram
Idaho Conservation League

Jacqueline Lassiter
Independent Consultant

Bob Lawson
National Energy Coalition
Midwest Academy, Inc.

Lenore Loeb
League of Women Voters of Missouri

Louise McCarren
New England Regional Energy Project

Margaret McMullen
Mid-Nebraska Community Action Program, Inc.

Helen Nelson
Center for Consumer Affairs
University of Wisconsin

Steven Pavich
Steven Pavich and Son

Tina Podolak
Carolina Action

Donald Ross
New York Public Interest Research Group (NYPIRG)

Mary Sealander
Unaffiliated Citizen Representative

Richard Seifert
Institute of Water Resources
University of Alaska

Dermot Shea
Unaffiliated Citizen Representative

Sylvia Siegel
Toward Utility Rate Normalization (TURN)

Alberta Slavin
Missouri Public Service Commissioner

Harlan Snider
Sunmark Industries

Charles H. Vincent
Dallas Department of Consumer Affairs

Nell Weekly
New Orleans Mayor's Office

Fritz Weicking
Citizens Action Coalition of Indiana

APPENDIX D

S.270,
"PUBLIC PARTICIPATION IN
FEDERAL AGENCY PROCEEDINGS"
(May 24, 1978)

95TH CONGRESS
1ST SESSION

S. 270

IN THE SENATE OF THE UNITED STATES

JANUARY 14, 1977

Mr. KENNEDY (for himself, Mr. ABOUREZK, Mr. BAYH, Mr. BROOKE, Mr. CHURCH, Mr. DURKIN, Mr. FORD, Mr. HUMPHREY, Mr. JAVITS, Mr. MAGNUSON, Mr. MATHIAS, Mr. METCALF, Mr. PELL, Mr. RIBICOFF, and Mr. WILLIAMS) introduced the following bill; which was read twice and referred to the Committees on Government Operations and the Judiciary jointly by unanimous consent and second committee has thirty days after first report

A BILL

To amend chapter 5 of title 5, United States Code (commonly known as the Administrative Procedure Act), to permit awards of reasonable attorneys' fees and other expenses for public participation in Federal agency proceedings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be cited as the "Public Participation in Federal Agency Proceedings Act of 1977".

SEC. 2. (a) Subchapter II of chapter 5 of title 5, United States Code (relating to administrative procedure), is

amended by inserting after section 558 of such title the following new section:

"§ 558a. Attorneys' fees; fees and costs of experts; participation expenses

"(a) (1) The Congress finds that effective functioning of the administrative process of Government requires Federal agencies to seek the views of all affected citizens. In practice, access to the administrative process is frequently an exclusive function of a person's ability to meet the high costs of participation in Government proceedings.

"(2) The purpose of this section is to promote increased public participation in agency proceedings, thereby insuring more effective functioning of the administrative process by enabling all affected persons to secure the representation in agency proceedings to which such persons are entitled. The Congress intends that Federal agencies shall utilize to the fullest extent the authority and funds provided pursuant to this section.

"(b) (1) For the purpose of this section the term—

"(A) 'person' means any person as defined in section 551 (2) of this title and includes a group of individuals with similar interests;

"(B) 'proceeding' means any agency process including adjudication, licensing, rulemaking, ratemaking, or any other agency process in which there may be public

participation pursuant to statute, regulation, or agency practice, whether or not such process is subject to the provisions of this subchapter.

"(2) (A) This section applies to all rulemaking, ratemaking, and licensing proceedings, and, in addition, to such other proceedings involving issues which relate directly to health, safety, civil rights, the environment, and the economic well-being of consumers in the marketplace.

"(B) This section does not authorize funds for merely attending, as opposed to participating in, agency proceedings, nor for proceedings where the cost of participation is minimal.

"(C) This section does not create any new right to participate in any Federal agency proceeding which is not authorized by other provisions of law.

"(c) Each agency is authorized, in accordance with the provisions of this section, to award reasonable attorneys' fees, fees and costs of experts, and other costs of participation incurred by eligible persons in any agency proceeding whenever public participation in the proceeding promotes or can reasonably be expected to promote a full and fair determination of the issues involved in the proceeding.

"(d) Any person is eligible to receive an award under this section for participation (whether or not as a party) in an agency proceeding if—

"(1) the person represents an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding, taking into account—

"(A) whether the person represents an interest which is not adequately represented by a participant other than the agency itself,

"(B) the number and complexity of the issues presented,

"(C) the importance of public participation, in consideration of the need to encourage participation by segments of the public who, as individuals, may have little economic incentive to participate, and

"(D) the need for representation of a fair balance of interests; and

"(2) (A) the economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person, or whenever the person is a group or organization, the economic interest of a substantial majority of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceeding, or

"(B) the person demonstrates to the satisfaction of the agency that such person does not have sufficient

resources available to participate effectively in the proceeding in the absence of an award under this section.

"(e) In any agency proceeding, the agency may require any participant to pay part or all of an award under this section if the agency determines that the participant has acted toward any other participant in an obdurate, dilatory, mendacious, or oppressive manner.

"(f) (1) Upon application for an award under this section, each agency shall make a written determination, giving reasons therefore, of the eligibility of a person for such award, and the amount and computation of such award. The determination required by this paragraph shall be made prior to the commencement of any proceeding in which application for an award is made (or as soon as practicable after such application is filed, if the application is filed after the commencement of the proceeding), unless the agency makes an express written findings that all or any part of such determination relating solely to the amount or computation of such award cannot practicably be made at the time the initial determination is made. The agency shall make such determination after consideration of the maximum amount payable for awards under this section for the proceeding and the requests or possible requests for awards under this section by other eligible participants in the proceeding.

"(2) Whenever multiple applications are submitted, the agency may require consolidation of duplicative presentations, select one or more effective representatives to participate, offer compensation only for certain categories of expenses, or jointly compensate persons representing identical or closely related viewpoints.

"(3) Payment of fees and costs under this section shall be made within ninety days after the date on which a final decision or order disposing of the matters involved in the proceeding is made by the agency, or, if the agency has not made a determination with respect to the amount and computation of an award under subsection (f) (1) of this section by the date of such final decision, within ninety days after the eligible person submits to the agency a statement of fees and costs which it has incurred.

"(4) If an eligible person establishes that the ability of such person to participate in the proceeding will be impaired by failure to receive funds prior to the conclusion of such proceeding, then the agency shall make advance payments to permit the person to participate or to continue to participate in the proceeding.

"(5) A person who receives advance payments pursuant to this section or who the agency determines to be eligible to receive a specified award pursuant to this section shall be liable for repayment of part or all of such pay-

ments actually received, or for forfeiture of part or all of the specified award for which such person is determined to be eligible, whenever the agency determines that—

"(A) the person clearly has not provided the representation for which the payments or specified award was made, or

"(B) the person has acted toward any other participant in an obdurate, dilatory, mendacious, or oppressive manner.

"(6) The amount of reasonable attorneys' fees, fees, and costs of experts, and other costs of participation awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (A) no expert or consultant shall be compensated at a rate in excess of the highest rate of compensation for experts and consultants paid by the agency involved; and (B) attorneys' fees shall not be awarded in excess of $75 per hour for any such participation unless the agency determines that special factors, such as an increase in the cost of living or limited availability of qualified attorneys for the proceedings involved justify a higher fee.

"(g) A person may bring an action in accordance with chapter 7 of this title for review of a final agency action under this section—

"(1) denying an award or failing to pay an award of fees or costs or both, or

"(2) granting an amount of fees or costs, or both, which is insufficient to enable such person to participate effectively in a proceeding, or

"(3) reimbursing an amount of fees or costs, or both, which is insufficient to compensate adequately such participation

in the appropriate court of the United States having jurisdiction of an appeal from the proceeding in which such person participated or sought to participate, except that no order to stay the proceeding in which application for payment of fees and costs under this section was made shall be entered by that court in such an action.

"(h) (1) Each agency shall, within ninety days after the date of enactment of this section, propose regulations to carry out the provisions of this section. Such regulations shall be adopted by the agency and take effect no later than one hundred and eighty days after the date of enactment of this section.

"(2) The head of each agency to which this section applies shall prepare and transmit to Congress on the date of submission of the President's budget an annual report with respect to the nature and disposition of all proceedings in which grants of fees and costs pursuant to this section were

sought, and which report shall include the amounts sought and awarded in each such proceeding, the computation of such amounts, and the identity of each applicant and recipient.".

(b) The analysis of chapter 5 of title 5, United States Code, is amended by inserting immediately after the item relating to section 558 of such title the following new item:

"588a. Attorneys' fees; fees and costs of experts; participation expenses.".

SEC. 3. (a) Chapter 7 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 707. Attorneys' fees; fees and costs of experts; litigation expenses

"(a) For the purpose of this section, the term 'person' means any person defined by section 551 (2) of this title and includes a class of individuals and any individual member of such class.

"(b) Notwithstanding any other provision of law, any party or party intervenor in a civil action or other proceeding for judicial review of agency action under this chapter shall be entitled to recover reasonable attorneys' fees, fees and costs of experts, and other reasonable costs of litigation, including taxable costs, from the United States if—

"(1) the court affords such person the relief sought in substantial measure or, after the filing of such action,

the agency affords such person the relief sought in substantial measure;

"(2) the court determines that such action served an important public purpose; and

"(3) (A) the economic interest of the person is small in comparison to the costs of effective participation in the action by that person, or whenever the person is a group or organization, the economic interest of a substantial majority of the individual members of such group or organization is small in comparison to the costs of effective participation in the action, or

"(B) the person demonstrates to the satisfaction of the court that such person does not have sufficient resources available to participate effectively in the action in the absence of an award under this section.

"(c) Reasonable attorneys' fees, fees and costs of experts, and other costs of litigation awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished.".

(b) The analysis of chapter 7 of title 5, United States Code, is amended by adding immediately after the item relating to section 706 of such title the following new item:

"707. Attorneys' fees; fees and costs of experts; litigation expenses.".

SEC. 4. The Administrative Office of the United States Courts shall, in accordance with such rules as the Judicial

Conference of the United States may prescribe, prepare, and transmit to Congress an annual report on awards of attorneys' fees and litigation expenses against the United States under section 707 of title 5, United States Code. Such report shall contain a list of all civil actions in which such awards were sought, and shall include the amounts awarded in each such action and the identity of each recipient.

SEC. 5. (a) In addition to the sums authorized under subsection (b), and in addition to any funds otherwise available for supporting public participation in agency proceedings, there are authorized to be appropriated for the purposes of carrying out the provisions of the amendment made by section 2 of this Act the sums of $10,000,000 for the fiscal year 1978, $10,000,000 for the fiscal year 1979, and $10,000,000 for the fiscal year 1980. All funds for any fiscal year which are not expended during such year shall remain available for expenditure in succeeding fiscal years for awards of fees and costs in proceedings commenced during such fiscal year.

(b) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of the amendments made by section 3 of this Act for each fiscal year prior to October 1, 1980, and there are authorized to be appropriated, for the fiscal year 1981 and succeeding fiscal years, such sums as may be necessary to satisfy court

awards of fees pursuant to the amendments made by section 3 where the action was brought prior to the end of fiscal year 1980.

SEC. 6. The provisions of this Act shall take effect on the date of its enactment, except that—

(1) the amendment made by section 2 shall take effect one hundred and eighty days after such date, but the provisions of the amendment made by such section shall apply to the proceedings in which regulations are required to be issued under section 558a(h)(1); and

(2) the amendments made by section 3 shall apply to any civil action brought after such date of enactment.

95TH CONGRESS
1ST SESSION

S. 270

A BILL

To amend chapter 5 of title 5, United States Code (commonly known as the Administrative Procedure Act), to permit awards of reasonable attorneys' fees and other expenses for public participation in Federal agency proceedings, and for other purposes.

By Mr. KENNEDY, Mr. ABOUREZK, Mr. BAYH, Mr. BROOKE, Mr. CHURCH, Mr. DURKIN, Mr. FORD, Mr. HUMPHREY, Mr. JAVITS, Mr. MAGNUSON, Mr. MATHIAS, Mr. METCALF, Mr. PELL, Mr. RIBICOFF, and Mr. WILLIAMS

JANUARY 14, 1977

Read twice, and referred to the Committees on Government Operations and the Judiciary jointly by unanimous consent

APPENDIX E

TEMPORARY RULES
TOSCA PAID PARTICIPATION
(November 30, 1977)

(7) On the same page, second column, in § 1.993-5(a)(2), delete the second line which reads "* * * pany describe in paragraph (c) of this * * *". Also, in paragraph (b)(1)(ii) in the seventh line, "* * * § 1.993(g) * * *" should have read "* * * 1.993-1(g) * * *".

[1505-01]

Title 32—National Defense

CHAPTER VI—DEPARTMENT OF THE NAVY

PART 724—NAVAL DISCHARGE REVIEW BOARD

Amendments to Naval Discharge Review Board Regulations

Correction

In FR Doc. 77-33030 appearing at page 59074 in the issue for Tuesday, November 15, 1977, in the first line of paragraph (b)(5) of § 724.321, the word "naval" should have read "novel".

[6560-01]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

[FRL 800-5]

TOXIC SUBSTANCES CONTROL

Compensation for Public Participation in Rulemaking Under Section 6 of the Toxic Substances Control Act

AGENCY: Environmental Protection Agency.

ACTION: Temporary rules.

SUMMARY: Section 6(c)(4) of the Toxic Substances Control Act (TSCA) grants the Administrator of EPA authority to compensate persons for the costs of participation in proceedings to consider rules proposed under section 6 of that statute. It will be some time before a permanent program to carry out this provision can be established. Meanwhile, the Agency has decided to implement it on a pilot basis, and the interim rules set forth below are being issued for that purpose. This pilot program will provide experience on which a permanent program can be based. EPA is also deferring any further steps to establish an agencywide program of public participation funding (see 42 FR 1492) until the results of this pilot program have been fully evaluated.

DATES: These rules will apply to the rulemaking phasing out most PCB uses which is scheduled for proposal shortly. Comments are solicited and will be considered to the extent that time allows.

FOR FURTHER INFORMATION CONTACT:

William F. Pedersen, Jr., Office of General Counsel, Environmental Protection Agency, 401 "M" Street, SW., Washington, D.C. 20460, 202-755-0434

SUPPLEMENTARY INFORMATION:

I. The Language of the Statute

Section 6(c)(4) of TSCA states that EPA "may" "provide compensation for reasonable attorney's fees, expert witness fees, and other costs of participation in" a section 6(a) rulemaking if the Administrator determines:

(1) That the participant "represents an interest which would substantially contribute to a fair determination of the issues to be resolved in the proceeding," and

(2) Either: (a) That the economic interest of the participant is small in comparison to the costs to the participant of effective participation in the proceedings, or

(b) That the participant would not have the resources to participate adequately in the proceeding if the compensation were not granted.

The relevant statutory provisions are set out as Appendix A.

The use of the word "may" here indicates that granting compensation is discretionary with EPA. We do plan to establish a permanent compensation program in the future, unless experience with this pilot program indicates otherwise.

II. Relationship to EPA's Prior Proposal

In taking this step, we are also deferring any action to establish a general EPA program of funding public participation in regulatory proceedings where explicit statutory authority is lacking. On January 7, 1977, former Administrator Train published an Advance Notice of Proposed Rulemaking suggesting such a program. 42 FR 1492.

A limited pilot program will supply experience as to the actual merits and disadvantages of a public funding program in practice. EPA can then rely on this experience both in establishing a permanent program under section 6 of TSCA, and in deciding what other action might be appropriate where regulatory proceedings under other EPA statutes are involved. Other approaches to implementing section 6(c)(4) of TSCA will of course be considered as options before a permanent program is established.

III. The Structure of the Pilot Program

The rules governing this program for the PCB ban rulemaking are as follows: [1]

1. A preliminary application for compensation for participation in the PCB ban regulations rulemaking may be filed at any time within thirty days after the publication of the Notice of Proposed Rulemaking. The total sum budgeted for such compensation is $20,000. This does not mean EPA is committed to disbursing that much money in these proceedings regardless of the type of the applications presented.

2. Each preliminary application shall contain: a. A brief statement of the nature and extent of the applicant's planned participation in the rulemaking. This should describe in some detail the nature of the presentation contemplated, the points to be made, what backup work will be done, and the qualifications of the persons involved. All forms of participation contemplated by the statute are potentially eligible for compensation. This does not include the cost of preparing applications for compensation themselves.

b. The nature of the interest to be represented by the applicant, together with a statement as to why the presentation to be made can be expected to contribute to a fair resolution of the issues involved.

c. Reasons for concluding that the interest to be represented by the applicant would not be adequately represented if the applicant does not participate in the rulemaking.

d. A statement showing why the financial requirements for eligibility set forth in the statute have been met. It will be helpful if, in cases where eligibility is asserted on grounds of a small financial interest, rather than total inability to participate if compensation is not granted, the application also sets forth what other planned activities of the applicant will have to be curtailed if compensation is not granted. Such statements as to curtailment should be supported by a budget statement showing projected income and planned expenditures for the fiscal year(s) in question.

e. A statement whether or not the applicant is a person who would be regulated by the proposed rule, or represents persons who would be so regulated.[2]

f. An itemized draft statement of anticipated expenses, indicating at a minimum:

i. Salary expenses. The salary, expressed as both an annual and an hourly rate, of each person for whose work compensation is rerequested shall be given, together with the number of hours estimated to be worked by that person, and the relevant totals. Those portions of compensation claims which request reimbursement for salaries in excess of what the U.S. Government pays persons of comparable qualifications and experience will receive a subordinate priority when available funds are being disbursed. Accordingly, applications should list and justify the extent to which sal-

[1] Detailed criteria for judging the worth of contributions to the rulemaking are not set forth. We know too little at present about how this program will work to justify departing from a case-by-case approach.

[2] Inclusion of this provision is necessary because section 6(c)(4)(B) provides that the aggregate amount of compensation paid in a given fiscal year under section 6(c)(4) to participants in rulemakings who would be regulated by the proposed rule, or represent persons who would be regulated, may not exceed a quarter of the total amount disbursed under section 6(c)(4) in that fiscal year.

ary claims exceed this ceiling. In addition, applicants are informed that EPA's 1978 budget prohibits payment of compensation in excess of the maximum paid a GS–18.

ii. Other anticipated out-of-pocket expenses (travel, copying, etc.).

iii. An appropriate allocation of anticipated overhead expenses such as office office rent, accompanied by a showing that the allocation of expenses to this particular proceeding is not excessive. (We will follow the FTC practice of automatically allowing overhead claims up to 25 percent of salary claims for applicants who do not wish to try to justify a higher figure.) See Federal Trade Commission, Bureau of Consumer Protection "Applying for Reimbursement for FTC Rulemaking Participation" p. 12 (1977). Other expenses not listed may also be considered for compensation if adequately justified.

Preliminary applications should be addressed to:

Irwin L. Auerbach, Office of Toxic Substances (TS–788), Environmental Protection Agency, 401 "M" Street SW., Washington, D.C. 20460.

3. No later than three weeks before the scheduled start of the informal hearing, the Assistant Administrator for Toxic Substances shall rule on all preliminary requests for compensation received. The Assistant Administrator may at that time authorize immediate disbursement of up to half the total amount set aside for funding public participation in that rulemaking to approved applicants. Any such advance is made on condition that the work projected in the preliminary application will actually be done, and that a final application for compensation will be prepared and submitted as required by paragraph 4.

4. All final applications for compensation shall be filed within thirty days after reply comments are due. All those who have filed preliminary applications must also file final applications updating their preliminary applications. However, filing of a preliminary application for compensation is not a prerequisite to filing a final application.

Final applications shall set forth the information required by paragraph 2, except that actual expenses, not estimated expenses, shall be given, and the merits of the participation sought to be funded shall be set forth based on the actual rulemaking record rather than on expectations of what it is likely to contain. Claimed expenses shall be supported by appropriate receipts. Material from a preliminary application that does not need to be updated to meet these standards may be incorporated by reference. In addition, persons who have received funds under paragraph 3 must in their final application supply a complete accounting of the expenditure of funds so received supported by appropriate receipts. Final applications should also be addressed to Mr. Auerbach.

5. Within forty-five days after the deadline for receipt of final applications, the Assistant Administrator for Toxic Substances shall rule on them, and shall obligate up to all of the funds set aside for public compensation in this rulemaking that were not disbursed on the basis of preliminary applications. Disbursement will be made as soon as practicable thereafter.

These interim rules are issued under authority of section 6(c)(4) of the Toxic Substances Control Act, 15 U.S.C. 2605 (c)(4).

Dated: November 25, 1977.

DOUGLAS M. COSTLE,
Administrator.

APPENDIX A—TEXT OF THE "PUBLIC FUNDING" PROVISIONS OF TSCA, SECTION 6(c)(4)

(4)(A) The Administrator may, pursuant to rules prescribed by the Administrator, provide compensation for reasonable attorneys' fees, expert witness fees, and other costs of participating in a rulemaking proceeding for the promulgation of a rule under subsection (a) to any person:

(i) Who represents an interest which would substantially contribute to a fair determination of the issues to be resolved in the proceeding, and

(ii) If: (I) The economic interest of such person is small in comparison to the costs of effective participation in the proceeding by such person, or

(II) Such person demonstrates to the satisfaction of the Administrator that such person does not have sufficient resources adequately to participate in the proceeding without compensation under this subparagraph.

In determining for purposes of clause (i) if an interest will substantially contribute to a fair determination of the issues to be resolved in a proceeding, the Administrator shall take into account the number and complexity of such issues and the extent to which representation of such interest will contribute to widespread public participation in the proceeding and representation of a fair balance of interests for the resolution of such issues.

(B) In determining whether compensation should be provided to a person under subparagraph (A) and the amount of such compensation, the Administrator shall take into account the financial burden which will be incurred by such person in participating in the rulemaking proceeding. The Administrator shall take such action as may be necessary to ensure that the aggregate amount of compensation paid under this paragraph in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either:

(i) Would be regulated by the proposed rule, or

(ii) Represent persons who would be so regulated, may not exceed 25 per centum of the aggregate amount paid as compensation under this paragraph to all persons in such fiscal year.

(5) Paragraph (1), (2), (3), and (4) of this subsection apply to the promulgation of a rule repealing, or making as substantive amendment to, a rule promulgated under subsection (a).

[FR Doc.77-34347 Filed 11-29-77;8:45 am]

[1505-01]

PART 205—TRANSPORTATION EQUIPMENT NOISE EMISSION CONTROLS

Noise Emission Standards for Medium and Heavy Trucks; Motor Homes: Stay Pending Reconsideration

Correction

In FR Doc. 77-33643 appearing at page 59975 in the issue for Wednesday, November 23, 1977, in the last paragraph, the sixth line stating "* * * shall continue until February 21, 1978 * * *." should read "* * * shall continue until 90 days following publication of notice in the FEDERAL REGISTER * * *."

[6730-01]

Title 46—Shipping

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND REGULATED ACTIVITIES

[Docket No. 76-40; General Order No. 38]

PART 531—PUBLISHING, FILING AND POSTING OF TARIFFS IN DOMESTIC OFFSHORE COMMERCE

Corrections

AGENCY: Federal Maritime Commission.

ACTION: Correction to final rule.

SUMMARY: This document corrects typographical and editorial errors appearing in General Order 38 Report served October 3, 1977 (42 FR 54810).

EFFECTIVE DATE: January 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney, Secretary, 1100 L Street, NW., Washington, D.C. 20573, 202-523-5725.

SUPPLEMENTARY INFORMATION: The Commission's final Order in Docket No. 76-40 as it appeared in 42 FR 54810, October 11, 1977 contained the following errors:

1. Page 54810, column 2, line 66: the citation "49 U.S.C. 36(c)" should read "49 U.S.C. 316(c)."

2. Page 54811, column 1, line 50: the word "modifications" should read "modification." [singular].

3. Page 54812, column 1, line 12: the word "unmistakenly" should read unmistakably."

4. Page 54813, column 2, final paragraph: the paragraph entitled "Authority" should read:

Sections 15, 16, 18(a), 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 814–815, 817(a), 820, and 841a); Sections 2, 3 and 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844–845a).

5. Page 54814, column 1, § 531.2(a)(1), line 4: the word "and" should be deleted and the word "or" substituted therefore.

APPENDIX F

CPSC INTERIM REGULATIONS ON PAID PARTICIPATION (May 31, 1978)

[6355-01]

Title 16—Commercial Practices

CHAPTER II—CONSUMER PRODUCT SAFETY COMMISSION

SUBCHAPTER A—GENERAL

PART 1050—FINANCIAL COMPENSATION OF PARTICIPANTS IN INFORMAL RULEMAKING PROCEEDINGS

Interim Policies and Procedures for Temporary Program

AGENCY: Consumer Product Safety Commission.

ACTION: Interim regulation.

SUMMARY: The Commission is issuing an interim regulation that concerns the financial compensation of participants in the Commission's informal rulemaking proceedings and other proceedings related to informal rulemaking. This regulation establishes the criteria for compensation and the procedures that applicants for compensation must follow. The Commission believes that this regulation will increase participation in its rulemaking proceedings by consumers and other participants who represent viewpoints and interests that will contribute in a positive way to the Commission's rulemaking decisions. The Commission is also establishing a temporary program under which it will actively solicit applications for funding in selected proceedings and will compensate participants in accordance with the interim regulation. (Under an existing ad hoc program the Commission merely considers whatever funding requests participants submit.)

DATES: The regulation becomes effective as interim on May 31, 1978. The temporary program will begin as soon after this date as possible.

FOR FURTHER INFORMATION CONTACT:

Catherine Bolger, Office of Public Participation, Consumer Product Safety Commission, Washington, D.C. 20207, telephone 202-254-6241.

SUPPLEMENTARY INFORMATION:

BACKGROUND

A. OFFICE OF PUBLIC PARTICIPATION

In January 1977 the Commission approved the creation of an Office of Public Participation (OPP). As an office located within the Commission, OPP's primary purpose will be to administer a funding program for participants in Commission proceedings.

In April 1977 the Commission received a report, written under contract by Nancy H. Chasen and Robert Jay Stein, which discusses some basic issues relating to OPP and to the financial compensation program. (Copies of the report, entitled CPSC's Office of Public Participation and Financial Compensation Program, and all other documents mentioned in this FEDERAL REGISTER notice are available from the Commission's Office of the Secretary, 1111 18th Street NW., Washington, D.C. 20207.) Examples of issues relating to OPP are staffing of the office, the different ways that OPP could encourage participation in the financial compensation program, and the different functions that OPP could perform. The Commission believes that the OPP Director should be actively involved in all major decisions that will affect the policies and operations of OPP. Therefore, the Commission will make no such decisions until after it has selected a Director.

Selection of a Director will begin as soon as the CPSC has established the position in accordance with the requirements of the Civil Service Commission. Although the Civil Service Commission has disapproved a requested Schedule C exclusion for the Director position, the CPSC plans to appeal this ruling. Once the position is established and a Director begins working, OPP will be ready to administer the financial compensation program on a permanent basis.

B. FINANCIAL COMPENSATION

In March 1977 the Commission proposed a regulation that included criteria and procedures for a financial compensation program (42 FR 15711-17, March 23, 1977). The purpose of the program is to fund selected participants in the Commission's proceedings.

Twenty-two individuals and groups submitted comments on the proposed financial compensation regulation. Thirteen of these supported the concept of a financial compensation program and nine did not. Of the comments from people who did not affiliate themselves with any organization or interest group, two people supported the program (one with a minor reservation) and four opposed it.

The National Legal Center for the Public Interest, the Grocery Manufacturers of America, the Chamber of Commerce of the United States, The Proprietary Association, and the Pacific Legal Foundation criticized the proposed financial compensation program. Their objections included the following: (1) It will be impossible to choose fairly among the groups and people that will request funding; (2) funding will be very expensive and is not needed because "the legal public interest movement is well-represented and well-financed" (National Legal Center); (3) the Commission lacks legal authority for the program; (4) in view of the bills pending in Congress to provide specific statutory authority and financing for compensation programs in numerous federal agencies, the Commission's proposal is premature; (5) the program "would invite dilatory litigation challenging the agency's exercise of its discretion in granting or denying funds" (Pacific Legal Foundation); and (6) the program "raises the ominous possibility of agency co-option of 'public interest' participants by application of the agency's discretion as to whom funds will be made available" (Pacific Legal Foundation).

The following groups supported the financial compensation program: National Consumers League, Center for Auto Safety, Environmental Defense Fund, Public Action Coalition on Toys, Arizona Consumers Council, and the Consumer Affairs Department of Detroit. Some of the comments from these groups which supported the program made specific suggestions for changes in the regulation. Nearly all of these suggestions addressed issues that the Commission had considered before it published the proposed regulation, and had discussed in the preamble to the proposal. As one example, several comments urged that financial compensation be made available for costs involved in preparation of funding applications. (In March 1977 the Commission's view of this issue was that the costs incurred during the application process would be insubstantial because, in part, the application provisions in the regulation were specifically drafted to minimize these costs (42 FR 15715).)

C. AD HOC PROGRAM

Since 1974 the Commission has funded participants in its rulemaking proceedings on an ad hoc basis. However, such funding has been limited to a handful of cases.

Under its ad hoc program, the Commission considers on a case-by-case basis all applications for funding that individuals or groups submit. The Commission does not solicit applications from participants. In addition, the Commission does not indicate which proceedings it believes would be benefited by the increased participation that would probably result from Commission funding.

TEMPORARY PROGRAM

A. INTRODUCTION

The Commission's ad hoc program for funding participants in its proceedings serves a limited purpose. The Commission proposed the March 1977 financial compensation regulation to serve as the basis of a broader and more effective program.

Until an OPP Director is ready to run a permanent Office of Public Participation, a financial compensation

program cannot fully meet the Commission's expectations. However, the Commission believes that a temporary program can remedy many of the deficiencies of the ad hoc program and can smooth the way for establishment of an effective permanent financial compensation program.

B. INTERIM REGULATION

The primary difference between an ad hoc program and the new temporary program is that the financial compensation regulation will now be in effect on an interim basis. When the Commission issues the regulation in final form, it may well want to modify some of the provisions. There are numerous issues, including those raised in the comments to the March 1977 proposal, which the Commission must fully consider before ultimately resolving. However, the experience of using the regulation is likely to contribute to an understanding of these issues and may even suggest some improvements to the regulation. For now, the Commission has made just one slight change in the proposed regulation (babysitting costs have been added to § 1050.7(e)(5) as an additional example of reasonable costs that are compensable).

All provisions of the proposed regulation are fully discussed in the preamble to the March 1977 FEDERAL REGISTER document (42 FR 15711-16). Since the regulation issued below in interim form is nearly identical to the proposed version, that discussion is applicable. Nevertheless, the most important aspects of the financial compensation regulation will be summarized here:

1. PURPOSE

The primary purpose of the regulation (§ 1050.1) is to increase participation in the Commission's informal rulemaking proceedings by those who represent viewpoints and interests that will contribute substantially to fair and full decisions in such proceedings. The Commission believes that the complexity of the technical issues involving rulemaking demands that it receive and consider evidence and opinion from the many segments of the affected public. Only in this way can the Commission ensure that its actions reflect the public interest.

Industries have a direct interest in a proposed safety standard with which they must comply. For this and other reasons, many industries have found it a good business practice to make substantial expenditures for research and other preparations that support comments on proposed Commission rulemaking actions.

By contrast, comments from nonregulated interests have been relatively infrequent. One reason may be that the immediate effect of Commission regulation on consumers is less discernible than on the regulated industries. Another reason is that consumers often have insufficient funds to present a position fully and effectively before the Commission.

The Commission hopes that the financial compensation regulation will encourage participation in CPSC rulemaking proceedings by those who represent interests and viewpoints which are currently underrepresented.

2. AUTHORITY

The Comptroller General of the United States, in decisions dated February 19 and May 10, 1976, held that the Commission has authority to provide financial assistance to those who cannot afford to participate in its proceedings, but whose participation is necessary to full and fair proceedings.

The U.S. Court of Appeals for the Second Circuit questioned the validity of these Comptroller General decisions in an opinion issued June 1977 (*Greene County Planning Board* v. *Federal Power Commission* 559 F. 2d. 122 cert. den., February 21, 1977 (No. 77-481)). This opinion, which held that the Federal Power Commission lacked the statutory authority to pay the counsel fees for intervenors in a licensing proceeding, has been cited to the CPSC as authority for the illegality of the CPSC's financial compensation program. (Although the timely comments on the March 1977 proposal could not cite this June 1977 decision, a follow-up comment from the Pacific Legal Foundation did so.)

The Commission considered the *Greene County* decision in August 1977 and decided unanimously to continue with its financial compensation program as planned. On March 1, 1978 the Department of Justice's Office of Legal Counsel also considered the *Greene County* decision and concluded that no Federal agency (other than possibly the Federal Energy Regulatory Commission, which has taken over the authority and functions of the no-longer-existing Federal Power Commission) is bound by the holding in that case.

3. SCOPE

The financial compensation regulation below applies to all of the Commission's informal notice and comment rulemaking proceedings. In addition, it applies to any hearings, meetings, or other proceedings which are "related to" informal rulemaking. By covering these categories of proceedings, the regulation will apply to most of the Commission's activities in which participation by the public is now sought.

The Commission also plans to issue a financial compensation regulation that will apply to its formal rulemaking and adjudicatory proceedings. Until such a regulation is issued, the Commission will continue to consider on an ad hoc basis all requests for funding from participants in those proceedings.

4. CRITERIA AND PROCEDURES FOR FUNDING

The regulation below includes the criteria that the Commission will consider before funding participants and the procedures that it will follow. (The Commission discussed these in great detail in the preamble to the March 1977 proposed regulation (42 FR 15712-15).)

To summarize the criteria, there are three factors which the Commission must consider prior to authorizing any funding under the regulation. These concern the importance of the proceeding; the need for representation of particular interests or viewpoints in the proceeding; and the expected representation of particular interests or viewpoints in the proceeding absent Commission funding.

In addition, there are three requirements that participants must meet to be eligible for funding. These concern the interest or viewpoint of the participant; the size of the participant's economic interest in the proceeding compared with the participant's costs of effective participation; and the participant's available financial resources.

The Commission believes that these factors and requirements will channel available compensation to participants and proceedings in such a way that the Commission will receive the greatest possible assistance in making rulemaking decisions.

The procedures included in the regulation have the same intent as the criteria, and they have the additional intent of preventing unnecessary delay in rulemaking proceedings. Under the procedures, the Commission would focus its funding efforts on particular rulemaking proceedings. The Commission will do this by soliciting applications for funding in selected proceedings and by setting a deadline for receipt of the applications. The Commission will then consider the applications and authorize funding according to the criteria already discussed. The Commission will respond in writing to all applications for funding and will provide reasons for its decisions to authorize or not authorize funding.

The regulation contains additional provisions: Funding is available for such reasonable costs as salaries, travel, and fees for consultants and attorneys. Funded participants may be subject to accounting and recordkeeping requirements. Even if the Commission does not solicit applications for funding, it will consider requests for funding in all proceedings that are subject to the regulation.

C. STAFFING

Catherine Bolger will be responsible for the day-to-day operation of the Commission's temporary financial compensation program. She has been assigned, on a temporary basis, to OPP (where a secretary has also been assigned). Her duties will include preparation of necessary forms, receiving and evaluating applications (the regulation requires funding applications to be submitted to the Office of the Secretary, but they will be immediately forwarded to OPP), and responding to questions from the public concerning the compensation program.

In addition, the Commission has formed a Financial Compensation Program committee to assist in the operation of the temporary program. Each Commission's office is represented on the committee, along with the Office of General Counsel and the Bethesda technical staff.

Although the committee's functions are flexible and partially undetermined, one of its functions will be to keep the Commissioners informed about the progress of the temporary program. The Commission itself, under the interim regulation, will be selecting the proceedings in which applications are solicited and will be authorizing or denying compensation.

Ms. Bolger, in conjunction with the committee, will do as much as possible to encourage participation in the temporary financial compensation program. As a minimum, solicitation of funding applications will be published in the FEDERAL REGISTER, in accordance with § 1050.6(a)(1) of the regulation.

D. FINANCIAL RESOURCES AVAILABLE

The basis of a financial compensation program is the reimbursement of selected participants in CPSC proceedings, but the Commission can only estimate the financial resources that will be necessary for an effective program. One purpose of a temporary program is to help determine how much money a permanent program might require.

Fiscal year 1978 ends on September 30, 1978 and the Commission has at least $30,000 available for funding between now and then. This should prove to be a sufficient amount for the beginning months of the program. During fiscal year 1979, which begins on October 1, 1978, the Commission expects to have available a larger amount.

By selecting appropriate proceedings one or two at a time, the Commission will make sure that the available financial resources do not become overextended. Whatever the number of proceedings selected, it is crucial that sufficient funds be available in advance of every proceeding in which applications are solicited.

ISSUANCE OF INTERIM REGULATION

The financial compensation regulation issued below formalizes funding procedures that have been available for public comment for more than a year. In addition, these procedures will apply to a program which is currently operating on an ad hoc basis, without any applicable procedures. Making the regulation effective will provide much-needed guidance and will not adversely affect the rights of any individuals or organizations. Therefore, the Commission finds, under 5 U.S.C. 553(d)(3) of the Administrative Procedure Act, that good cause exists for making the regulation effective immediately.

In accordance with provisions of the Consumer Product Safety Act (15 U.S.C. 2051-81), the Federal Hazardous Substances Act (15 U.S.C. 1261-74), the Flammable Fabrics Act (15 U.S.C. 1191-1204), and the Poison Prevention Packaging Act (15 U.S.C. 1471-76), the Commission issues, on an interim basis, the following new Part 1050 of Title 16, Chapter II, Subchapter A:

Sec.
1050.1 Purpose.
1050.2 Scope.
1050.3 Definitions.
1050.4 Criteria for financial compensation.
1050.5 Submission of applications by participants.
1050.6 Commission solicitations of and decisions on applications.
1050.7 Amounts of financial compensation and procedures for payment.

AUTHORITY: Consumer Product Safety Act (15 U.S.C. 2051-81). Federal Hazardous Substances Act (15 U.S.C. 1261-74). Flammable Fabrics Act (15 U.S.C. 1191-1204); Poison Prevention Packaging Act (15 U.S.C. 1471-76).

§ 1050.1 Purpose.

(a) The Consumer Product Safety Commission, in carrying out its statutory purposes, issues numerous rules that concern the procedures of the Commission and the manufacture and distribution of products. These rules can have far-reaching effects on the health and safety of the public and on the operations of industry.

(b) The Commission seeks the involvement of all interested persons in most of its rulemaking proceedings, but seeking such involvement does not ensure that it will take place. When rules present complex legal or technical issues, interested persons may be unable to comment on them because of the costs of effective participation. When any interested individual consumers, organized groups representing consumer viewpoints, small business interests, or others cannot participate in a rulemaking proceeding, the ability of the Commission to regulate effectively is impaired. If the Commission is to reach fair and balanced decisions in rulemaking matters, the diverse interests and viewpoints of all interested persons should be represented in rulemaking proceedings.

(c) The Commission's policy is to provide financial compensation to participants in its rulemaking proceedings to obtain the representation of interests and viewpoints expected to contribute to full and fair decisionmaking, if those interests and viewpoints would not be represented effectively without the Commission's financial compensation. The Commission provides such compensation to the fullest extent possible within its budgetary constraints and in accordance with appropriate priority considerations. The purpose of this part is to establish procedures and guidelines to carry out the Commission's policy of providing financial compensation.

§ 1050.2 Scope.

The Commission may provide financial compensation under this part to participants in any proceedings related to informal rulemaking in which the Commission seeks written and/or oral comments from all interested members of the public under the authority of one or more of the following statutory provisions:

(a) In the Consumer Product Safety Act, sections 7(d)(3), 9(a), 9(e), 10(c), 14(b), 14(c), 16(b), 26(c), 27(a), 27(e), and 30(d);

(b) In the Federal Hazardous Substances Act, sections 2(f)(1)(D), 2(q)(1)(B), 3, 10, and 18(b)(3);

(c) In the Flammable Fabrics Act, sections 4, 5, and 16(c);

(d) In the Poison Prevention Packaging Act, sections 3, 4(c), and 8(c);

(e) Any other statutory provision under which the Commission seeks public comment in accordance with 5 U.S.C. 553 of the Administrative Procedure Act or in accordance with similar informal notice and comment rulemaking procedures.

§ 1050.3 Definitions.

As used in this part—

(a) "Commission" means the Consumer Product Safety Commission, established by section 4 of the Consumer Product Safety Act.

(b) "Proceeding" or "proceeding related to informal rulemaking" means any of the Commission's procedures, held under the authority of one or more of the statutory provisions listed in § 1050.2, for soliciting written and/or oral comments from the public on matters related to rulemaking.

(c) "Participant" means any interested individual, group of individuals, public or private organization or association, partnership, or corporation who or which is taking part or intends to take part in a Commission proceeding.

(d) "Application" means a written request by a participant for financial

compensation submitted in accordance with § 1050.5.

§ 1050.4 Criteria for financial compensation.

(a) The Commission shall consider the following factors in connection with authorization of financial compensation for participation in a proceeding:

(1) The importance of a particular proceeding, compared with other Commission proceedings, in terms of the potential impact of the proceeding on the public health and safety;

(2) The need for representation of one or more particular interests or points of view in the proceeding; and

(3) The extent to which particular interests or points or view can reasonably be expected to be represented in a proceeding if the Commission does not provide any financial compensation.

(b) The Commission may authorize financial compensation only for participants who meet all of the following criteria:

(1) The participant represents a particular interest or point of view that can reasonably be expected to contribute substantially to a full and fair determination of the issues involved in the proceeding.

(2) The economic interest of the participant in any Commission determination related to the proceeding is small in comparison to the participant's costs of effective participation in the proceeding. If the participant consists of more than one individual or group, the economic interest of each of the individuals or groups comprising the participant shall also be considered, if practicable and appropriate.

(3) The participant does not have sufficient financial resources available for effective participation in the proceeding, in the absence of financial compensation under this part.

§ 1050.5 Submission of applications by participants.

(a) A participant must submit a written application to the Commission in order to be authorized to receive compensation. The application shall contain, to the fullest extent possible and appropriate, the following information:

(1) A description of the point of view that the participant intends to represent in the proceeding and a discussion of the participant's capability to represent such point of view;

(2) The reason(s) that representation of the participant's interest or point of view can reasonably be expected to contribute substantially to a full and fair determination of the issues involved in the proceeding;

(3) An explanation of the economic interest, if any, that the participant (and individuals or groups comprising the participant have) in any Commission determination related to the proceeding;

(4) A discussion, with supporting documentation, of the reason(s) a participant is unable to participate effectively in the proceeding without financial compensation;

(5) A description of the participant's employment or organization, as appropriate; and

(6) A specific and itemized estimate of the costs for which compensation is sought.

(b) Applications must be submitted to the Office of the Secretary, 1111 18th Street NW., Washington, D.C. 20207 in accordance with the applicable deadlines or guidelines on timeliness set forth in § 1050.6.

§ 1050.6 Commission solicitations of and decisions on applications.

(a) Whenever the Commission anticipates that financial compensation of participants in a particular proceeding can reasonably be expected to contribute substantially to full and fair decision-making, it may solicit applications for compensation in that proceeding. With regard to any such proceeding, the Commission shall:

(1) Publish in the FEDERAL REGISTER the solicitation and as full a description as possible of the nature of the proceeding, including any relevant facts the Commission is seeking, the policy and legal questions at issue, and the potential rulemaking actions being considered (the Commission may decide that this description will include the text of the proposed rule);

(2) Set a deadline for receipt of applications that is at least 30 days after publication in the FEDERAL REGISTER of the soliciation and description;

(3) Notify every participant who submits an application prior to the deadline whether compensation has or has not been authorized, in accordance with the following:

(i) All notifications must be in writing and must include the reason(s) that compensation has or has not been authorized.

(ii) All notifications that compensation has been authorized must specify the amount authorized.

(iii) All notifications responding to applications for compensation in oral proceedings shall be made as far as possible in advance of the scheduled participation of the participant and in no case later than five days before such scheduled participation.

(iv) All notifications responding to applications for compensation in written proceedings shall be made as far as possible in advance of the date on which the public comment period begins. If any participant is notified after this date, the Commission may extend or delay the comment period if it believes that any participant will not otherwise have a comment period of a reasonable length that begins on the date of notification to such participant under this paragraph.

(v) Notifications shall be considered to be made when either mailed or delivered by hand to the participant or an authorized representative of the participant;

(4) Consider any application submitted after the deadline only to the extent practicable.

(b) The Commission shall consider applications at any time by participants in any proceeding for which the Commission has not solicited applications according to paragraph (a) of this section. The Commission shall notify every participant who submits such an application whether compensation has or has not been authorized, in accordance with the following:

(1) All notifications must be in writing and must include the reason(s) that compensation has or has not been authorized.

(2) All notifications that compensation has been authorized must specify the amount authorized.

(3) All notifications must be made in as timely a manner as possible.

§ 1050.7 Amounts of financial compensation and procedures for payment.

(a) The Commission may establish a limit on the total amount of financial compensation to be made to all participants in a particular proceeding and/or may establish a limit on the total amount of compensation to be made to any one participant in a particular proceeding.

(b) The Commission shall compensate participants only for costs that have been authorized and only for such costs actually incurred for participation in a proceeding.

(c) The participant shall be paid upon submission of an itemized voucher listing each item of expense. Each item of expense exceeding $15 must be substantiated by a copy of a receipt, invoice, or appropriate document evidencing the fact that the cost was incurred.

(d) The Commission shall compensate participants only for costs that it determines are reasonable. As guidelines in these determinations, the Commission shall consider market rates and rates normally paid by the Commission for comparable goods and services, as appropriate.

(e) The Commission may compensate participants for any or all of the following costs:

(1) Salaries for participants or employees of participants;

(2) Fees for consultants, experts, contractual services, and attorneys that are incurred by participants;

(3) Transportation costs;

(4) Travel-related costs such as lodging, meals, tipping, telephone calls, etc.; and

(5) All other reasonable costs incurred, such as document reproduction, postage, baby-sitting, etc.

(f) The Commission shall compensate participants within 30 days following the date on which the participant submits an itemized voucher of actual costs pursuant to paragraph (c) of this section.

(g) The Commission and the Comptroller General of the United States, or their duly authorized representatives, shall have access for the purpose of audit and examination to any pertinent books, documents, papers and records of a participant receiving compensation pursuant to this section. The Commission may establish additional guidelines for accounting, recordkeeping, and other administrative procedures with which participants must comply as a condition of receiving compensation.

Effective date: May 31, 1978.

Dated: May 24, 1978.

SADYE E. DUNN,
Acting Secretary, Consumer Product Safety Commission.

[FR Doc. 78-14963 Filed 5-30-78; 8:45 am]

[6740-02]

Title 18—Conservation of Power and Water Resources

CHAPTER I—FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. R-441; Order No. 455-C]

PART 2—GENERAL POLICY AND INTERPRETATIONS

Further Amendment of Statement of Policy Relating to Optional Procedure for Certificating New Producer Sales of Natural Gas

MAY 19, 1978.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rulemaking.

SUMMARY: The Commission extends the 9-month period of review during which deliveries are made at the prevailing nationwide ceiling rate until a final order has been issued determining the contract rate just and reasonable. If the rate determined by the Commission is higher than the nationwide rate collected, the final order will allow a surcharge to be collected for the difference in rates during the extended period. The purpose of this rulemaking is to provide consumers with the protection intended by the Natural Gas Act.

EFFECTIVE DATE: May 19, 1978.

FOR FURTHER INFORMATION CONTACT:

Elisabeth Pendley, Office of the General Counsel, Federal Energy Regulatory Commission, 202-275-4216.

SUPPLEMENTARY INFORMATION: Pursuant to 5 U.S.C. 553, sections 4, 5, 7, 8, 14, 15, and 16 of the Natural Gas Act (52 Stat. 822, 823, 824, 825, 828, 829, 830; 15 U.S.C. 717c, 717d, 717f, 717g, 717m, 717n, 717o), and pursuant to section 403(a) of the DOE Act (91 Stat. 565), the Commission issues an amendment to the: General Rules under the Natural Gas Act, Subchapter A, Chapter I, Title 18, CFR.

The Commission's optional certificate procedure was established by Order No. 455, Optional Procedure for Certificating New Producer Sales of Natural Gas, 48 F.P.C. 218 (1972), affirmed in part and reversed in part sub nom., *Moss* v. *F.P.C.*, 502 F.2d 461 (D.C. Cir. 1974), reversed in part, 424 U.S. 494 (1976). Originally § 2.75 of the regulation, which implemented Order No. 455, contained, in paragraph (o), a provision which permitted producers to collect their contract rate without any refund obligation 6 months after the commencement of deliveries[1] until such time as the Commission entered a final order on the application. This provision was operative despite the possibility that the Commission might ultimately conclude that the contract rate was in excess of the just and reasonable rate for the sale of the gas.

After 2 years of experience under Order No. 455, the Commission, in Order No. 455-B, issued November 25, 1974, concluded that the 6-month period within which to analyze the optional pricing applications was inadequate. The Commission increased the time period for analysis to 9 months, stating:

> that the "public interest requires a disposition of the certificate applications under the optional procedure for certificating new producer sales of natural gas, prior to the effectuation of a non-refundable contract rate. Accordingly the Commission finds that the extension of the time period from six to nine months is justly warranted and compelled by the public interest." (52 FPC 1418)

The change did not however, prevent producers from collecting the contract rate, without refund obligation, after the 9-month period, if the Commission had not yet been able to issue a final order.

Recent applications under the optional pricing alternative have proven to be extremely complex, multiblock ventures which require significant time by staff to properly and completely analyze. Often additional information from the applicant is required. It is our experience that the production of such additional information is often not made in a timely manner in order to enable the Commission to complete its analysis within the 9-month period. Additionally, the applications, particularly in the complicated multiblock cases, are usually contested. The result is that the applications are set for hearing, and the administrative process requires substantially more time than the 9-month period originally anticipated to be adequate.

The consequences of allowing producers to automatically collect their contract rate following the expiration of the 9-month period have become much more severe in their effect on consumers. We note that in certain recent cases producers have sought to collect rates of $2.54 and $3.30. Other applications before the Commission indicate that the price levels sought are also substantially in excess of the nationwide just and reasonable rate.[2] Typically, the optional price gas is sold from offshore blocks, and involve large reserves. In many of the cases the Commission cannot, due to factors noted above, reach a final decision in the 9-month period. Accordingly the contract rate goes into effect without refund obligation. The effect on consumers is immediate and substantial. Under the present § 2.75(o) there does not appear to be a satisfactory method for indemnifying consumers for portions of the rate which might ultimately be determined to be in excess of the just and reasonable rate.

The Commission cannot permit consumers to go unprotected during the period of analysis and administrative proceedings necessary to determine the public interest and the necessity of allowing sales of gas at prices substantially in excess of the nationwide norm.

Conversely, where Commission proceedings are quite extended it appears inequitable to require producers to sell at the national rate for excessive periods of time where the just and reasonable rate is ultimately determined to be in excess of the national rate.

Accordingly the Commission amends paragraph (o) of § 2.75 to permit it, in appropriate cases, to extend the time for consideration of applications filed under § 2.75. The right of the producer to sell at the prevailing nationwide ceiling rate for 9 months is preserved. However, if the Commission deter-

[1] In its May 8, 1978 order in *Pennzoil Louisiana and Texas Offshore Company, Inc., et al.*, Docket Nos. CI77-702, et al., the Commission found that the applicable time period before the applicants were permitted to collect the contract rate ran from the date the Commission was notified of commencement of deliveries as required by § 2.75(n).

[2] In *Pennzoil, Louisiana and Texas Offshore Company Inc.*, Docket No. CI78-767, the applicants have sought a rate of $4.74 plus $0.05 per Mcf compression charge, Btu adjustment and tax reimbursements for its interest in 50 offshore blocks.

APPENDIX G

CAB PROPOSED RULES ON PAID PARTICIPATION (April 4, 1978)

ment include a comprehensive review of all regulatory requirements and policies related to the use of water in poultry processing. Recently, the Administrator was asked whether the amount of intake water presently required by regulation for chilling poultry was necessary or whether lesser amounts would accomplish the same end. The poultry industry in Virginia also raised the same question with research and extension personnel at the Virginia Polytechnic Institute and State University (VPI).

A study of the attributes of poultry chillers (turbidity, suspended solids, microbiological profile, and pH) which may affect the condition of the product or chill media, was conducted by VPI. The study reported that, for the circumstances studied, 50 percent reduction in water exchange rate for the several kinds of poultry had no significant effect on the quality of the product or the chill media.

USDA Studies

The Department undertook field studies of its own to see if currently required water intake levels could be adjusted. These were run in locations different from the VPI studies. The field studies emphasized the relationship of water intake to the microbiological quality of the poultry and that of the chill media. At the same time, review of the available literature and a consideration of the findings of a Department advisory committee on salmonellae was undertaken. This is of interest because salmonellae bacteria have been frequently associated with food infection episodes traced to poultry.

The results of those Department field tests showed that the total number of bacteria remaining on representative carcasses removed from chill tanks tended to increase when the intake water was reduced.[2] The average increase in bacterial level corresponding to a 50 percent water reduction was estimated at 1.8 times on carcasses and 1.5 in the water for broiler chickens. The median increase in the bacterial level was estimated at 1.8 times on carcass and 1.7 in the water. The latter estimate is generally considered to give a better expression of the change. The data available describing bacterial levels on turkeys compares the loads at 170 percent of the minimal per bird water requirement with that at 50 percent. The corresponding average increases were 3.2 times on the carcasses and 3.2 times in the chill water, with median values at 3.9 times and 2.1 times respectively. Interpolating these data to estimate the increases in bacterial levels that might be expected when water is reduced from the minimal (100 percent) per bird requirement to 50 percent of that level indicates that the average increase for carcasses would be 1.3 times and for chill water would be 1.3 times with median values at 1.6 and .9 times respectively. These increases are comparable to those obtained for the broiler chickens. Although a microbiological standard for such poultry carcasses has not been established, the significance of these increases in the bacteria level from a public health standpoint does not appear to be great. There is, however, a departmental policy that calls for an all out effort to reduce the number of organisms on food wherever they are present with specific reference to those of the *Salmonella* variety.

Effect of Chlorination

The bactericidal properties of chlorine on bacterial cells in general and on salmonellae in particular are well documented. A 20 ppm value of available chlorine was established as proper for poultry operations from recommendations contained in documents received from the public concerning a related rulemaking action "Poultry Slaughter Practices," 42 FR 41873.[3] Some of these references are: Barnes, E. M. and Mead 1971. Clostridia and Salmonellae In Poultry Processing. Poultry Disease and World Economy. 47-63 Drewniak, E. A. et al. 1954. Studies on Sanitizing Methods for Use In Poultry Processing. USDA Circular, No. 930. Reprinted without change in text 1964. Nilsson, T. and Regner, B. 1963. The Effect of Chlorine in the Chilling Water on Salmonellae in Dressed Chicken. Acta. Vet. Scand. 4: 307-312. Waybeck, C. J. et al. 1968. Salmonella and Total Count Reduction in Poultry Treated with Sodium Hypochlorite Solutions. Pov. Sci. 47. 1090-1094

Since the Department studies showed an increase in bacterial numbers, when the fresh water intake of continuous poultry chillers is reduced to 50 percent of the current requirements, an unconditional change would not be consistent with departmental policy. However, in view of the antibacterial action of chlorine, the Department proposes a 50 percent water reduction in conjunction with intake water that contains 20 parts per million (ppm) available chlorine in the continuous poultry chillers. This would appear to be in the public interest in resource and environmental management. The Department believes that this could be achieved with no detrimental effect on the wholesomeness of poultry available to consumers.

Therefore, the Food Safety and Quality Service is proposing to amend the first sentence of §381.66(c)(2)(ii) of the poultry products inspection regulations to read as follows:

* * * * *

§381.66 Temperatures and chilling and freezing procedures.

* * * * *

(c) * * *

(2) * * *

(ii) With respect to continuous chilling systems, the fresh water intake in the first section of the system, after all sections of the system are filled with water, shall be not less than one-half gallon per chicken, duck, or guinea, and not less than one gallon per goose or turkey: *Provided,* That if the fresh water intake, including that used to fill chillers but excluding ice, consists entirely of fresh water that contains 20 ppm available chlorine, the fresh water intake shall be not less than one-fourth gallon per chicken, duck or guinea, and not less than one-half gallon per goose or turkey.

* * * * *

NOTE.—The Food Safety and Quality Service has determined that this document does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821 and OMB Circular A-107.

Done at Washington, D.C., on March 29, 1978.

ROBERT ANGELOTTI,
Administrator, Food Safety and Quality Service.

[FR Doc. 78-8710 Filed 4-3-78; 8:45 am]

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[2] A copy of these tests will be on file in the Office of the Hearing Clerk, U.S. Department of Agriculture, Washington, D.C. Additionally, copies will be provided free upon request to Dr. J. P. Lyons, Inspection Standards and Regulations Staff, Technical Services, Meat and Poultry Inspection Program, Food Safety and Quality Service, U.S. Department of Agriculture, Washington, D.C. 20250.

[3] A copy of these documents will be on file in the Office of the Hearing Clerk, U.S. Department of Agriculture, Washington, D.C. Additionally, copies will be provided free upon request to Dr. J. P. Lyons, Inspection Standards and Regulations Staff, Technical Services, Meat and Poultry Inspection Program, Food Safety and Quality Service, U.S. Department of Agriculture, Washington, D.C. 20250.

[6320-01]

CIVIL AERONAUTICS BOARD

[PDR-50; Docket No. 29880; Dated: March 16, 1978]

[14 CFR Part 304]

COMPENSATION OF PARTICIPANTS IN BOARD PROCEEDINGS

Proposed Rulemaking

AGENCY: Civil Aeronautics Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice proposes to establish a program to promote public participation in CAB proceedings. Reimbursement for the costs of participation would be provided to eligible participants. Compensation would be paid to applicants whose participation in a proceeding can be expected to contribute substantially to a full and fair determination of the issues presented. To qualify, an applicant would also need to be financially unable to participate without compensation. This proposal responds to a petition for rulemaking filed by the Aviation Consumer Action Project and the Institute for Public Interest Representation.

DATES: Comments by May 19, 1978. Reply comments by June 5, 1978. Comments and other relevant information received after these dates will be considered by the Board only to the extent practicable. Requests to be put on Service List by April 19, 1978. Docket Section prepares the Service List and sends it to each person listed, who then serves his comments on others on the list.

ADDRESSES: Twenty copies of comments should be sent to Docket 29880, Civil Aeronautics Board, 1825 Connecticut Avenue NW., Washington, D.C. 20428. Individuals may submit their views as consumers without filing multiple copies. Comments may be examined in Room 711, Civil Aeronautics Board, 1825 Connecticut Avenue NW., Washington, D.C., as soon as they are received.

FOR FURTHER INFORMATION CONTACT:

Mark Schwimmer, Civil Aeronautics Board, Office of the General Counsel, 1825 Connecticut Avenue NW., Washington, D.C. 20428, 202-673-5442.

SUPPLEMENTARY INFORMATION: The Aviation Consumer Action Project (ACAP) and the Institute for Public Interest Representation petitioned the Board in October 1976, to establish a program to promote public particiption in Board proceedings. The program would provide compensation for attorneys' fees, expert witness fees, and other costs of participation incurred by qualifying participants. To qualify, a participant would need to represent "an interest which will substantially contribute to a full and fair determination of the issues involved in the proceeding" and meet a criterion of financial need.

Responding to the petition, we issued PDR-45, an advance notice of proposed rulemaking, in February 8, 1977 (appearing at 42 FR 8663, February 11, 1977). We agreed in principle with the petition's aims, and requested comment on various questions of detail that it raised. We also discussed our legal authority to spend appropriated money on a compensation program, referring to a series of supporting decisions by the Comptroller General and the decision of a three-judge panel in *Greene County Planning Board* v. *Federal Power Commission*, 559 F.2d 1227 (C.A. 2, 1976) (*Greene County I*). We have now decided that a compensation program would be in the public interest, and by this notice we solicit comment on the particular approach that is discussed below.

The Comments on PDR-45

PDR-45 evoked support for a compensation program from several public interest groups, one air carrier, one other Federal agency, the Board's Office of the Consumer Advocate (OCA), and several individuals.[1] These commenters generally agreed on the following propositions: (1) The quality of Board decision making is enhanced by the participation of representatives of consumer interests and other broad public interests. (2) Skilled, effective representation in administrative proceedings can be very expensive, so that the right to participate—whether by formal intervention as a party, by informal intervention, as a commenter on a proposed rule, or otherwise—is distinct as a practical matter from the ability to participate. (3) Regulated persons have strong and direct financial incentives and resources to spend the money necessary to participate in proceedings that have an immediate impact on their businesses. Public interest groups on the other hand, have limited budgets that preclude their effective participation in all but a few proceedings. Therefore, representation before the Board is currently unbalanced.

The concept of a compensation program was opposed by several air carriers, trade associations, and individuals and one public interest group.[2] Their arguments were of three general types: (1) That there is no need for such a program; (2) that ascertaining who really "represents the public interest" is impracticable and that it would be inappropriate to spend public money to support special interests or individuals who purport to represent the public good; and (3) that the Board may not, or in any avent should not, establish such a program without Congressional guidance.

Some commenters suggested that a compensation program to promote public participation is unnecassary, pointing to the liberal intervention provisions of Rules 14 and 15 of our Rules of Practice (14 CFR §§ 302.14 and 302.15). Others argued that there is no need for such a program because the public interest is already represented by various Board components, most notably OCA. It was suggested also that, to the extent that OCA is not now adequately representing the public interest, a better solution is to expand the budget of or otherwise improve OCA, rather than to give money to private parties.

We disagree with thse arguments. Rules 14 and 15 alone do not, as a practical matter, guarantee effective public participation. Fees for attorneys, expert witnesses, consultants, and clerical services, among others, can make participation in a Board proceeding expensive. The costs are magnified when there are many parties and the proceeding is long. These costs tend to limit participation to parties that have an immediate financial interest in the outcome.

The Senate Committee on Government Affairs examined this effect in a July 1977 study.[3] It found that in calendar year 1976, 11 trunk carriers alone paid nearly $3 million to outside counsel to represent them before the Board. One carrier alone spent $650,000. However, the only "public interest" group that participates substantially in Board proceedings—ACAP—had a total budget of $40,000 in 1976. Of that, only $20,000 was spent on Board matters. Even when augmented by the value of pro bono legal assistance that ACAP received from affiliated groups, this represents less than 1 percent of the amount spent by the trunk carriers. The contrast is sharpened if one considers that the trunks also paid for in-house counsel and the non-legal costs of participation.

The National Legal Center for the Public Interest (NLCPI) pointed out that all members of the public are free to use their time and money as they see fit to participate in agency matters. Therefore, it argued, if an individual is unable to interest others in

[1] Supporting comments were filed by OCA, the Department of Health, Education, and Welfare's Office of Consumer Affairs, ACAP and the Institute for Public Interest Representation, Environmental Defense Fund, Center for Law and Social Policy, Council for Public Interest Law, the firm of Swankin & Turner, and World Airways, in addition to comments from individuals. World's comment particularly urged reimbursement for public participation in the Transcontinental Low Fare Route Proceeding (Docket 30356).

[2] Opposing comments were filed by National Legal Center for the Public Interest, Air Transport Association, TWA, Air Illinois, Privincetown-Boston Airline, Hawaii Air Cargo Shippers Association, Middlewest Motor Freight Bureau, Diamond Travel, and several individuals.

[3] "Study on Federal Regulation: Public Participation in Regulatory Agency Proceedings", Senate Committee on Governmental Affairs, 95th Congress, 1st Session.

combining their resources with him, his views may be aberrational and not shared by other members of the public. We recognize that the amount of money one is willing to spend on participation can reflect the strength of this interest in a matter. Air carriers, for example, must decide almost daily whether and to what extent they wish to pursue their interests before the Board. Each decision is made on the basis of the expected costs and benefits, and the participation expense is a cost of doing business. This is not the case, however, with interests that are of great magnitude in the aggregate but are held so diffusely that any one person's stake is small. While the fact that an individual or small group has attracted many small contributions suggests that it represents a significant interest, its converse is not true. Many significant interests have been underrepresented.[4] The cost and uncertainties of fundraising present a practical barrier. This problem is aggravated when the interest is not of a continuing nature, but arises instead in response to a particular Board activity. For example, a request for route authority to a particular airport, especially a satellite airport, may be opposed by most airlines yet supported by area residents concerned about jobs and area development who have no pre-existing group to represent them.

As we see it, discussion of the merits of a compensation program has been clouded by the varying uses of the words "public interest." Strictly speaking, the "public interest" is the only consideration in every Board proceeding. Section 102 of the Federal Aviation Act sets out some of the factors to be considered in determining where the public interest lies. In urging the Board to adopt its particular position, every participant will argue that the public interest requires that result. Even when a regulated corporation argues for what may appear to be its private rights, it is really arguing that the public interest requires recognition of those rights. Distinct from this meaning of the words, the label "public interest" has been used to describe certain groups. These groups claim to represent the interest of the public-at-large or of broad segments of the public, unlike "private" businesses that pursue, in the first instance, their immediate commercial interest. But a decision that authorizes compensation to enable one of these groups to participate in a proceeding would in no way constitute a determination that its position properly characterizes the overall public interest. In fact, if the decision did imply such a determination, there would be no need for any further proceeding.

Thus, the argument that the Board staff represents "the public interest" is somewhat beside the point. The staff does and always will represent the public interest. But, the term "public interest" either means the correct final decision in any matter, which the five-Member Board itself must reach at the end of the proceeding, or it means all the various "interests" that may be advocated by the public. The staff can and does do much to present what it considers, on the basis of its expertise and common sense, the most reasonable position for the Board to adopt. But in the second sense, it is unrealistic to expect any staff group always to be able to detect and present all these interests to the Board. Furthermore, in a complex case more than mere presentation is needed. All positions are obviously not of equal merit. It is the foundational tenet of our legal system, of which administrative agencies are a part, that decisions are best reached when the decisionmaker is directly exposed to the full force of argument of those on various sides of the question. It is this advocacy of different positions that may be overlooked, misunderstood, or underweighted, whether formal testimony in an adjudicative matter or a comment in a rulemaking proceeding, that is the goal of this program. There is a great value, for both the soundness and the acceptance of our decisions, in promoting voluntary, pluralistic participation by persons representing the variety of interest that may be affected by our actions. Paying for active participation by these interests, on whose behalf we are supposed to operate, would thus complement the staff's function, and in no sense be a substitute for it. This is further reflected in the expectation that funds for the compensation program would make up only 1 percent of our annual budget.

Under the rule that we propose today, a decision to compensate an otherwise qualifying applicant would mean only that the interest is significant enough that its representation appears likely to substantially assist us in fully and fairly resolving the issues presented in the proceeding. We in fact contemplate the eligibility of several applicants representing different points of views in a single proceeding.[5] We also would not rule out compensation for regulated or commercial interests. It is true that the representatives of such interests will rarely be unable to participate without financial assistance. When they truly are unable, however, there appears to be no good reason automatically to preclude their eligibility if it is found that the value of their presentations, in assisting the Board to reach soundly based decisions in the public interest, will justify the expenditure of public funds.

Closely related to the argument that we should not compensate anyone because of the difficulty in ascertaining who represents the public interest is the suggestion of some commenters that public money should not be used to subsidize special interest groups. These commenters misunderstand the thrust of a compensation program. It would create no entitlements to money. Authorizations of compensation would not be based on any right of an applicant to be heard in a proceeding. They would instead be based on the usefulness of his expected presentation to the Board in carrying out its statutory mandate to promote the public interest in aviation regulation. Payments under the program would thus be in the nature of compensation for services rendered.

TWA and NLCPI argued that we cannot legally spend money on a compensation program without explicit statutory authority. Others suggest that even if we do have the authority, we should not exercise it, but should wait instead for specific guidance from Congress.

We have tentatively concluded that we already have implied statutory authority to conduct a compensation program of the type proposed today. The authority is implicit in Section 203 of the Federal Aviation Act, empowering the Board to make such expenditures "as may be necessary for the exercise and performance of the

[4] For further discussion of this subject see, for example, "Study on Federal Regulation", supra; "Federal Agency Assistance of Impecunious Intervenors," 88 Harv. L. Rev. 1815 (1975); Gellhorn, "Public Participation in Administrative Proceedings," 81 Yale L. J. 359 (1971); Lazarus and Onek, "The Regulators and the People," 57 Va. L. Rev. 1069 (1972). Several Commenters argued that it will be very difficult to ascertain which applicants for compensation really represent the public interest. NLCPI criticized the opinion that "the regulated industry presents one view the public interest offers another *single* view and the two views are diametrically opposed." It points out, for example, that an industry opposing a proposed regulation intended to protect consumers will not argue that consumers do not deserve protection, but instead will argue that the protection is not worth the cost. It also points out that there can often be large subclasses of consumers with divergent views of the public interest. We quite agree, and over the years have observed the same phenomenon. We do not believe, however, that uncertainty about who "represents the public interest" compels the conclusion that a compensation program would be impracticable or inappropriate. Indeed, this very uncertainty highlights the need for a program to ensure the effective and undiluted representation of a variety of views.

[5] In this connection, we note that the Federal Trade Commission compensated 44 participants in the first 13 proceedings under its program, and the Department of Transportation compensated 21 in its first 5 proceedings. These programs are discussed further below.

powers and duties vested in and imposed upon the Board by law, and as from time to time may be appropriated for by Congress * * *" (49 U.S.C. 1323). Our current appropriation act provides "For necessary expenses of the Civil Aeronautics Board" (Pub. L. 95-85, August 2, 1977). In PDR-45, we discussed a series of opinions[6] in which the Comptroller General has interpreted similar governing statutes of other agencies as authorizing reimbursement when (1) the participation "can reasonably be expected to contribute substantially to a full and fair determination" of the issues in a proceeding, and (2) the participant is "indigent or otherwise unable to finance its participation." We agree with those interpretations and, applying them to our governing statutes, tentatively adopt them as our own.

We have fully considered the June 30, 1977, decision of the U.S. Court of Appeals for the Second Circuit in the *Greene County* case. In that decision, *Greene County I* was reversed en banc, the full Court agreeing with the Federal Power Commission (FPC) that the Federal Power Act did not authorize the FPC to compensate participants without a more explicit statutory authorization. *Greene County Planning Board* v. *FPC*, 559 F. 2d 1237 (C.A. 2, 1977) (*Greene County II*). There have been further developments in this case, however. On September 27, 1977, the Greene County Planning Board petitioned the Supreme court for certiorari (No. 77-481). On October 1, the Federal Energy Regulatory Commission (FERC) succeeded the FPC as a party in the litigation.[7] The FERC reversed its earlier position, concluded that its governing statute did authorize compensation, and thus concluded that the holding in *Greene County II* was mistaken. On January 12, 1978, the Solicitor General, Department of Justice, filed a brief on behalf of the FERC, urging the Supreme Court to remand the case to the Court of Appeals for reconsideration in light of that conclusion. In denying the petition for certiorari on February 21, the Supreme Court took no position on the merits of the case. In this context and in view of the fact that *Greene County II* did not construe the Federal Aviation Act, we believe that the decision is not a legal prohibition of a Civil Aeronautics Board compensation program. A recent letter from the Department of Justice (John M. Harmon, Assistant Attorney General, March 1, 1978) to our General Counsel confirms this view.

Although bills to provide explict statutory authority have been filed in both Houses of Congress (S. 270 and H.R. 8798), we believe we should not await specific legislative action. By waiting, we would be depriving ourselves of valuable contributions that could not be made without compensation. Moreover, the most recent committee print of S. 270[8] and the experience of other Federal agencies have already provided much guidance. Since August 1975, the Federal Trade Commission (FTC) has been compensating participants in proceedings for the development of Trade Regulation Rules under the Magnuson-Moss Warranty—FTC Improvement Act (15 U.S.C. 57A).[9] Since January 1977, the Department of Transportation's National Highway Traffic Safety Administration (DOT/NHTSA) has been compensating participants in its major auto safety and fuel economy rulemaking proceedings.[10] In addition to these full-scale programs, other agencies have made ad hoc awards,[11] and at least three have outstanding proposals to establish compensation programs.[12]

The Details of This Proposal

We propose to consider applications for compensation in any type of proceeding. Although the other agencies' actual experience in this area is almost exclusively in rulemaking, there is nothing inherently inadvisable about compensation in other types of proceedings. Indeed, it is likely that a smaller fraction of the important issues are resolved through rulemaking at the Civil Aeronautics Board than in those agencies. Therefore, we would not limit our program to rulemakings. "Proceeding" would be defined very broadly, to include any Board process in which there may be public participation. The rule would not enlarge intervention rights or create any new rights to participate. It would only offer an ability to participate to persons who already have such rights.

The timing and procedure of ratemaking, route, enforcement, and other adjudicatory proceedings are less predictable than with rulemaking. In some cases, the usefulness of public participation may not become evident until late in a proceeding. In others, however, it may be apparent near the beginning, before any notice has been published or any action has been taken by the Board. The complaints againt the IATA carriers' competitive response to Skytrain service between New York and London[13] are an example. Because of this unpredictability and the procedural variety of our cases, the proposed rule is drafted to allow maximum flexibility in handling applications for compensation.

We invite comments on the possible form of administration. To help ensure objectivity of eligibility and authorization decisions it would appear best to exclude from the administering bodies those who may be participating as a party in the particular proceeding. The administering body could, however, consider the recommendations of the relevant involved staff members, bureaus or offices that do participate in particular proceedings. One proposal is that the administering body be a committee consisting of the Managing Director, the Director of the Office of Economic Analysis and the General Counsel, or their delegates. This approach to administration is set out in the text of the proposed rule. We propose in the alternative to include a Board Member on the committee, to set up a separate office for the purpose, or to give the task to the Office of the Consumer Advocate. Yet another alternative would be for the Chief Administrative Law Judge to designate a single judge or a panel of judges to administer the program in adjudicated cases, or rulemakings, or both. Delegating this function to the Managing Director's office would be another possibility.[14]

While applications for compensation could be submitted in any proceeding, the board might also invite applications in cases where promoting public

[6] Decision of the Comptroller General re Costs of Intervention Nuclear Regulatory Commission (B-92288, February 19, 1976); Letter to Congressman Moss from Comptroller General (B-180224, May 10, 1976); Decision of the Comptroller General re Costs of Intervention—Food and Drug Administration (B-139703, December 3, 1976).

[7] On September 30, pursuant to the Department of Energy Organization Act (DOE Act), Pub. L. 95-91, 91 Stat. 565, and Executive Order No. 12009, 42 FR 46267, the FPC ceased to exist. Most of its functions and regulatory responsibilities were transferred to the FERC, which, as an independent commission within the Department of Energy, was activated on October 1. The "savings provisions" of the DOE Act provide for the substitution of the FERC for the FPC in pending litigation such as this case.

[8] Bill as Reported on May 4, 1977 from the Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary.

[9] The FTC guidelines appear at 42 FR 30480 (June 14, 1977).

[10] The DOT/NHTSA guidelines appear at 42 FR 2864 (January 13, 1977).

[11] See, for example, Consumer Product Safety Commission, 42 FR 34892, July 7, 1977 (Consumers Union); Federal Energy Administration Decision and Order FSG-0042, May 6, 1977 (Consumer Federation of America).

[12] National Oceanic and Atmospheric Administration, Department of Commerce, 42 FR 40711, August 11, 1977; Consumer Product Safety Commission, 42 FR 15711, March 23, 1977; Food and Drug Administration, 41 FR 35855, August 25, 1976.

[13] See Order 77-9-55.

[14] After choosing the particular form of administration, Part 385 of our Organization Regulations would be amended to delegate the necessary authority.

participation would be especially useful.[14a] The invitation would include a closing date for the submission of applications. Because of the variety and unpredictability of timing discussed above, it would be inadvisable to establish closing dates by rule for all proceedings. When there is no invitation, however, applications should be submitted as early as practicable. Prospective applicants would be on notice that early applications would be favored. A late applicant might find that the request of another person representing the same interest has already been approved. Moreover, the Committee would have the discretion to disapprove an application if it found that the applicant was not likely to be able to participate effectively within the time remaining in the proceeding.

Invitations would be published in the FEDERAL REGISTER and could also be publicized in any other media that appeared appropriate. Board publications already receive wide distribution apart from the FEDERAL REGISTER. We solicit comment, however, on methods to further improve the dissemination of information about our proceedings, and the availability of compensation, to consumer groups and other potential public participants. Expanding our mailing lists to include those who have already shown an interest in Board matters could be helpful. Commenters should also address possible methods of more actively promoting the program. We are particularly concerned that it should reach out beyond Washington to individuals and local organizations throughout the country.

An applicant would be required to submit information about its interest, its proposed presentation and expenses, and its financial condition. We recognize the need to minimize the burden placed on prospective participants by the application process. The requirements set out in § 304.5(e) of the proposed rule reflect a balancing of this need with that of the committee for enough information to make its determinations wisely and within the limits of the board's legal authority to award compensation. We call particular attention to the requirement of § 304.5(e)(8) that an application contain "a description of the evidence, activities, or other submissions that the applicant expects to generate." Compensated participation can contribute to the decisionmaking process in essentially two ways: either by offering novel arguments based on existing evidence, or by developing new evidence with accompanying arguments. It appears that improvement of the factual record in our cases could be especially useful. We therefore invite comment on the extent to which applicants who propose to develop new evidence should be favored.

Applications would be submitted and the Committee would approve projected expenditures before the applicant began the work that would be funded. The opposite approach—evaluating applications at the end of a proceeding—would enable funding to be based on the quality and cost of the work actually performed. Most supporters of compensation argue, however, that this approach is unrealistic, and stress the need for prior authorizations. Most public participants would otherwise be precluded from the program, because they could not afford to gamble on subsequent approval of their applications. Therefore, we propose to base the approval on the contribution and expenses that can reasonably be expected. If expenses turned out to be less than the authorized amount, then reimbursement would of course be limited to the costs actually incurred. If they turned out to be more, they could still be reimbursed if the applicant obtained a supplemental authorization before incurring them. The board would take the risk that the quality of the contribution might turn out to be less than had been reasonably expected.[15] We note that the FTC and DOT/NHTSA take this approach, and have found the risk generally to be a good one.[16]

In evaluating an application, the Committee would first determine whether it meets the "substantial contribution" criterion of importance, the "inability to participate without compensation"[17] criterion of financial need, and a "small economic interest" requirement. This requirement is designed to exclude those applicants whose economic stake in a proceeding is sufficient to warrant either the expenditure of personal funds or the borrowing of funds to enable participation. Where the applicant's participation would be exceptionally important, the Committee could waive this requirement. The applicant would still be required, however, to satisfy the financial need test.

The eligibility criteria would be interpreted liberally, but not all applications that satisfied them would necessarily be approved. For example, if several applicants sought to represent the same interest, the Committee could select one of them. If their approaches differed significantly, it could partially or completely approve the applications of two or more. Factors to be weighed in comparing applications are set out in § 304.7(d). Even if there were no overlap of applications, the Committee would have the discretion to disapprove applications from eligible persons. For example, it might conclude that, in light of the limited money available, a particular proceeding or interest is not important enough to merit funded participation. It might also disapprove an application as premature.

The Committee would explain its disposition of each application in writing, including the amount and computation of any compensation authorized. The decision would be mailed to applicants. Copies of each application and decision would be filed in the relevant docket and in a new "Compensation of Participants" file to be maintained in the Board's Public Reference Room. The Committee would also file copies of any informal written communications with applicants and summaries of oral communications.

Although the application and approval process should operate quickly and would be administered in a way that gives great importance to procedural expedition, it would not be instantaneous. In particular cases, a short delay of a proceeding might be advisable in order to afford approved applicants time to prepare their presentations. The merits of delay would have to be evaluated on a case-by-case basis, however. The Committee would therefore be authorized to seek an extension of a filing period or a postponement of a hearing if it appeared necessary in light of all the circumstances. This procedure should not cause any serious delays: In fact, it may in some cases actually reduce the overall length of a proceeding: A short delay to facilitate public participation at an early stage could, by improving the quality of our decision, lessen the likelihood that a reviewing court would remand the case to us for time-consuming further consideration. Moreover, the interest of the types of

[14a] Typical examples might be a rate case in which fundamental questions about the price/quality-of-service tradeoff were raised, and a rulemaking proceeding on consumer protections for charter flight passengers. Our decision-making could benefit from a wider range of public advocacy in such cases, especially when the participants could afford to back up their positions with thorough technical analyses. We ask the commenters to specifically address the matter of the types and relative importance of proceedings in which compensated intervention would likely be requested and be helpful to the board's decisionmaking process.

[15] A prior authorization scheme has also been chosen by the sponsors of S. 270 and H.R. 8798, and by the other agencies that have proposed compensation programs.

[16] Memorandum of meeting with staff members of other agencies, January 24, 1978 (filed in this docket).

[17] In recognition of the fact that most individuals do not keep elaborate financial records, an individual with a gross income below a specified amount would be presumed unable to participate without compensation. While $30,000 is the figure appearing in the proposed text set out below, we also invite comment on other possible cutoff levels that may be preferable.

participants likely to seek compensation will often be in a speedier resolution of a proceeding. The "Chicago Midway Low Fare Route Proceeding" and the "Transcontinental Low Fare Route Proceeding" are recent examples. Even when the net result of funding public participation would be delay, the delay should be short.

While advance authorizations would be a basic feature of the program, advance payments are prohibited by 31 U.S.C. 529. We propose to make actual payment within 90 days after an approved applicant submits a completed, documented claim for its expenses. Progress payments could be made when an applicant's continued participation would otherwise be severely impaired.

The amount of payment would be limited to the reasonable costs of participation. Prevailing market rates would ordinarily be considered reasonable. The proposed rule would prevent windfalls, however, by setting as a ceiling the amount normally paid by the Board for comparable goods or the salaries paid by the Board for comparable services. In determining the comparable salary levels for attorneys, consultants, and others, competence and the number of years' experience would be considered.

To ensure that payments under this part are used for their intended purposes, the Board and the General Accounting Office would have the right to audit the pertinent records of a participant receiving compensation. The Board could also establish by order additional accounting, recordkeeping, and other procedures to be followed by participants.

We would consider the program as experimental during its first year or so. With that experience, we should be in a good position to see how effectively it is serving its intended purpose.

Most of the questions presented in PDR-45 have been tentatively answered by the decisions embodied in this proposal. We believe that the others need not, and in some cases cannot, be answered before a compensation program is begun. As proposed, the rule would allow the flexibility necessary to accommodate the uncertainties of timing. It would also preserve broad discretion to balance competing factors in applying the eligibility and allocation criteria. Actual experience with a program can be expected to highlight any problems or areas where discretion should be confined or expanded.

The FTC has been spending about $500,000 annually on its compensation program and has requested $1,000,000 for next year. Although DOT/NHTSA spent under $100,000 in the first year of its program, it has budgeted $150,000 for the current fiscal year and has requested $250,000 for next year. Because of the amounts of money involved, we have tentatively decided to seek a supplemental appropriation for our Fiscal 1979 budget to fund this proposal.

O'MELIA, MEMBER, SEPARATE STATEMENT

In voting the publication of this notice of proposed rulemaking, the Board is proceeding with a proposal which would afford financial assistance to impecunious intervenors. I have, of course, no objection to soliciting comments on the proposal since the desire to obtain relevant views on proceedings is a laudable goal. However, there are, in my opinion, serious problems with such a move from both a legal and policy standpoint. I must record my reservations on these points and would welcome public comment on them.

The question of whether and when federal funds should be paid to private parties by federal regulatory agencies is a matter which, as the majority is well aware, has received considerable discussion and debate in law review articles, bar association journals, and most recently, Congress. In 1975, the Federal Trade Commission was awarded specific statutory authorization to fund intervening parties by way of the Magnuson-Moss Warranty-FTC Improvement Act of 1975 (15 U.S.C. 57A). Presently there are a number of bills pending in Congress which would confer such explicit statutory authority upon other agencies.

The CAB, like most federal agencies, does not at the present time possess explicit statutory authority to fund litigation and participation expenses of private parties. For several centuries it has been the American Rule that "absent statute or enforcible contract, litigants pay their own attorneys' fees". *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). Although the gravamen of this proposed rule is fee reimbursement rather than fee shifting, a statutory basis must nevertheless be present. The authority of an agency to disburse funds must come from Congress. *Turner* v. *FCC,* 514 F. 2d 1354, 1356 (1975). Additionally, sums appropriated for the various branches of expenditure in the public service must be applied solely to the objects for which appropriations were made and for no others. 31 U.S.C. 628.

The NPRM does not contend that there is explicit authority for such a funding program. It concludes instead that there is implied statutory authority and alludes to a series of rulings by the Comptroller General.

The issue of whether a federal agency can, in the absence of a specific grant of statutory authority, reimburse litigants for their expenses was directly confronted in *Greene County Planning Board* v. *FPC,* 559 F. 2d 1237 (CA 2, 1977), cert. denied, February 21, 1977 (No. 77-481). In that case the Second Circuit considered the argument of implied authority and the applicability of the rulings of the Comptroller General.[1] After considering the role and function of the Comptroller General, the U.S. Court of Appeals for the Second Circuit, sitting en banc, held that:

> The authority of a Commission to disburse funds must come from Congress, *Turner* v. *FCC,* U.S. App. 113, 514 F. 2d 1354, 1356 (1975); and it is for Congress, not the Comptroller General, to set the conditions under which payments, if any, should be made. No officer or agent of the United States may disburse public money unless authorized by Congress to do so. *Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 294, 61 S. Ct. 995, 85 L. Ed. 1361 (1941); *Heidt* v. *United States,* 56 F. 2d 559, 560 (5th Cir. 1932); *Fansteel Metallurgical Corp.* v. *United States,* 172 F. Supp. 268, 270, 145 Ct. Cl. 496 (Ct. Cl. 1959). Id at 1239.

The majority here today do not deny the validity nor the impact of the *Greene County* case but they argue that the Federal Aviation Act was not construed in that decision. It is, of course, technically true that our statute was not involved. The Court did clearly emphasize, however, that the Comptroller General does not possess power to legitimize expenditures where statutory authority is absent. A ruling by the Comptroller General is merely an acquienscence to an agency disbursement that "operates as a form of estoppel against subsequent challenge by the GAO." Id. at 1239. It is somewhat ironic that the Notice of Proposed Rulemaking seeks to elude the ambit of *Greene County* but at the same time appears to embrace the holdings of the Comptroller General as authority after they were rejected by the Second Circuit.

The Notice also observes that "the experience of other Federal agencies [has] already provided much guidance". Although reference is made to the Federal Trade Commission's similar program, it must be remembered that the Federal Trade Commission's situation is unique in this regard. As a result of the 1975 Improvement Act, it possesses explicit statutory authority, a fact that sets it apart from other agencies. The Federal Trade Commission can point to a clear Congressional mandate.

It is true that several agencies have either proceeded with such programs

[1] The Comptroller General has also cautioned: "It would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for the purpose to be fully set forth by Congress in legislation as was done in the case of the Federal Trade Commission by the provisions of section 202(a) of the Magnuson-Moss Warranty Federal Trade Commission Improvement Act". 42 FR 2864 (Jan. 13, 1977).

on the basis of implied authority,[2] or at least indicated to Congress that they believe they possess such authority.[3] And, of course, the Board before the final decision in *Greene County II*, went on record as supporting such a program "in principle".[4] I believe it is important to note, however, that most of these comments to Congress were submitted shortly after the Second Circuit initially ruled in favor of such funding by the FPC. That favorable ruling was overturned when the Second Circuit, sitting en banc, reversed the three judge panel's decision and adopted the dissenting position of Judge Van Graffeiland. I cannot interpret *Greene County II* as anything but an erosion of this doctrine of implied authority as analogized to fee reimbursement. I question whether these agencies could be as confident in their representations of implied authority in the wake of the Supreme Court's recent denial of the FERC's Petition for a Write Certiorari.

The Department of Justice, Office of Legal Counsel, in a March 1, 1978 letter to the General Counsel, has concluded that *Greene County* does not preclude an agency "from determining whether its organic statutes and other relevant statutes permit some kind of compensation program to be established". I fully agree, but it must be borne in mind that the Justice Department letter is not a determination that we have authority, but is merely an invitation to scrutinize our organic statute for such authority.[5]

While I fully recognize that the enabling statutes of different agencies are far from uniform and that the holding of *Green County II* cannot, because of these disparities, be deemed automatically applicable to all federal agencies, I nonetheless believe that the Department of Justice too narrowly construes this decision when it states that "*no* department or agency (including your department) is bound by that holding". The extent to which an agency eludes the impact of *Greene County* depends, in my judgment, on the extent to which its statutory provisions are distinguishable from those of the FPC. In other words, I believe that an agency with provisions closely resembling those of the FPC might well be obliged to respect the holding in *Greene County.*

In reviewing our statutory framework, the majority discovers implied authority in Section 203 (the General Authority provision) of the Federal Aviation Act and our current appropriation act. Section 203(a) reads as follows:

"AUTHORIZATION OF EXPENDITURES AND TRAVEL

"GENERAL AUTHORITY

"Sec. 203. (72 Stat. 742, as amended by 76 Stat. 921, 49 U.S.C. 1323) (a) The Board is empowered to make such expenditures at the seat of government and elsewhere *as may be necessary for the exercise and performance of the powers and duties vested in and* imposed upon the *Board by law,* and as from time to time may be appropriated for by Congress, including expenditures for (1) rent and personal services at the seat of government and elsewhere; (2) travel expenses; (3) office furniture, equipment and supplies, lawbooks, newspapers, periodicals, and books of reference (including the exchange thereof); (4) printing and binding; (5) membership in and cooperation with such organizations as are related to, or are part of the civil aeronautics in the United States or in any foreign country; (6) making investigatins and conducting studies in matters pertaining to aeronautics; and (7) acquisition (including exchange), operation, and maintenance of passenger-carrying automobiles and aircraft, and such other property as is necessary in the exercise and performance of the powers and duties of the Board: *Provided,* That no aircraft or motor vehicle purchased under the provisions of this section, shall be used otherwise than for official business." [Emphasis added.]

The FPC's statutory analogue, one of the provisions relied upon in *Greene County,* reads in part as follows:

"The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) *as are necessary to execute its functions.* Expenditures by the commission shall be allowed and paid upon the presentation of itemized vouchers therefor, approved by the chairman of the commission or by such other member or officer as may be authorized by the commission for that purpose subject to applicable regulations under the Federal Property and Administrative Services Act of 1949, as amended." [Emphasis added.] 16 U.S.C. 793.

Both of these provisions dealing with expenditures are ambiguous to be sure. The CAB's statute makes reference to expenditures "necessary for the exercise and performance of the powers and duties" whereas the FPC's statute refers to expenditures "necessary to execute its functions."[6]

The question that is still not fully answered, and which the commenters should address is whether these differences are enough to confer implied authority for the Civil Aeronautics Board. In this connection, in reviewing our Act and its legislative history I cannot find any suggestion or implication that Congress intended this agency to expend funds to reimburse so-called "public interest" litigants. The majority merely make reference to Section 203 and our current appropriations act. No effort has been made to trace the legislative history and adduce any support for this novel proposition. The FPC statute, whose wording is closely similar to ours, was found insufficient in this regard. Moreover, the fact that Congress is giving great attention to this matter now is no reason to suppose that they intended to give us this authority twenty years ago.

There have been discussions and suggestions in legal circles that *Greene County* was wrongly decided and that the doctrine of implied authority in this context enjoys a greater vitality than was accorded it by the Second Circuit Court of Appeals. It was specifically argued by the FERC in its Petition for a Writ of Certiorari that the Commission's reversal of its initial position regarding its implied authority for such funding might be a critical decisional factor that, if explored on remand, might provoke a different result. Since the Supreme Court declined this invitation to remand *Greene County,* we can only speculate as to the weight carried by the Commission's initial adverse decision on its authority. It is clear, however, that the Second Circuit did scrutinize the statutory base of the FPC and found it inadequate. In light of these circumstances, today's action by the Board needs careful assessment from a legal standpoint before a final rule is issued.

The Board has recently sought a supplemental appropriation for the current fiscal year and an explicit appropriation for next year in order to

[2] Although several agencies have opted to attempt funding of such a program without explicit statutory authority, a recent Senate study noted that "Even before this decision some agencies, most notably the Nuclear Regulatory Commission, had declined to proceed under their own authority in this area. It stated that it prefers to act under the mantle of congressional authority. Moreover, the FCC and the ICC have stated that while they may approve compensation of participants in principle, they are unable to provide such assistance in the absence of a special appropriation for that purpose, funding that could only be provided through congressional action." U.S. Senate Committee on Governmental Affairs "Public Participation in Regulatory Agency Proceedings", Volume III as reported in the Congressional Record (March 7, 1978), Volume 124, No. 31, p. S 3189.

[3] U.S. Senate Commerce Committee, "Agency Comments on the Payment of Reasonable Fees for Public Participation in Agency Proceeding", 95th Congress, 1st Session (1977).

[4] Ibid.

[5] The March 1, 1978, letter from the Department of Justice cannot in anyway be characterized as an analysis of our statute. It is a terse epistle which incorporates by reference a response to the Department of Transportation which is said to be "fully applicable to your agency". A review of the DOT letter reveals that there was no specific review of their statute either.

[6] Reference has also been made to the current appropriation bill for the CAB which provides "for necessary expenses". The general appropriation act relied on in *Greene County* authorized "expenses necessary for the work of the commission". I can detect no meaningful distinction on which to base a finding of implied authority.

implement this program. If Congressional authority for such spending is forthcoming, I believe it would largely remedy any existing deficiency and would provide a clear legal basis on which to provide such funding. I do not believe that an amendment to our basic statute is absolutely necessary in order to proceed with such a program. Approval in the context of an appropriation bill would certainly be sufficient. Given *Greene County II* and our present legal posture, I believe the more prudent course would be to wait until Congress has had an opportunity to act. Many of the problems associated with this novel concept could be best resolved through the legislative environment of hearings, testimony, and floor debate. Not only would this obviate the technical question of legal authority, but it would also provide a solid legislative history on which the Board could rely in its implementation.

Aside from the rather narrow question of whether the Board is cloaked with authority under its present statute, I am also skeptical about this program as a matter of policy. There are a number of troublesome dimensions to such public financing, both in terms of eligibility and operation, which I would also like to see addressed in the comments we receive.

The NPRM assumes that this program is necessary to guarantee "effective public participation". It is admitted, as indeed it must be, that there is a measure of uncertainty as to who really represents the public interest. Although there are a number of organizations which purport to be the only genuine representatives of the public at large, the fact is that we are all consumers and public citizens interested in the public interest as we perceive it.

It is this fundamental hurdle—the immense difficulty in ascertaining who really represents the public or consumer interest—that troubles me the most. If federal dollars are to be expended to finance legal representation in proceedings in which the Government is not a party, the importance of identifying eligible recipients of this largesse is paramount if abuse and exploitation are to be guarded against. History is not very consoling in this respect. The likelihood of abuse increases correspondingly with the absence of definitive standards.

There is also, attributable in large part to the absence of definitive standards, a genuine danger of prejudgment in the consideration. We are told in §304.7(a)(1) that an applicant must show that it can "reasonably be expected to contribute substantially to a full and fair determination" of the proceeding. I find this standard to be of such a nebulous character as to make the decision by the Evaluation Committee, however it is eventually structured, almost wholly discretionary. Under such circumstances, a decision to commit Board funds cannot help but indicate an implicit endorsement of the worthiness of the claim itself and the Board's desire to justify the expenditure of public funds on a litigant's presentation may, even if only unconsciously, lead it to give excessive weight to the positions presented by the funded parties. The majority insists that a distinction can be maintained between a decision on funding and a decision on the merits. Where the standard is as discretionary as it is here, I believe that is a dubious supposition. A determination that one can contibute substantially to a full and fair determination entails a weighing of the merits of the case itself.

I also find an absence of logic in the requirements under §304.7(b)(1) that an applicant show that his economic interest is small in comparison to the cost of effective participation. If the applicant's claim is found to be necessary to a full and fair determination of the hearing, it makes little sense to deny his claim because his potential economic stake outweighs his cost of participation. I would presume that if a "representation of a fair balance of interests" cannot be accomplished in his absence it would be imprudent to keep him out because he may profit from the outcome.[7]

The setting up of an evaluation committee also poses potential "separation of powers" problems. This danger is particularly present in the suggestion to involve a Board Member or a judge in the process. I question whether a Member could properly participate in the ultimate decision on the merits if he has been involved in the processing of a funding claim. Similarly, the position of a particular bureau, either as a party or as an advisor, might be compromised if it were involved in the funding decision.

Closely related to this is the problem of the funding. When a statutory right to federal funds is created, the government is usually obliged to provide funding to all who meet the criteria for eligibility. No real effort has been made here to determine what the cost of funding all eligible candidates would be. Instead, we are going to proceed with a finite number of dollars and disburse the funds as qualified individuals apply. What this would seem to portend is that applicants at the end of the fiscal year may, despite qualifying for funds by meeting the criteria, be denied funding. I believe there may be serious legal questions as to whether such a program can be administered on a "first come, first serve" basis.[8] The commenters should address this point.

U.S. Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedure, "Public Participation in Federal Agency Proceedings Act of 1977, S. 270," statement of Senator James B. Allen, 95th Congress, 1st Session.

I find myself considerably distressed by the limits on what constitutes financial need. Particularly troublesome is the provision that any individual litigant whose gross income is less than $30,000 is presumed to be in financial need. I have no idea how such an arbitrary figure as that was reached, but surely it strains the imagination to suppose that an individual making $29,000 per annum is entitled a presumption of financial need. There is some doubt in my mind whether such a person should be automatically classed as an "impecunious intervenor".

Neither am I sure that the setting of Board salaries as the ceiling is a sufficient pecuniary guidepost. I question whether it is feasible to analogize government salaries with the costs of litigation. I would prefer to see more specific enunciations of rates for particular services.

The policy concerns discussed above are also sound reasons for deferring to Congress in this matter. If federal agencies are to have programs such as this one, there is much to be said for having as much uniformity among agencies as possible. Given the fact that the Board has elected, however, to proceed at this juncture, I hope

[7]The proposed rule would provide an exception where the participation is "exceptionally important". This exception only further reinforces my belief that a decision on funding is inextricably linked to a consideration of the merits.

[8]Senator James B. Allen raised identical concerns with respect to the operation of S. 270: I question too, Mr. Chairman, whether there will be enough of the yearly $10 million pie authorized in S. 270 to be divvied up to the satisfaction of all among the many competitors for a slice. I would not argue for an increased authorization, but I am wondering what will happen when an agency adopts regulations permitting taxpayer-funded intervention and then has no money appropriated to its use for that purpose. You know, Mr. Chairman, in fiscal year 1976 the Federal Trade Commission had requests for funding for public intervention far in excess of the $500,000 appropriated. I especially wonder what court response would ensue, if suit were brought against such an agency under the provision of the bill which permits an action in the appropriate court of the United States for the purpose of recovering an award which the agency denied or failed to pay out. Certainly we are going to create legal fee litigation wholly unrelated to public participation in agency proceedings, and at the rate of $75 per hour or greater we are going to enrich a class of lawyers, experts, and other professional public citizens who, in my judgment, will do little but milk the system for every dollar they can obtain.

that we elicit a wide range of comments and suggestions, and that these will be carefully examined before issuing a final rule.

RICHARD J. O'MELIA.

THE PROPOSED RULE

In light of the above, the Civil Aeronautics Board proposes to add a new Part 304 to its Procedural Regulations (14 CFR Part 304), to read as follows:

PART 304—COMPENSATION OF PARTICIPANTS IN BOARD PROCEEDINGS

Sec.
304.1 Scope.
304.2 Purpose.
304.3 Application.
304.4 Definitions.
304.5 Applications for compensation.
304.6 Processing of applications.
304.7 Eligibility and allocation criteria.
304.8 Compensable costs and services.
304.9 Payments to participants.
304.10 Audits.

AUTHORITY.—Secs. 203 and 204 of the Federal Aviation Act of 1958, as amended, 72 Stat. 742 and 743 (49 U.S.C. 1323, 1324)

§ 304.1 Scope.

This part establishes criteria and procedures for compensation to eligible participants in Civil Aeronautics Board proceedings. It does not, however, create any new right to intervene or otherwise participate in any proceeding.

§ 304.2 Purpose.

The purpose of this part is to assist the Board in making full and fair resolutions of the issues presented in its public proceedings by funding the representation of eligible interests that would otherwise be unrepresented.

§ 304.3 Application.

This part applies to all proceedings before the Board.

§ 304.4 Definitions.

(a) "Applicant" means any person who submits an application in accordance with § 304.5 for compensation under this part.

(b) "Evaluation Committee" or "Committee" means the committee established by § 304.6(a).

(c) "Person" means any person as defined in Section 101(29) of the Federal Aviation Act of 1958 (49 U.S.C. 1301(29)) and includes a group of individuals with similar interests.

(d) "Proceeding" means any Board process (including adjudication, licensing, rulemaking, ratemaking, or any other board process) in which there may be public participation pursuant to statute, rule, order, or Board practice.

§ 304.5 Applications for compensation.

(a) Any person may submit an application for compensation for participation in any Board proceeding. The application should be submitted as earlier as practicable.

(b) If the Board anticipates that compensated participation would be especially useful to it in a particular proceeding, it may invite applications for compensation. The invitation, including a closing date for the submission of applications, will be published in the FEDERAL REGISTER and may also be publicized in any other media that appear appropriate. Applications submitted after the closing date will be considered only to the extent practicable.

(c) Applications for compensation will not be considered for work already performed or for costs already incurred.

(d) Applications shall be submitted to the Office of the Secretary, Civil Aeronautics Board, Washington, D.C. 20428, marked for the attention of the "Public Participation Evaluation Committee". Three copies are requested but not required.

(e) Applications shall contain the following information, in the order specified:

(1) The applicant's name and address, and in the case of an organization, the names, addresses, and titles of the members of its governing body and a description of the organization's general purposes, structure, and tax status;

(2) An identification of the proceeding for which funds are requested;

(3) A description of the applicant's economic, social, and other interests in the outcome of the proceeding;

(4) A discussion of the reasons why the applicant is an appropriate representative of those interests, including the expertise and experience of the applicant;

(5) A specific explanation of how the applicant's participation would enhance the quality of the decision making process and serve the public interest;

(6) A statement of the total amount of funds requested;

(7) With respect to the proceeding for which funds are requested, an itemized statement of the services and expenses to be covered by the requested funds;

(8) A description of the evidence, activities, studies, or other submissions that the applicant expects to generate;

(9) An explanation of why the applicant cannot use funds that it already has, or expects to receive, for the purpose for which funds are requested, including:

(i) a listing of the applicant's anticipated income and expenditures (rounded to the nearest $100) during its current fiscal year, and

(ii) A listing of the total assets and liabilities of the applicant; and

(10) A list of all proceedings of the Federal government in which the applicant has participated during the past year (including the interest represented and the nature and extent of the contribution made) and any amount of financial assistance received from the Federal government in connection with those proceedings.

§ 304.6 Processing of applications.

(a) Applications will be processed by an Evaluation Committee composed of the Managing Director, the Director of the Office of Economic Analysis, and the General Counsel, or their respective delegates. Whenever a member of the Evaluation Committee is participating in the proceeding, he or she will not participate in the evaluation of applications for compensation for participation in that proceeding. The member will instead delegate the position on the Committee to a person who is not and will not become substantively involved.

(b) If the Board had invited applications for compensation in a particular proceeding, the Evaluation Committee will act on the applications as soon as practicable after the closing date announced in the invitation. Otherwise, the Committee will act on an application as soon as practicable after it is received. In accordance with the criteria set out in § 304.7, the Committee will approve or disapprove the application, in whole or in part.

(c) The Evaluation Committee may consider the recommendations of Board staff members whose views appear relevant to the proceeding. The Committee's determination whether to select any applicant who satisfies the criteria of § 304.7(a) is discretionary. In addition to the criteria of § 304.7, the Committee may consider—

(1) The importance of the applicant's proposed participation in light of the funding available for compensation under this part; and

(2) Whether the application is premature, in light of the stage that the proceeding has reached.

(d) A written decision of the Evaluation Committee will be mailed to each applicant for compensation in the proceeding. The decision will explain the reasons for the Committee's disposition of the application and the amount and computation of any compensation authorized. Copies of each application and decision will be filed in the docket for the proceeding and in a "Compensation of Participants" file in the Public Reference Room.

(e) The Committee and applicants may also communicate informally. The Committee will file copies of any written communication in the docket and in the "Compensation of Participants" file. It will similarly file a summary of any oral communication, and mail a copy to the applicant.

(f) The Committee may, for a good reason given by an applicant, reconsid-

er the disapproval of all or part of an application.

(g) After the beginning of its participation, an applicant may request a supplemental authorization to enable it to complete its work. The committee may approve the request if the applicant shows that, because of an unforeseeable change in circumstances, it or the Committee seriously underestimated the probable costs of participation. Such requests will not be approved for work already performed or for costs already incurred.

(h) The Evaluation Committee may ask the Board or the relevant Board employee, as appropriate, to extend any filing period for all parties or postpone any hearing, in order to afford applicants adequate time to prepare their presentations. The Committee, in deciding whether to make such a request, and the Board or Board employee, in considering whether to agree to it, shall balance the Board's need to give time to applicants against the need for a speedy resolution of the proceeding.

§ 304.7 Eligibility and allocation criteria.

(a) The Evaluation Committee may approve an application, in whole or in part, only if it finds that:

(1) The applicant represents an interest whose representation can reasonably be expected to contribute substantially to a full and fair determination of the proceeding, in light of the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interests;

(2) Participation by the applicant is reasonably necessary to represent that interest adequately;

(3) It is reasonably probable that the applicant can competently represent the interests it espouses within the time available for the proceeding;

(4) The applicant does not have available, and cannot reasonably obtain in other ways, enough money to participitate effectively in the proceeding without compensation under this part; and

(5) The applicant's economic interest in the outcome of the proceeding is small in comparison with the cost of effective participation, except that if the applicant is a group or organization, the Committee need only find that the economic interest of a substantial majority of its individual members is small in comparison with the cost of effective participation.

(b) In determining whether an applicant would be unable to participate effectively without compensation, the Committee will require the applicant to demonstrate that its current assets (cash, accounts receivable, and marketable securities that are not in reserves, budgeted for other use, or otherwise restricted for withdrawal) less current liabilities, adjusted by any anticipated operating loss or profit over the relevant year, do not equal or exceed the amount need for participation, subject to the following:

(1) Salaries paid to employees of an applicant in excess of salaries paid to Board employees for comparable services will be disallowed, and

(2) An individual applicant whose gross income is less than $30,000 will be presumed unable to participate effectively without compensation.

(c) The committee may waive the "small economic interest" requirement of paragraph (a)(5) of this section if it finds that the applicant's participation in the proceeding would be exceptionally important.

(d) If multiple applications that satisfy the criteria of paragraph (a) of this section seek to represent the same or similar interest, but contain significant differences in viewpoint, approach, or proposals, the Evaluation Committee may partially or completely approve one or more of these applications.

(e) In selecting among applications representing the same or similar interests, the Evaluation Committee will consider and compare the applicants' skills and experience and the contents of their proposals. In particular, the Committee will consider and compare:

(1) The applicants' experience and expertise in Civil Aeronautics Board matters generally and in the substance of the proceeding particularly;

(2) The applicants' prior general performance and competence;

(3) Evidence of the applicants' relations to the interest they seek to represent;

(4) The specificity, novelty, relevance, and significance of the matters the applicants propose to develop and present; and

(5) The public interest in promoting new sources of public participation.

§ 304.8 Compensable costs and services.

(a) The following costs and services are compensable under this part:

(1) Salaries or other remuneration for services performed by participants or their employees;

(2) Fees for consultants, experts, contractual services, and attorneys;

(3) Transportation costs;

(4) Travel-related costs such as lodging, meals, and telephone calls; and

(5) All other costs reasonably incurred.

(b) Compensation is limited to reasonable services and costs of participation that have been authorized and actually incurred. In no case, however, will compensation be greater than salaries paid by the Board for comparable services or the amounts normally paid by the Board for comparable goods.

§ 304.9 Payments to participants.

Payment of compensable expenses for approved applications will be made by the Board within 90 days after the applicant has submitted a completed claim, including bills, receipts, or other proof of costs incurred or services performed. For good cause shown, partial payments may be made as a applicant's work progresses.

§ 304.10 Audits.

The Board and the General Accounting Office shall have access for the purposes of audit to any pertinent records of a participant receiving compensation under this part. The Board may by order establish additional guidelines for accounting, recordkeeping, and other procedures to be followed by participants.

By the Civil Aeronautics Board.

PHYLLIS T. KAYLOR,
Secretary.

[FR Doc. 78-8818 Filed 4-3-78; 8:45 am]

[6750-01]

FEDERAL TRADE COMMISSION

[16 CFR Part 13]

[File No. 722-3213]

HIKEN FURNITURE CO.

Consent Agreement With Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Provisional consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this provisionally accepted consent agreement, among other things, would require a Belleville, Ill. furniture retailer to cease using bait and switch tactics, and misrepresenting or failing to make relevant disclosures regarding prices, products, service, cooling-off periods, cancellation and refund rights and the availability of arbitration to resolve consumer disputes. The order would further prohibit the firm from using unfair or deceptive means to induce payment from allegedly delinquent debtors; and require the firm to provide, in the extension of credit, the materials and disclsoures required by Federal Reserve System regulations. Additionally, the firm would be required to maintain particular records and furnish its advertising media with copies of the Commission's press release setting forth the terms of the order.

DATE: Comments must be received on or before June 1, 1978.

ADDRESS: Comments should be directed to: Office of the Secretary, Fed-

APPENDIX H

NOAA REGULATIONS ON PAID PARTICIPATION (April 26, 1978)

of Bank Supervision deems necessary to protect the confidential nature of the record, the financial integrity of any bank to which the record relates, and the legitimate privacy interests of any individual named in such report or record.

(8) *Production of exempt records and testimony of Corporation personnel.* The Corporation's General Counsel, or anyone designated by him in writing, may produce or authorize the production of any exempt record in response to a valid subpoena, court order, or other legal process and may authorize any officer, employee, or agent of the Corporation to appear and testify regarding any exempt record at any administrative or judicial hearing or proceeding where such person has been served with a valid subpoena, court order, or other legal process requiring him to so testify. The General Counsel, or anyone designated by him in writing, may produce or authorize the production of any exempt record sought in connection with any hearing or proceeding without the service of a subpoena, or other process requiring production, if he determines that the records to be produced are relevant to the hearing or proceeding and that production is in the best interests of justice. Where the General Counsel authorizes the production of any exempt record, or the testimony of any officer, employee or agent of the Corporation relative thereto, pursuant to this § 309.6(c)(8), he shall limit his authorization to so much of the record or testimony as is relevant to the issues at the hearing or proceeding, and he shall give his authorization only upon fulfillment of such conditions as he deems necessary to protect the confidential nature of the record consistent with any requirement that it be produced and made a part of the record of the hearing or proceeding.

(9) *Disclosures by corporation division or office heads.* Except as otherwise provided in §§ 309.6(c)(1) through 309.6(c)(8), each head of a Corporation Division or Office may disclose any exempt record which is in the custody of and was created by or originated in the Division or Office he supervises. Any such disclosure shall be made only: (i) upon receipt of a written request specifying the record sought and the reason why access to the record is necessary; and (ii) after the Division or Office head determines that disclosure of the record is in the public interest and not detrimental to any individual or concern.

(10) *Authority of the chairman of the corporation's board of directors.* Except where expressly prohibited by law, the Chairman of the Corporation's Board of Directors may authorize the disclosure of any Corporation records. Except where disclosure is required by law, the Chairman of the Corporation's Board of Directors may direct any officer, employee or agent of the Corporation to refuse to disclose any record if the Chairman determines that refusal to permit such disclosure is in the best interests of the Corporation and is not contrary to the public interest.

(11) *Limitations on disclosure.* Any disclosure permitted by this § 309.6(c) is discretionary and nothing in this § 309.6(c) shall be construed as requiring the disclosure of information. Further, nothing in this § 309.6(c) shall be construed as restricting, in any manner, the authority of the Board of Directors, the Chairman of the Board of Directors, the Director of the Corporation's Division of Bank Supervision or anyone designated by him in writing, the Corporation's General Counsel or anyone designated by him in writing, or any other Corporation Division or Office head, in their discretion and in light of the facts and circumstances attendant in any given case, to impose conditions upon and to limit the form, manner, and extent of any disclosure permitted hereunder.

By order of the Board of Directors, April 19, 1978.

FEDERAL DEPOSIT INSURANCE CORPORATION,
ALAN R. MILLER,
Executive Secretary.

[FR Doc. 78-11270 Filed 4-25-78; 8:45 am]

[3510-12]

Title 15—Commerce and Foreign Trade

CHAPTER IX—NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 904—FINANCIAL COMPENSATION OF PARTICIPANTS IN ADMINISTRATIVE PROCEEDINGS

Criteria and Procedures

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Final rulemaking.

SUMMARY: These rules establish criteria and procedures for reimbursing members of the public for the costs of participation in administrative proceedings conducted by NOAA. The intended effect of this action is to provide a mechanism for compensation of participants in proceedings of the agency in accordance with the criteria established in this regulation.

DATES: These rules will go into effect on May 26, 1978.

ADDRESS: Office of General Counsel, National Oceanic and Atmospheric Administration, Room 5807, U.S. Department of Commerce, Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT:

Patrick J. Travers, Office of General Counsel, National Oceanic and Atmospheric Administration, Room 310, Page Building No. 1, 3300 Whitehaven Street NW., Washington, D.C. 20235, telephone 202-634-4245.

SUPPLEMENTARY INFORMATION: On August 11, 1977, the National Oceanic and Atmospheric Administration (NOAA) published a notice of proposed rulemaking on financial compensation of participants in NOAA administrative proceedings, 42 FR 40711. At that time, NOAA invited interested persons to comment on the proposed rules. The comment period was extended, and the administrative record of the rulemaking made available for routine public inspection, through notices published on November 14, 1977, 42 FR 58958, and on March 9, 1978, 43 FR 9623. The comment period closed on March 25, 1978.

NOAA has received 23 comments on the proposed rules, submitted on behalf of 39 organizations. We appreciate the interest of those who commented, and are grateful for the resources devoted to the preparation of the comments. Each comment has been carefully reviewed and considered with the other materials in the administrative record. On the basis of this review and consideration, NOAA has prepared the final rules set forth below.

In accordance with 5 U.S.C. § 553(d), the final rules will go into effect May 26, 1978.

NECESSITY OF THE RULES

Few of the comments treated in great detail the question whether financial assistance to persons who would otherwise be unable to participate in NOAA administrative proceedings would so improve the quality of NOAA decisionmaking as to justify the associated expense. Some commenters suggested that public participation in agency proceedings is already sufficiently broad. They contended that representatives of affected interests will come forward whether or not they are offered the prospect of agency funding. Commenters also expressed the fear that the increased number of participants resulting from, and the burden of administering, a financial assistance program would seriously disrupt agency processes and delay agency action. One commenter suggested that financial assistance programs would hinder the expansion efforts of the energy industry. Another commenter stated that, if financial assistance programs are to be established, this should be done under

uniform guidelines applicable to all agencies.

Although one commenter offered this rulemaking as an example of a proceeding in which a wide range of businesses, trade associations, and public interest organizations of varying sizes had enjoyed access to the decisionmaking process, the commenters did not in general include factual evidence to support their assertions that a financial assistance program would be unnecessary, or even harmful.

This lack of data was also a feature of most comments asserting that financial assistance programs like the one proposed are necessary for sound agency decisionmaking. Among those taking this position was a Federal agency that alleged the costs of participation in administrative proceedings to have caused a severe imbalance of access to the decisionmaking process of regulatory agencies. This commenter noted the support of the present Administration for increased public participation in agency proceedings, and urged study and analysis of the financial assistance programs of the Federal Trade Commission and the Consumer Product Safety Commission. A trade association of party-boat owners commented that it had been prevented from participating in the development of fishery conservation and management measures by a lack of funds, noting that it represented a fragmented industry serving unorganized recreational fishers. Another commenter pointed out that businesses that participate in agency proceedings are authorized to treat the associated costs as business expenses for tax purposes.

In view of the lack of factual evidence in the comments, NOAA has turned to its own experience for guidance as to the desirability of a financial assistance program. NOAA's administrative actions are subject to the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. Chapter 7. Under the APA, a NOAA action may be reversed if the reviewing court finds, on the basis of the administrative record, that the action was arbitrary and capricious or that it was not based on substantial evidence. 5 U.S.C. 706. Knowing that their actions will be judged on the basis of the evidence and arguments submitted to them through the prescribed proceedings, and thus included in the administrative record, NOAA decisionmakers must of necessity focus upon those items in formulating their final action while giving little, if any, consideration to materials not in the record. Among the items in the administrative record, the prospect of judicial review causes most attention to be given to sophisticated legal arguments and to carefully compiled and verified evidence. In many NOAA proceedings, particularly those dealing with marine mammal protection and fishery conservation and management, such arguments and evidence can be provided only through the expenditure of substantial sums of money on professional, technical and clerical services. When a hearing is involved, these materials can be presented fully only through the expenditure of further sums on transportation and other expenses incidental to attendance at the hearing.

NOAA thus perceives a real danger that, in the absence of a financial assistance program like the one proposed, important interests and viewpoints that it should consider in formulating its actions will be inadequately considered because their proponents lack the financial resources to participate in the prescribed NOAA proceedings on a basis comparable to that of proponents of opposing views. Because this possibility has serious implications for the quality of NOAA's decisionmaking, NOAA has concluded that it is necessary to implement a financial assistance program like the one proposed on an indefinite trial basis. As the program is implemented, NOAA will attempt to determine the effect, if any, that the program has on the range of interests and viewpoints that are represented adequately in NOAA administrative proceedings.

Legal Authority for the Rules

The main issue dealt with in the comments was whether or not NOAA has the legal authority to implement a financial assistance program like the one proposed.

In its notice of proposed rulemaking of August 11, 1977, NOAA cited as authority for the proposed rules the statutory appropriation of funds "[f] or expenses necessary for the National Oceanic and Atmospheric Administration. . . ." Pub. L. No. 95-86, Title III, 91 Stat. 419, 431 (1977). It noted that several decisions of the Comptroller General, particularly B-92288 of February 19, 1976, and B-180224 of May 10, 1976, had stated that an agency was authorized to provide similar financial assistance on the authority of similarly broad statutory language if the agency determined that such assistance was necessary for the performance of its functions. NOAA acknowledged, however, that on June 30, 1977, the United States Court of Appeals for the Second Circuit had specifically disapproved B-92288 in *Greene County Planning Board* v. *Federal Power Commission*, 565 F.2d 807 (2d Cir. 1977), *cert. den.*, —— U.S. —— (February 21, 1978).

As was expected, many commenters argued that the *Greene County* decision undercut any claim of authority that NOAA might have had under its appropriation act and the Comptroller General's decisions for the implementation of the proposed financial assistance program. NOAA believes the *Greene County* decision was poorly reasoned and incorrect. In NOAA's view, the decision is deficient in at least two respects:

(a) It disregards the principle of *Udall* v. *Tallman* 380 U.S. 1, 16 (1965), by failing to accord deference to the Comptroller General's construction of an appropriation act.

(b) It unjustifiedly assumes that recent cases, forbidding courts and agencies to shift attorney fees from the prevailing party in a proceeding to another unwilling party without specific statutory authority, govern the question whether an agency may reimburse the expenses of a participant in a proceeding itself without imposing corresponding levies on other participants and without regard to whether the reimbursed party "prevailed" in any sense.

On September 27, 1977, the General Counsel of NOAA joined the chief legal officers of six other Federal agencies in requesting the Solicitor General to support the petition for certiorari then before the United States Supreme Court in the *Greene County* case, even though the Government had prevailed in the Court of Appeals and would normally have opposed the petition. The Solicitor General subsequently filed a brief in support of the petition for certiorari, and requested that the Supreme Court vacate the *Greene County* decision. The Supreme Court nevertheless denied certiorari on February 21, 1978. The Supreme Court's denial of the petition for certiorari did not involve an evaluation of the merits of the case.

Subsequent to the denial of certiorari in *Greene County*, the Assistant Attorney General for the Office of Legal Counsel, in a letter of March 1, 1978, to the General Counsel of the Department of Transportation, expressed the opinion that the *Greene County* decision involved only a construction of the Federal Power Act and that, as a result, no department or agency other than the successor to the Federal Power Commission is bound by the decision. Based upon this Justice Department opinion, NOAA does not consider the *Greene County* decision to be a legal obstacle to implementation of the proposed financial assistance program. NOAA also believes that the *Greene County* case can be distinguished from the circumstances that NOAA confronts because the Federal Power Commission had found that financial assistance to the parties requesting it in *Greene County* was not necessary to the performance of the Commission's functions. NOAA's proposed rules would authorize assistance only in situations in which NOAA has

determined that such assistance is necessary for the performance of its mission.

Many commenters treated the question of NOAA's authority to implement the proposed program independently of the controversy surrounding *Greene County.* Some commenters were disturbed by the generality of the statutory language relied upon by NOAA. NOAA acknowledges the sweeping character of this language. It continues, however, to rely upon the Comptroller General opinions cited in the notice of proposed rulemaking as authoritative constructions of similar language by the agency charged by Congress with the enforcement of the appropriations statutes. In this connection, NOAA emphasizes that, contrary to the belief of some commenters, the Comptroller General was not in these opinions purporting to allow uses of appropriated funds other than the uses permitted by Congress. The Comptroller General was attempting to determine what uses Congress had authorized through its enactment of extremely broad statutory language, and he decided in these opinions that financial assistance like that proposed by NOAA was one of those uses.

One commenter suggested that appropriation acts are to some degree inferior to other acts of Congress, and should not be relied on to the same extent as authorities for agency action. NOAA does not preceive a basis for the proposed distinction in either theory or practice.

Many commenters suggested that because Congress has specifically authorized certain agencies, such as the Federal Trade Commission, to provide financial assistance like that proposed by NOAA, Congress should be considered to have withheld that authority from all other agencies. While this argument has merit, NOAA does not consider it to be dispositive in view of the following statement of the conference committee that deleted specific financial assistance authority for the Nuclear Regulatory Commission from the Energy Reorganization Act of 1974:

> . . . because there are currently several cases on the subject pending before the Commission, it would be best to withhold Congressional action until these issues have been definitely determined. The resolution of these issues will help the Congress determine whether [such a] provision . . . is necessary since it appears that there is nothing in the Atomic Energy Act, as amended, that would preclude the Commission from reimbursing parties where it deems it necessary.

H. Rep. No. 93-1445 at 37 (1974). The Nuclear Regulatory Commission was the agency dealt with in Comptroller General's Opinion No. B-92288.

Some commenters argued that the Comptroller General's statement in Opinion B-92288 that "it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation" was an implied directive to Federal agencies to withhold action on such financial assistance programs until Congress acted. Neither NOAA nor, to the best of NOAA's knowledge, the Comptroller General, reads this language as anything more than a recommendation to Congress.

Some commenters questioned NOAA's authority to implement a program having the scope of the one it has proposed on the basis of the following language from Opinion B-92288:

> [I]f NRC in the exercise of its administrative discretion, determines that it *cannot make the required determination* unless it extends financial assistance to certain interested parties who require it, and whose participation is *essential* to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose.

Comp. Gen. Op. No. B-92288, February 19, 1976, at 4 [emphasis added].

These commenters argued that this passage should be read conservatively, so that the most NOAA could claim authority for under Opinion B-92288 would be financial assistance to parties without whose participation a NOAA proceeding would be totally paralyzed. The Comptroller General eschewed this position in Opinion No. B-139703 of December 3, 1976, 56 Comp. Gen. 111, in which he stated:

> While our decision to NRC did refer to participation being "essential," we did not intend to imply that participation must be absolutely indispensable. We would agree . . . that it would be sufficient if an agency determines that a particular expenditure for participation "can reasonably be expected to contribute substantially to a full and fair determination of" the issues before it, even though the expenditure may not be "essential" in the sense that the issues cannot be decided at all without such participation. Our previous decision, B-92288, . . . may be considered modified to this extent.

56 Comp. Gen. 113.

Some commenters argued that the Comptroller General's opinions relied upon by NOAA authorize financial assistance only to persons or organizations that are "indigent." Opinion No. B-92288, however, authorized the agency to provide financial assistance.

> . . . when it finds that the intervenor is indigent *or otherwise unable to bear the financial costs of participation in the proceedings.*

Comp. Gen. Op. No. B-92288, at 7 [emphasis added].

Several commenters argued that the proposed financial assistance program is prohibited under such cases as *Alyeska Pipeline Service Company* v. *Wilderness Society,* 421 U.S. 240 (1975), and *Turner* v. *Federal Communications Commission,* 514 F.2d 1354 (D.C. Cir. 1975), which forbade courts and agencies to shift attorney fees from prevailing parties to other unwilling parties to proceedings before them. As was noted above in the discussion of *Greene County,* NOAA believes that its proposed program is totally different from the involuntary fee shifting dealt with in *Alyeska* and *Turner.*

On the basis of the preceding discussion, NOAA concludes that it has the legal authority to establish and implement a financial assistance program like the one it has proposed.

Specific Inquiries of the Notice of Proposed Rulemaking

In its notice of proposed rulemaking of August 11, 1977, NOAA requested comment on ten specific questions concerning the proposed program. The comments received on these questions are discussed below.

1. Should attorneys' fees and other assistance be provided in all administrative proceedings conducted by NOAA?

Most commenters who replied to this question stated that NOAA should not at this time categorically limit the kinds of proceedings in which financial assistance to participants would be considered. Their underlying assumption appeared to be that experience in the operation of the program would be needed before sound limitations could be formulated. Some commenters urged that assistance be considered even in NOAA proceedings not involving a hearing, including negotiations that obviate the need for a hearing and the consultations that often take place before the issuance of a notice of proposed rulemaking. One commenter asked whether participants in hearings on draft environmental impact statements would be considered for financial assistance under NOAA's proposal. Other commenters urged that NOAA limit the kinds of proceedings in which assistance might be granted in the final rules.

NOAA agrees with the commenters who believe that it lacks the experience to formulate at this time detailed limitations on the kinds of proceedings in which assistance will be considered. Because the danger that financial considerations will interfere with equal access to the decisionmaking process is greatest when a hearing is involved, however, the program will for the time being be limited to proceedings involving a hearing.

In considering whether hearings on draft environmental impact statements would be included in the program as it was described in the proposed rules, NOAA focused on the

statement of scope contained in proposed section 904.1. This section would have authorized assistance.

> . . . in any adjudication, enforcement, or rulemaking proceeding involving a hearing in which there may be public participation pursuant to statute, regulation, or agency practice. . . .

Because the scope of the term "Adjudication" is not entirely clear, and in order to ensure that proceedings such as hearings on draft environmental impact statements are not categorically excluded from the program's coverage, the quoted language has been changed in the final rules to read as follows:

> . . . in any NOAA proceeding involving a hearing in which there may be public participation pursuant to statute, regulation, or agency practice. . . .

Thus, under the final rules, financial assistance to participants is authorized in any NOAA proceeding involving a hearing. Whether or not such assistance will be granted in any single proceeding will depend on the particular circumstances and the funds available.

One commenter suggested that NOAA reimburse the expenses of parties to litigation against it that has contributed to a clarification of its responsibilities. The suggestion is beyond the scope of this rulemaking.

2. Should the standard for providing attorney's fees and other assistance be the standard in the regulation, or should the standard be expanded to include applicants who represent an interest which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceedings and applicants whose economic interest in the outcome is small in comparison to the costs of effective participation?

While some commenters favored adoption of the broader standard set forth in the question, NOAA has decided that it should not be adopted in view of the specific disapproval of the standard by the Comptroller General in Opinion No. B-139703 of December 3, 1976, 56 Comp. Gen. 114-15. The Comptroller General stated there that the standard for providing financial assistance must, in the absence of specific statutory authority, incorporate a criterion of financial need.

One commenter suggested that the criterion of small economic interest in the outcome relative to the costs of participation be *added* to the criteria of substantial contribution to a fair determination and financial need that are provided for in the proposed rules. In this way, prospective participants having comparatively great economic interests in the outcome would not be eligible for financial assistance even if they faced immediate difficulty in financing their participation. In view of NOAA's position that the public interest requires the broadest possible participation, rather than the participation or nonparticipation of any particular type of entity, this suggestion will not be adopted.

3. What financial eligibility criteria should be adopted?

Some commenters suggested that assistance be given only to participants found to be "indigent." This suggestion appears to be based on the view that indigency is required under the Comptroller General's opinions relied upon by NOAA, a view that was rejected above.

The comments contained almost no discussion of substantive standards of financial need. NOAA believes that the formulation of such standards must await the acquistion of experience under the new program. The broad standard set forth in proposed § 904.3(a)(2) will therefore be retained. This standard does not require "indigency," and the Administrator will give full consideration to a wide range of circumstances that might cause applicants to lack sufficient resources of their own for participation in a proceeding.

Most of the comments on this question dealt with the procedures to be followed in determining financial eligibility for assistance. NOAA agrees with the commenters who pointed out that case by case evaluation of each applicant will require some loss of privacy and the making of judgments about applicants' management of their resources. It will also impose an additional administrative burden on NOAA and on the applicants themselves. NOAA is not convinced, however, that the difficulties posed by these requirements are so great as to justify either a decision to provide no financial assistance at all or the exemption of entire categories of participants from financial disclosure requirements of the kind provided for in the proposed rules.

In considering applications for assistance, NOAA will attempt to confine its evaluation of the program and policy priorities of any applicant to the process of determining the applicant's comparative ability to contribute substantially to a fair determination of the proceedings. Once an applicant has been determined to be eligible under the substantial contribution criterion, its program and policy priorities will not be considered in determining its eligibility under the financial need criterion. Under no circumstances will assistance be denied or its amount affected on the ground that an applicant opposes NOAA or a position supported by NOAA in another proceeding.

One commenter suggested that a participant must have "standing" of the kind required for participation in judicial proceedings before it might be considered for financial assistance. NOAA administrative proceedings are open to all interested persons, and participation in those proceedings does not depend upon satisfaction of any standing requirement.

In evaluating the financial needs of applicants for assistance, NOAA will make every effort to take into account the differing financial situations confronting businesses and nonprofit organizations, each of which enjoys certain advantages and is subject to certain disadvantages in the mobilization of financial resources that do not apply to the other.

4. Should attorneys' fees and other assistance be available to those with an economic interest in the outcome or limited to those whose participation benefits the general public or has a strong public interest justification?

One commenter was under the impression that the proposed rules would disqualify those having economic interests in the outcome from receiving assistance through their incorporation of the following subcriterion, appearing in proposed § 904.3(a)(1)(iv):

> The need to encourage participation by segments of the public who, as individuals, may have little economic incentive to participate. . . .

This language is not intended to disqualify those having substantial economic interests in the outcome from receiving assistance. It is only one of five subcriteria for determining whether an applicant will contribute substantially to a fair determination of the proceedings.

Some commenters urged that those with an economic interest in the outcome of a proceeding be disqualified from receiving financial assistance, while others took the opposite view. NOAA believes that the public interest is served by the widest possible participation in its proceedings by all persons with an individual interest in the outcome, whether or not that interest is economic. It therefore declines to incorporate in the final rules a blanket disqualification of persons having an economic interest in the outcome of a proceeding. For the same reason, NOAA does not believe that the criteria for eligibility should incorporate a comparison of the magnitude of the economic interest of an applicant with the cost of that applicant's participation in a proceeding beyond what already appears in proposed § 904.3(a)(1)(iv).

5. What procedures and criteria should NOAA adopt for (a) evaluating the quality of a participant's potential contribution to the resolution of a hearing; (b) determining the importance of the issue(s) to be heard; (c) assessing the strength of a participant's interest or the uniqueness of a participant's point of view; and (d) distinguishing among equally capable

participants all of whom want to receive financial support for participation in the same proceeding?

The commenters noted a number of considerations that NOAA would have to take into account in making these determinations, including professional and technical expertise, past interest and involvement in the problem at issue, and accountability to the class of persons allegedly represented. NOAA agrees, however, with those commenters who suggested that the formulation of procedures and criteria more specific than the ones contained in the proposed rules would have to be based upon experience in administering the program.

NOAA will not require that the participation of an applicant be "essential" for the reaching of a decision before financial assistance will be given. This is in accordance with the present position of the Comptroller General, discussed above.

One commenter suggested that competition for financial assistance among public interest groups will not be a major problem, because those groups are accustomed to forming coalitions for the sharing of resources. This, too, is a point that may or may not be borne out by experience with the program. NOAA does not believe that the purposes of the program will be advanced by giving automatic preference to those applicants who have devoted some of their own resources to participation in a proceeding before finding out whether they have been awarded assistance by NOAA. Neither would those purposes be served by establishing priorities among equally qualified applicants on the basis of the dates of their applications.

NOAA will not require that parties receiving assistance present facts that would otherwise not be presented to the agency in the proceeding. A distinctive interpretation of a line of argument based on facts that have been demonstrated by other participants will be sufficient for consideration of an application for assistance.

6. Should the number of participants who may be subsidized in any one proceeding be limited? If so, what should the number be?

Most of the commenters on this question stated that there should be no limitation in the final rules on the number of participants in any proceeding who might receive assistance. Two commenters urged that a limit of one award of assistance in any proceeding should be established. NOAA does not believe it has sufficient information at this time to establish a numerical limit on those receiving assistance in a proceeding, and will therefore refrain from incorporating such a limit in the final rules.

7. Who should determine eligibility for compensation?

Several commenters suggested that NOAA establish an independent office for the consideration of applications for assistance. At the present time, the expense of establishing such an office would probably consume a large part of the funds that might otherwise be available for assistance, and therefore will be avoided.

One commenter suggested that the decision be made by the administrative law judge in formal proceedings. Several others suggested that it be made by the NOAA General Counsel. The arguments for these alternatives were not, however, compelling enough for NOAA to abandon the procedure prescribed in the proposed rules, under which applications would be processed through the General Counsel's office, with the final decisions made by the Administrator.

One commenter suggested that applicants have the opportunity to appeal the Administrator's decision to the Secretary of Commerce. In NOAA's view, this procedure would disrupt the administrative process without resulting in significant modification of financial assistance decisions.

8. What criteria should NOAA adopt for determining whether the costs of participation incurred by a participant are reasonable or necessary for participation?

None of the commenters on this question seemed to object seriously to the "prevailing market rates" standard of proposed § 904.5(c). Several commenters did, however, object to that provision's limitation of attorney, expert, and consultant fees to the amounts paid for such services by NOAA. NOAA believes, however, that specific congressional authorization would be advisable before it pays private attorneys and experts at rates higher than it is authorized to pay its own employees, particularly in view of the incorporation of such a ceiling in the specific statutory authority of the Federal Trade Commission to grant financial assistance.

9. Should reimbursable costs be limited to certain costs, but not all costs, *e.g.*, the cost of travel, but not the costs of salaries of persons regularly employed by the participant?

While many commenters argued that any cost incurred as a result of participation in a NOAA proceeding should be considered for reimbursement, other commenters suggested that one or more kinds of costs should be excluded. NOAA did not find the reasons given for the proposed exclusions to be sufficiently strong to warrant adoption of the exclusions, at least until they have been substantiated by experience. The inclusive provisions of proposed section 904.5(d) are, therefore, retained in the final rules.

One commenter suggested that the cost of preparing the application to NOAA for assistance should be included in reimbursable costs under the program. While NOAA is willing to consider claims for such costs during the early stages of the program on a case-by-case basis, such claims will not be favored to the extent that they threaten to reduce the total number of assisted participants.

10. What consideration should NOAA give to alternative ways of providing advocacy assistance to participants, *e.g.*, establishment of a public counsel within the agency to represent consumer interests in hearings; and what support should NOAA give for establishment of an independent agency to advocate consumer interests?

Most commenters seemed to regard these questions as beyond the scope of this rulemaking, and their remarks were too sparse to justify extended treatment here. NOAA will continue to investigate alternative ways of accomplishing the purposes of the final rules set forth below.

General Comments

Some commenters suggested that establishment of the program would embroil NOAA in litigation brought by disappointed applicants for assistance. While this possibility should not be dismissed lightly, NOAA believes that courts will not be inclined to overturn the kind of factual determinations upon which NOAA's decisions under this program will be based.

Some commenters appeared to believe that this program would cover proceedings before the Regional Fishery Management Councils established under the Fishery Conservation and Management Act of 1976 (FCMA). It will not cover proceedings before the Councils, but will cover NOAA proceedings under the FCMA.

Several commenters expressed general unease about the vagueness of the standards proposed for the program and the subjectivity inherent in NOAA's evaluation of applications for assistance. NOAA believes that general standards are necessary until it has enough practical experience to formulate more specific standards. It believes that the dangers of subjectivity can be minimized through the preparation of written determinations on the eligibility of each applicant for assistance. Because these written determinations will be required in the final rules, NOAA has decided not to adopt the suggestion that the names of those granted and refused assistance be published in the Federal Register, which is another possible device for checking subjectivity in financial assistance decisions.

One commenter suggested that NOAA should coordinate its financial assistance actions with those of all other Federal agencies under uniform

guidelines. NOAA considers early implementation of this program to be more important than uniformity of procedure among all Federal agencies, the attainment of which could take years.

One commenter questioned the need for this program because it believed that the agency staff should represent the public interest. While it is the ultimate responsibility of NOAA's employees to determine what agency actions will be in the best interest of the public, they must have the broad public input that this program is intended to foster if they are to determine where the public interest lies.

One commenter suggested that, because implementation of this program may shift the political balance in NOAA proceedings, it should have been left to Congress. As was discussed above, NOAA believes that this program is necessary to carry out the duties that Congress has assigned it. Operation of the program, like all NOAA activities, will be subject to regular Congressional oversight.

One commenter urged that NOAA incorporate in the proposed rules a provision for recovery of assistance provided a participant who engaged in dilatory tactics during the proceeding. This commenter also suggested a contractual provision under which those assisted would agree to compensate other parties that might be injured by their misconduct during the proceeding. The latter suggestion would put those receiving assistance on an unequal footing relative to other parties, and is not acceptable. In NOAA's view, the probability that a misbehaving participant would never again receive assistance is a sanction sufficient to obviate the need for adoption of the first suggestion.

One commenter urged that NOAA provide a reserve fund in each proceeding to accommodate late requests and supplemental assistance for unanticipated expenses. Such a fund would be permissible under the final rules, but its establishment in any proceeding occurring in the near future may be impractical due to the shortage of available funds.

One commenter suggested that those hoping to receive assistance under the program might become less diligent in their other fundraising activities. Under the final rules, NOAA is requiring applicants to describe their fundraising efforts, which will be evaluated as part of the determination of financial need.

One commenter questioned NOAA's statement in the notice of proposed rulemaking that the proposal did not require preparation of an economic impact analysis under Executive Orders 11821 and 11949. In view of the aggregate amount of funds likely to be involved in this program for the foreseeable future, NOAA adheres to that statement.

Dated: April 19, 1978.

RICHARD A. FRANK,
Administrator.

Chapter IX of 15 CFR is amended by adding the following Part 904:

PART 904—FINANCIAL COMPENSATION OF PARTICIPANTS IN ADMINISTRATIVE PROCEEDINGS

Sec.
904.1 Purpose.
904.2 Definitions.
904.3 Criteria for financial compensation.
904.4 Submission of applications by participants.
904.5 Amount of financial compensation and procedures for payment.

AUTHORITY: Title III, Pub. L. 95-86, 91 Stat. 419, 431.

§ 904.1 Purpose.

The Administrator may provide compensation for reasonable attorneys' fees, fees and costs of experts, and other costs of participation incurred by eligible participants in any NOAA proceeding involving a hearing in which there may be public participation pursuant to statute, regulation, or agency practice, whenever the Administrator determines that public participation in such a proceeding promotes or can reasonably be expected to promote a full and fair determination of the issues involved in the proceeding.

§ 904.2 Definitions.

As used herein: (a) "NOAA" means the National Oceanic and Atmospheric Administration;

(b) "Administrator" means the Administrator of NOAA;

(c) "Applicant" means any person who has filed a timely application for compensation;

(d) "Person" means any person as defined in section 551(2) of 5 U.S.C. and includes a group of individuals with similar interests.

§ 904.3 Criteria for Financial Compensation.

(a) Any person is eligible to receive compensation under this section for participation (whether or not as a party) in NOAA proceedings referred to in § 904.1 if:

(1) The person represents an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding, taking into account:

(i) Whether the person represents an interest which is not adequately represented by a participant other than the agency itself;

(ii) The number and complexity of the issues presented;

(iii) The importance of public participation;

(iv) The need to encourage participation by segments of the public who, as individuals, may have little economic incentive to participate;

(v) The need for representation of a fair balance of interests; and

(2) The person demonstrates to the satisfaction of the Administrator that such person does not have sufficient resources available to participate effectively in the proceedings in the absence of compensation under § 904.1.

(b) In order to facilitate public participation, the Administrator shall make written determinations, giving reasons therefor, of the eligibility of an applicant for compensation under § 904.1, and the amount and computation of such compensation. The determinations required by this paragraph shall be made as soon as practicable after receipt of an application for compensation, unless the Administrator makes an express written finding that all or any part of the determination relating to the amount or computation of such compensation cannot practicably be made at the time the initial determination of eligibility is made. The Administrator shall make such determination after consideration of the maximum amounts payable for compensation under § 904.5 for the proceedings and requests or possible requests for compensation under § 904.1 by other eligible participants in the proceeding.

(c) The Administrator may require consolidation of duplicative presentations, select one or more effective representatives to participate, offer compensation only for certain categories of expenses, or jointly compensate persons representing identical or closely related viewpoints.

§ 904.4 Submission of applications by participants.

(a) A participant must submit a written application to the Administrator in order to be authorized to receive compensation. This application shall be submitted as soon as practicable after publication of notice of the proceeding in the FEDERAL REGISTER. Applications shall be addressed to: Office of General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, D.C. 20230. Each application shall contain, in a sworn statement, the following information in the form specified:

(1) The applicant's name and address, and in the case of an organization, the names, addresses, and titles of the members of its governing body and a description of the organization's general purposes, structure, and tax status;

(2) An identification of the proceeding for which funds are requested;

(3) A description of the applicant's economic, social, and other interests in

the outcome of the proceeding for which funds are requested;

(4) A discussion of the reasons why the applicant is an appropriate representative of those interests, including the expertise and experience of the applicant in the matters involved in the proceeding for which funds are requested and in related matters;

(5) An explanation of how the applicant's participation would enhance the quality of the decisionmaking process and serve the public interest by contributing views and data which would not be presented by another participant;

(6) A statement of the total amount of funds requested;

(7) With respect to the proceeding for which funds are requested, an itemized statement of the expenses to be covered by the requested funds and of the expenses to be covered by the applicant's funds;

(8) A description of the evidence, activities, studies or other submissions that will be generated by each of those expenditures;

(9) An explanation of how the requested funds would result in enhancing the quality of the applicant's participation in the proceeding for which funds are requested;

(10) An explanation of why the applicant cannot use funds that it already possesses or expects to receive for the purpose for which funds are requested, including:

(i) A listing of the applicant's anticipated income and expenditures (rounded to the nearest $100) during the current fiscal year; and

(ii) A listing of the total assets and liabilities of the applicant as of the date of the application.

(11) An explanation of why the applicant cannot in other ways obtain the funds that are requested, including a description of the applicant's past efforts to obtain those funds in other ways and the feasibility of future attempts to raise funds in other ways; and

(12) A list of all proceedings of the Federal Government in which the applicant has participated during the past year (including the interest represented and the contribution made) and any amount of financial assistance received from the Federal Government in connection with these proceedings.

§ 904.5 Amount of financial compensation and procedures for payment.

(a) The Administrator may establish a limit on the total amount of financial compensation to be made to all participants in a particular proceeding and/or may establish a limit on the total amount of compensation to be made to any one participant in a particular proceeding.

(b) The Administrator shall compensate participants only for costs that have been authorized and only for such costs actually incurred for participation in a proceeding.

(c) The Administrator shall compensate participants only for costs that he or she determines are reasonable. The amount of reasonable attorneys' fees, fees and costs of experts, and other costs of participation awarded under § 904.1 shall be based upon prevailing market rates for the kind and quality of the goods and services, as appropriate, furnished, except that no attorney, expert or consultant shall be compensated at a rate in excess of the highest rate of compensation for attorneys, experts, consultants, and other personnel with comparable experience and expertise paid by NOAA.

(d) The Administrator may compensate participants for any or all of the following costs:

(1) Salaries for participants or employees of participants;

(2) Fees for consultants, experts, contractual services, and attorneys that are incurred by participants;

(3) Transportation costs;

(4) Travel related costs such as lodging, meals, tipping, telephone calls, etc.; and

(5) All other reasonable costs incurred, such as document reproduction, postage, etc.

(e) The Administrator shall compensate participants within 30 days following the date on which the participant submits an itemized voucher of actual costs pursuant to paragraph (a) of this section.

(f) The participant shall be paid upon submission of an itemized voucher listing each item of expense. Each item of expense exceeding $15.00 must be substantiated by a copy of a receipt, invoice, or appropriate document evidencing the fact that the cost was incurred.

(g) The Administrator and the Comptroller General of the United States, or their duly authorized representatives, shall have access for the purpose of audit and examination to any pertinent books, documents, papers and records of a participant receiving compensation under this section. The Administrator may establish additional guidelines for accounting, recordkeeping and other administrative procedures with which participants must comply as a condition of receiving compensation.

[FR Doc. 78-11254 Filed 4-25-78; 8:45 am]

[6351-01]

Title 17—Commodity and Securities Exchanges

CHAPTER I—COMMODITY FUTURES TRADING COMMISSION

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

Demonstration of Continued Compliance With the Requirements for Contract Market Designation

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission ("Commission") is revising regulation 1.50 to permit the Commission periodically to review the designations of contract markets more efficiently. Regulation 1.50 previously required each contract market to demonstrate to the Commission at least once every 5 years the provisions that it had made to comply with the conditions and requirements for designation as a contract market set forth in sections 5 and 5a of the Commodity Exchange Act, as amended. The automatic 5-year filing requirement has been deleted. A contract market will be required to file a report upon the request of the Commission to demonstrate compliance with all or a specified portion of the conditions and requirements of Sections 5 and 5a.

EFFECTIVE DATE: May 26, 1978.

FOR FURTHER INFORMATION CONTACT:

John Mielke, Office of Surveillance and Analysis, Commodity Futures Trading Commission, 2033 K Street NW., Washington, D.C. 20581, telephone 202-254-3310.

SUPPLEMENTARY INFORMATION: On December 21, 1977 the Commission published a proposal (42 FR 63899) to revise regulation 1.50, 17 CFR 1.50 (1977), by eliminating (1) the mandatory 5-year filing requirement, and (2) the requirement that each submission seek to demonstrate compliance with all of the provisions of sections 5 and 5a of the Commodity Exchange Act, as amended, 7 U.S.C. 7 and 7a (1976). In lieu thereof, the Commission proposed that with respect to each commodity for which it has been designated as a contract market, each board of trade be required to file a report upon Commission request to demonstrate its compliance with the conditions and requirements for designation set forth in Sections 5 and 5a of the Act as the Commission shall specify in the request. The report also would be re-

APPENDIX I

FTC CHART:
OBLIGATED FUNDS BY RULEMAKING
(March 1, 1978)

A. FTC IMPROVEMENT ACT RULEMAKING

Total Obligated Compensation Per Rule
(As of March 1, 1978)

1.	Antacid Over-the-Counter Drugs	$ 97,709.00
2.	Unfair Credit Practices	$ 115,620.24
3.	Food Advertising	$ 149,917.48
4.	Funeral Industry	$ 117,835.41
5.	Health Spas	$ 62,886.00
6.	Hearing Aids	$ 80,230.00
7.	Mobile Homes	$ 123,951.20
8.	Ophthalmic Goods and Services	$ 127,274.33
9.	Over-the-Counter Drugs	$ 93,403.03
10.	Prescription Drugs	$ 2,070.00
11.	Preservation of Consumers' Claims and Defenses	$ 3,093.25
12.	Protein Supplements	$ 33,970.30
13.	Revised Care Labeling	$ 48,008.67
14.	Thermal Insulation	$ 49,467.19
15.	Used Motor Vehicles	$ 115,087.79
16.	Vocational Schools	$ 33,654.25
TOTAL AMOUNT OBLIGATED TO DATE		$1,254,178.14

B. 1

ATTORNEY FEES AND COSTS COMPARED TO TOTAL BUDGET AS OF MARCH 1, 1978

Participant	Rule	Attorneys' Fees	Attorney-Related Costs Including Travel & Per Diem	Total for: Attorneys' Fees and Other Attorney Costs	Total Approved Maximum Budget
California Citizen Action Group	Antacids	$ 11,540.00	$ 15,314.00	$ 26,854.00	$ 64,228.00
Council of Children, Media and Merchandising	Antacids	$ 5,460.00	$ 4,404.00	$ 9,864.00	$ 26,644.00
Center for Public Representation	Thermal Insulation	$ 979.00	$ 276.00	$ 1,255.00	$ 4,573.09
National Consumers League	Thermal Insulation	$ 12,480.00	----------	$ 12,480.00	$ 18,512.00
COALITION: Sierra Club; Friends of the Earth; Environmental Defense Fund; Natural Resources Defense Fund	Thermal Insulation	$ 12,830.00	$ 75.00	$ 12,905.00	$ 17,645.00
Consumer Federation of America	Thermal Insulation	$ 1,470.00	----------	$ 1,470.00	$ 2,141.10
Arizona Consumers Council	Thermal Insulation	----------	----------	----------	$ 1,036.00
National Ass'n of Home Insulation Contractors	Thermal Insulation	$ 4,560.00	----------	$ 4,560.00	$ 5,560.00
TOTALS:		$481,613.59	$125,730.70	$605,960.29	$1,199,746.79

B. 2

ATTORNEY FEES AND COSTS COMPARED TO TOTAL BUDGET AS OF MARCH 1, 1978

Participant	Rule	Attorneys' Fees	Attorney-Related Costs Including Travel & Per Diem	Total for: Attorneys' Fees and Other Attorney Costs	Total Approved Maximum Budget
Council for Children, Media, and Merchandising	Over-the-Counter Drugs	$ 7,560.00	_____	$ 7,560.00	$19,175.00
National Consumer Law Center	Proposed 11-19-75: Claims and Defenses	$ 1,248.10	$ 1,455.50	$ 2,703.60	$ 3,093.25
Automobile Owners Action Council	Proposed 12-23-75: Used Motor Vehicles	$11,680.00	$ 2,030.00	$13,710.00	$24,260.00
California Public Interest Research Group	Used Motor Vehicles	$ 3,240.00	$ 3,074.68	$ 6,314.68	$39,358.68
Center for Public Representation	Used Motor Vehicles	$ 4,420.00	$ 1,866.00	$ 6,286.00	$33,146.00
San Francisco Consumer Action	Used Motor Vehicles	$ 5,420.00	$ 4,512.52	$ 9,932.52	$11,751.52
Center for Auto Safety	Used Motor Vehicles	$ 780.00	$ 720.00	$ 1,500.00	$ 4,500.00
California Citizens Action Group	Proposed 1-16-76 Ophthalmic Goods	$ 9,867.00	$ 1,394.00	$11,261.00	$38,285.00
San Francisco Consumer Action	Ophthalmic Goods	$ 3,270.00	$ 6,227.00	$ 9,497.00	$43,544.00
Arkansas Community Organizations For Reform Now	Ophthalmic Goods	$ 1,080.00	$ 210.00	$ 1,290.00	$ 2,668.00
New York Public Interest Research Group	Ophthalmic Goods	$ 10,202.00	$ 1,405.00	$ 11,607.00	$ 12,575.00
Americans for Democratic Action	Ophthalmic Goods	$ 15,924.00	$ 5,012.00	$ 20,936.00	$ 34,603.00
National Consumers Congress	Proposed 1-26-76: Care Labeling	$ 11,040.00	$ 1,826.00	$ 12,866.00	$ 47,352.67
Consumer Union/ California Citizen Action Group	Health Spas	$ 19,510.00	$ 3,122.00	$ 22,632.00	$ 28,512.00
Americans for Democratic Action	Health Spas	$ 17,504.00	$ 3,023.00	$ 20,527.00	$ 20,732.00
Americans for Democratic Action	Antacids	$ 4,795.00	----------	$ 4,795.00	$ 6,837.00

ATTORNEY FEES AND COSTS COMPARED TO TOTAL BUDGET AS OF MARCH 1, 1978

Participant	Rule	Attorneys' Fees	Attorney-Related Costs Including Travel & Per Diem	Total for: Attorneys' Fees and Other Attorney Costs	Total Approved Maximum Budget
Society for Nutrition Education	Food Advertising	No Legal Fees Involved			$20,860.00
National Council of Senior Citizens	Proposed 6-4-75: Prescription Drugs	$ 630.00	$ 280.00	$ 910.00	$ 2,070.00
National Council of Senior Citizens	Proposed 6-24-75: Hearing Aids	$38,197.50	$ 2,170.00	$40,367.50	$46,734.13
National Hearing Aid Society	Hearing Aids	$31,036.00	$ 50.00	$31,086.00	$33,495.80
Consumers Union	Proposed 8-29-75: Funeral Industry	$ 1,620.00	$ 120.00	$ 1,740.00	$ 3,980.00
Arkansas Consumer Research	Funeral Industry	$ 2,660.00	_____	$ 2,660.00	$ 7,694.00
Continental Association of Funeral & Memorial Societies	Funeral Industry	$ 6,156.00	$ 2,000.00	$ 8,156.00	$18,170.00
Americans for Democratic Action and National Council of Senior Citizens	Funeral Industry	$29,795.50	$ 3,919.00	$33,714.50	$46,150.17
California Citizen Action Group	Funeral Industry	$ 8,346.00	$ 2,765.00	$11,111.00	$23,885.41
Central Area Motivation Program	Funeral Industry	$ 4,981.00	$ 1,829.00	$ 6,810.00	$ 7,410.00
New York Public Interest Research Group	Funeral Industry	$ 9,273.00	$ 1,912.00	$11,185.00	$11,740.00
San Francisco Consumer Action	Proposed 9-4-75: Protein Supplements	$ 4,050.00	$ 1,405.00	$ 5,455.00	$15,507.00
Consumers Cooperative of Berkeley	Protein Supplements	No Legal Fees Involved			$ 3,967.70
Consumer Action Now	Protein Supplements	No Legal Fees Involved			$13,955.60
California Citizens Action Group	Proposed 11-11-75: Over-the-Counter Drugs	$ 8,832.00	$ 700.00	$ 9,532.00	$33,112.00
Americans for Democratic Action	Over-The-Counter Drugs	$ 20,873.00	$ 50.00	$ 20,923.00	$ 25,540.90

ATTORNEY FEES AND COSTS COMPARED TO TOTAL BUDGET AS OF MARCH 1, 1978

Participant	Rule	Attorneys' Fees	Attorney-Related Costs Including Travel & Per Diem	Total for: Attorneys' Fees and Other Attorney Costs	Total Approved Maximum Budget
San Francisco Consumer Action	Proposed 8-15-74: Vocational Schools	$11,990.00	$ 5,525.00	$17,515.00	$ 25,720.00
Joel Platt	Vocational Schools	$ 4,560.00	$ 900.00	$ 5,460.00	$ 5,460.00
National Consumer Law Center	Vocational Schools	$ 1,374.49	$ 328.00	$ 1,702.49	$ 2,474.25
National Consumer Law Center	Proposed 4-11-75: Credit Practices	$36,485.00	$11,170.00	$47,655.00	$109,392.24
Council of State Credit Institutes	Credit Practices	$ 5,166.00	$ 744.00	$ 5,910.00	$ 6,228.00
Center for Auto Safety	Proposed 5-19-75: Mobile Homes	$17,049.00	$ 8,015.00	$25,064.00	$ 28,850.00
Golden State Mobile Home Owners' League	Mobile Homes	$ 2,520.00	$ 500.00	$ 3,020.00	$ 28,780.00
Housing Advocates	Mobile Homes	$ 7,520.00	$ 6,407.00	$13,927.00	$ 49,914.80
Michigan Mobile Homeowners' Ass'n	Mobile Homes	$ 1,040.00	$ 344.00	$ 1,384.00	$ 2,224.00
National Manufactured Housing Federation	Mobile Homes	$ 5,240.00	$ 1,307.00	$ 6,547.00	$ 8,627.00
Council on Children, Media, and Merchandising	Proposed 5-28-75: Food Advertising	$ 9,720.00	$ 7,146.00	$16,866.00	$ 58,976.78
Consumers Union	Food Advertising	$ 4,580.00	$ 740.00	$ 5,320.00	$ 7,360.00
Iowa Consumers League	Food Advertising	No Legal Fees Involved			$ 200.00
Indiana Home Economics Assn.	Food Advertising	No Legal Fees Involved			$ 39.70
Connecticut Citizen Research Group	Food Advertising	$ 160.00	$ 150.00	$ 310.00	$ 6,777.00
National Consumers Congress	Food Advertising	No Legal Fees Involved			$ 9,295.00
Consumer Action (Washington, D.C.)	Food Advertising	$30,900.00	$ 9,308.00	$40,208.00	$46,844.00
Mary Ruth Nelson	Food Advertising	No Legal Fees Involved			$ 270.00
Wendy Gardner	Food Advertising	No Legal Fees Involved			$ 295.00

APPENDIX J

DOT (NHTSA) REGULATIONS ON PAID PARTICIPATION (January 13, 1977)

federal register

THURSDAY, JANUARY 13, 1977

PART VIII

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

■

FINANCIAL ASSISTANCE TO PARTICIPANTS IN ADMINISTRATIVE PROCEEDINGS

Final Rule and Advance Notice of Proposed Rulemaking

Title 49—Transportation

CHAPTER V—DEPARTMENT OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

[OST Docket No. 48]

FINANCIAL ASSISTANCE TO PARTICIPANTS IN ADMINISTRATIVE PROCEEDINGS

Agency: Department of Transportation.

Action: Final rule and advance notice of proposed rulemaking.

Summary: The first part of the preamble of this notice announces and discusses the issuance by the Department of Transportation (DOT) of a regulation establishing procedures to govern a one-year demonstration program of financial assistance to participants in certain administrative proceedings of the National Highway Traffic Safety Administration (NHTSA). This demonstration program has been established to determine whether the process governing the making of administrative decisions will be enhanced by financially assisting participants whose representation contributes or can reasonably be expected to contribute to a full and fair determination of the issues, but who would otherwise be financially unable to participate effectively.

The second part of the preamble is an advance notice of proposed rulemaking, inviting public comment on whether financial assistance to participants in administrative proceedings, under appropriate circumstances, on a department wide and permanent basis ought to be established. The public is invited to comment also on the applicable scope, criteria, and procedures that should govern such a program of assistance.

Dates: The regulation is effective on January 13, 1977. Comments on the Advance Notice of Proposed Rulemaking must be received on or before April 20, 1977.

Address: Comments on the Advance Notice of Proposed Rulemaking should be addressed to:

Docket Clerk, OST Docket Number 48, Office of the General Counsel, Department of Transportation, Washington, D.C. 20590.

For further information contact:

Robert B. Donin, Office of the General Counsel, Department of Transportation, Washington, D.C. 20590 (202) 426-4704.

Supplementary information: During the preceding year, the DOT has intensively considered promulgating regulations that would enhance the presentation of relevant information and points of view in its administrative proceedings. In reaching the position announced today, the DOT has taken cognizance of several legislative initiatives, S. 2715 and H.R. 12762, of the 94th Congress, 2d Session, to affirm the authority of Federal agencies to fund participants in administrative proceedings and to provide guidelines for the exercise of that authority. The DOT has also been considering an opinion of the Comptroller General, cited below, determining that the NHTSA already possesses sufficient authority to fund participants in its proceedings, and letters from Congressman John E. Moss and Senator Warren G. Magnuson, urging the NHTSA to use its existing authority to assist participants financially under the appropriate circumstances. This notice also responds to a petition for rulemaking submitted by the Center for Auto Safety, Environmental Defense Fund and Consumers Union. That petition requested that the DOT promulgate regulations to provide for compensation of costs incurred in the presentation of views in certain proceedings of the NHTSA and the other operating administrations of the DOT.

PART I: DEMONSTRATION PROGRAM

Purpose of the demonstration program. The goal of this demonstration is to provide added assurance that a full range of views and all relevant information are presented to the NHTSA in its consideration of regultory actions. The DOT has already sought to encourage wider consumer participation in decisionmaking through the formulation of a Consumer Representation Plan which outlines the opportunities for communication of views regarding regulation, policymaking and program development and sets out Departmental procedures intended to increase participation. (41 FR 42822, September 28, 1976)

In the past, however, it has sometimes been difficult for some consumer, environmental and other groups of citizens that are either widely dispersed or poorly financed to bear the cost of participating in federal regulatory proceedings. By contrast, better financed and organized groups, frequently representative of the regulated industry, are often able to participate vigorously and effectively. Of course, there are other adequately financed public interest groups to which this program may not pertain and there may be groups representing regulated parties which are not able to finance effective participation. There is a risk that because of this financial and organizational imbalance, the views of those who are now financially able to participate in regulatory proceedings may have a disproportionate influence on government decisionmaking. It is hoped that by removing some of the financial barriers to effective participation, under appropriate circumstances, this imbalance may be reduced or eliminated.

Where public interest groups have possessed sufficient resources to participate in administrative proceedings, they generally have made a valuable contribution. As Judge Harold Leventhal recently observed:

> Administrative law and regulation have been profoundly influenced by the participation, in both agencies and courts of public interest representatives who have identified issues and caused agencies and courts to look squarely at the problems that otherwise would have been swept aside and passed unnoticed. They have made complaints, adduced and marshaled evidence, offered different insights and viewpoints, and presented scientific, historical, and legal research. They have been of significant service to the entire decisional process.[1]

Although the reimbursement of costs that would otherwise pose a bar to future participation by such groups benefits the assisted participants, this demonstration program is primarily aimed at benefiting the general public by promoting fair, balanced, and effective regulation.

At the same time, designing a system to fund citizen participation in regulatory proceedings poses difficult questions of cost, feasibility and fairness. Among these issues are the criteria for eligibility, expense to the public (including both the cost of administration and the cost of disbursements), the appropriate procedure for selection of recipients of financial support, and the determination of what costs should be reimbursable by the DOT. In order to gain experience which will indicate whether, and in what form, such a program of financial support shall be permanently adopted, the DOT has decided to undertake a one-year demonstration limited in scope to certain proceedings of the NHTSA.

Statutory authority for program. The DOT has adequate statutory authority to conduct this program of assistance Under the Department of Transportation Act, 49 U.S.C. § 1651, et seq. and related statutes,[2] the DOT and its component agencies have broad responsibility for safety regulation, energy conservation and the sound development of the various transportation modes. The Comptroller General has held that while 31 U.S.C. § 628 prohibits agencies from using appropriated funds except for the purpose for which the appropriation was made, an appropriation made for a particular object, purpose of program "is available to finance expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made . . ." 53 Comp. Gen. 351, 364 (1973). See also 50 Comp Gen. 534, 536 (1971); 44 Comp. Gen. 312 314 (1964); *Northern States Power Co.* v. *FPC*, 118 F. 2d 141, 143 (7th Cir. 1941). In an opinion issued February 19, 1976, (Decision B-92288) the Comptroller General advised the Nuclear Regulatory Commission (NRC) that, under this principle, it could lawfully reimburse intervenors in licensing proceedings where (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) the intervenor is indigent or otherwise unable to bear the financial costs of participation in the proceeding.

A subsequent opinion has clarified both of these standards. (Decision B-139703, December 3, 1976). This opinion is addressed to the Food and Drug

[1] "Attorneys' Fees for Public Interest Representation," 62 ABA Journal 1134 (September, 1976).

[2] With respect to NHTSA, for example, see the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 et seq., the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1901, et seq., and the Highway Safety Act of 1966, 23 U.S.C. § 401, et seq.

Administration but appears equally applicable to other agencies. The December 3 opinion expressly provided that an agency need not determine that a person's participation is essential to a full and fair determination in a proceeding in order for the agency to be able to fund that person's participation. With respect to the second standard, the recent opinion stated

> • • • (I)t is our view that FDA may not extend financial assistance to a party requesting to participate which has the financial resources to participate but does not, for whatever reason, wish to use its resources for this purpose.

At the same time, the December 3 opinion rejected giving financial assistance based upon an applicant's having an economic interest in a proceeding that is small in comparison with the costs of effective participation. The GAO found that eligibility criterion to be unacceptable under its prior decisions and in the absence of specific statutory authority.

Since the appropriation for DOT and its component agencies provides for "necessary expenses," Pub. L. No. 94-387, 90 Stat. 1171 (1976), it is clear that DOT may, under appropriate circumstances, reimburse the cost of participation in the administrative proceedings of any of its operating components. Moreover, the Comptroller General has specifically advised that "the rationale of our February 19 decision to NRC is equally applicable" to the NHTSA, and that therefore payments may be made to cover participation in the NHTSA's proceedings. See letter of May 10, 1976, from R. F. Keller, Deputy Comptroller General, to Hon. John E. Moss, Chairman, Oversight and Investigations Subcommittee, House Commerce Committee (B-180224) (reprinted as Appendix B to Food and Drug Administration Advance Notice of Proposed Rulemaking, 41 FR 35855, 35860 (August 25, 1976)).

Standards and procedures of the program. The regulation set forth in this notice adopts a standard for compensation based on the Comptroller General's decisions discussed above. Funding determinations are to be made by a 3-member evaluation board composed of the following three officials or their delegates: the Assistant Secretary for Environment, Safety, and Consumer Affairs, the NHTSA Associate Administrator for Planning and Evaluation, and the NHTSA Chief Counsel. Applications may be submitted for funding for participation in any NHTSA rulemaking proceeding, selected by the Administrator, under the National Traffic and Motor Vehicle Safety Act of 1966, as amended, or any proceeding under section 152(a) of that Act for the presentation of data, views, and arguments following an initial determination of a noncompliance or safety-related defect. The possibility of funding participation in investigations preceding such initial determinations was also considered. Since investigations are not public proceedings and because it is desirable to keep the demonstration program limited in scope, the DOT decided not to fund participation in those areas. Applications may also be submitted for funding for participation in any proceeding, selected by the Administrator, under the Motor Vehicle Information and Cost Savings Act, as amended, and the Highway Safety Act of 1966, as amended.

Applications for a proceeding are to be submitted to the NHTSA official immediately responsible for the program under which the proceeding will be held. The appropriate official will be the Associate Administrator for Motor Vehicle Programs in the case of the Vehicle Safety Act and Titles I-IV of the Cost Savings Act; the Director of the Office of Automotive Fuel Economy in the case of Title V of the Cost Savings Act; and the Associate Administrator for Traffic Safety Programs in the case of the Highway Safety Act. The official receiving the applications may submit his comments regarding them to the evaluation board. The evaluation board may approve an application only if it makes positive findings on four criteria relating to representation of the applicant's interest and economic need. In brief, the evaluation board must find that (1) representation of the applicant's interest contributes or can be reasonably expected to contribute substantially to a full and fair determination of the issue involved; (2) participation by the applicant is reasonably necessary to represent that interest adequately; (3) the applicant can competently represent the interest it espouses; and (4) absent funding pursuant to this regulation, the applicant does not have available to it sufficient resources to participate effectively.

Where more than one applicant representing the same interest satisfies these criteria, the evaluation board may approve partial or complete funding of two or more applications or approve a single application after a comparison of the applicants' interest, proposals, and past performance in regulatory proceedings. However, the evaluation board may determine with respect to a proceeding under any of the above statutes, that in view of the public interest and the availability of funding for the demonstration program as a whole, no applications for compensation should be considered. Resources for this program are limited, and therefore some proceedings may go entirely unfunded since other more important proceedings may require intensive work by one or more funded participants.

To facilitate determinations by the evaluation board, applicants are to submit a sworn statement describing the work to be funded, the applicant's participation in other administrative proceedings, and the applicant's interest, organization and financial status.

Reimbursement will be limited to reasonable out-of-pocket costs of participation such as attorneys' fees, expert witness fees, and clerical and travel expenses, and will be paid at market rates for the kind and quality of service provided. Reimbursement will not be provided for time expended by any individual on his own behalf or by the staff of any group or organization on its behalf. Similarly, reimbursement will not be provided for the hiring of outside personnel when staff personnel are available and qualified to do the work. Advance payment of funds by an agency to an applicant in order to ensure the participation of that applicant in a proceeding is impermissible. See, Opinions of the Comptroller General, B-139703, September 22, 1976, and B-139703, December 3, 1976, and 31 U.S.C. § 529.

PART II: ADVANCE NOTICE OF PROPOSED RULEMAKING

The Department of Transportation (DOT) is considering promulgating final regulations providing for financial assistance under appropriate circumstances, to participants in all administrative proceedings of the Department and its operating administrations. The purpose of this notice is to invite the public to comment on whether such financial assistance should be provided and suggest the applicable scope, criteria, and procedures which should govern such a program of assistance.

As discussed in Part I of this notice, announcing the NHTSA demonstration program, the DOT believes that the quality of administrative decisionmaking will be enhanced by broad citizen participation which provides a counterweight to the appeals of narrow, special interest groups. Given the ample financial resources of well-organized industry groups, however, there is a serious question whether effective citizen participation can be achieved in the absence of federal action to lessen the often substantial cost of developing a regulatory presentation.

It is clear that DOT and its operating administrations[1] have authority to provide such financial assistance under appropriate circumstances. Under the Department of Transportation Act, 49 U.S.C. § 1651 et seq. and related statutes,[2] the Department and its component agencies have broad responsibility for safety regulation, environmental quality and the sound development of the vari-

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[1] United States Coast Guard, Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, National Highway Traffic Safety Administration, Urban Mass Transportation Administration, and St. Lawrence Seaway Development Corporation.

[2] See, for example, Federal Boat Safety Act, 46 U.S.C. § 1451 et seq., Deepwater Port Act, 33 U.S.C. § 1501 et seq., Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq., Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 et seq., International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. § 1159a et seq., Federal-Aid Highway Act, 23 U.S.C. § 101 et seq., Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 et seq., National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 et seq., Highway Safety Act of 1966, 23 U.S.C. § 401 et seq., Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 et seq., Hazardous Materials Transportation Act, 49 U.S.C. § 1801 et seq., National Environmental Policy Act 1969, 42 U.S.C. § 4231 et seq., Noise Control Act of 1972, 42 U.S.C. § 4901, et seq., Clean Air Act, 42 U.S.C. § 1857f-10, Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq.

ous transportation modes. The appropriation for the Department and its component agencies provides for "necessary expenses." Pub. L. No. 94-387, 90 Stat. 1171 (1976). Hence financial assistance for participants in Department and agency proceedings is legally permissible under the reasoning of recent Opinions of the Comptroller General, as discussed in Part I.

DOT expects to derive substantial guidance regarding the utility and feasibility of a system of reimbursement from the one-year NHTSA demonstration program. In addition, however, DOT welcomes public comment on the overall question of whether, and in what form, regulations governing DOT and all its operating administrations should be permanently established. Specifically, DOT seeks public comment on questions including, but not limited to, the following:

(1) Should DOT or any of its component agencies adopt permanent procedures to provide reimbursement for participation in administrative proceedings?

(a) If funds should be provided for participation in the proceedings of all components of DOT, should reimbursement be administered under a single Department-wide procedure or under separate procedures applicable to each operating administration?

(2) What changes should be made in the regulations governing the NHTSA demonstration program before they are permanently adopted and applied to proceedings by other operating administrations of DOT?

(a) In what types of proceedings (hearings, rulemakings, adjudications, public meetings) should reimbursement be made available?

(b) In addition to the findings specified by the Comptroller General as prerequisite to fundings, what additional criteria and standards should the agency adopt for evaluating the strength of an applicant's interest and its potential contribution to the proceeding?

(c) Where two or more applicants representing the same interest seek funds to participate in the same proceedings, should the agency use to seelct the applisingle applicant? If so, what criteria should the agency use to selet the applicant that will receive an award?

(d) With regard to any single proceeding, should the number of applicants that receive funds be limited?

(e) What types of expenses should be recoverable? Should reimbursement be available only for out-of-pocket costs (e.g., legal fees, travel expenses) or also for the value of work performed by an individual-applicant or the staff of organization-applicant in developing its presentation? With regard to the participant's presentation, should DOT fund scientific, technical, demographic or similar research, or should reimbursement be limited to the preparation of oral or written testimony based on existing data?

(f) What agency official(s) should make the funding determination? Should administrative appeal of this determination be provided? If so, to what agency official(s)?

(g) Should funding decisions be reached before the proceeding (based on the participant's planned presentation and projected costs) or after the proceeding (based on the quality of the participant's presentation and costs actually incurred)?

(h) Should funds be issued before, during or after the proceeding?

All comments received before the close of business on the comment closing date will be considered, and will be available for public inspection or copying from 9 A.M. to 5:30 P.M., Monday through Friday, except Federal Holidays, in Room 10100, DOT Headquarters, 400 Seventh Street, S.W., Washington, D.C. 20590. To the extent possible, comments filed after the closing date will also be considered. However, the rulemaking action may proceed at any time after that date, and comments received after the closing date and too late for consideration in regard to the action will be treated as suggestions for future rulemaking. The DOT will continue to file relevant material as it becomes available in thet docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Issued in Washington, D.C. on January 11, 1977.

WILLIAM T. COLEMAN, JR.,
Secretary of Transportation.

FINANCIAL ASSISTANCE TO PARTICIPANTS IN ADMINISTRATIVE PROCEEDINGS

SECTION 1. *Purpose.* This regulation establishes procedures for a demonstration program for compensating individuals, groups, associations, partnerships, or corporations that are financially unable to participate in certain administrative proceedings of the National Highway Traffic Safety Administration.

SEC. 2. *Applicability.* This regulation applies to any individual, group, association, partnership, or corporation, seeking financial assistance for participation in proceedings of the National Highway Traffic Safety Administration.

SEC. 3. *Definitions.* As used herein—

"Administration" means the National Highway Traffic Safety Administration.

"Administrator" means the Administrator of the National Highway Traffic Safety Administration or his delegate.

"Applicant" means any individual, or any profit or nonprofit group, association, partnership, or corporation seeking financial assistance under this regulation to participate in proceedings.

"Appropriate Administration official" means—

(a) The Associate Administrator for Motor Vehicle programs in the case of applications submitted for proceedings under the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. 1381 et seq.) or Titles I–IV of the Motor Vehicle Information and Cost Savings Act, as amended (15 U.S.C. 1901 et seq.).

(b) The Associate Administrator for Traffic Safety Programs in the case of applications submitted for proceedings under the Highway Safety Act of 1966, as amended (23 U.S.C. 401 et seq.).

(c) The Director of the Office of Automotive Fuel Economy in the case of applications submitted for proceedings under Title V of the Motor Vehicle Information and Cost Savings Act, as amended (15 U.S.C. 2001 et seq.).

"Evaluation board" means a board composed of the Assistant Secretary for Environment, Safety, and Consumer Affairs, NHTSA Associate Administrator for Planning and Evaluation, and the NHTSA Chief Counsel, or their respective delegates.

"Proceeding" means any proceeding (a) which is a rulemaking proceeding under the National Traffic and Motor Vehicle Safety Act of 1966, as amended, the Motor Vehicle Information and Cost Savings Act, as amended, the Highway Safety Act of 1966, as amended, or a proceeding under section 152(a) of the National Traffic and Motor Vehicle Safety Act of 1966, as amended, for the presentation of views, data, and arguments following an initial determination of a noncompliance with a Federal motor vehicle safety standard or of a defect related to motor vehicle safety,

(b) which commences prior to the end of the one-year period immediately following the effective date of this regulation,

(c) regarding which the Administrator has determined, in light of the public interest and the availability of funding under this program, that application for assistance under this regulation should be considered.

SEC. 4. *Application period.* Applications may be submitted under this regulation during the one-year period immediately following January 13, 1977, the effective date of this regulation.

SEC. 5. *Application procedure.* Applications for financial assistance for participation in proceedings shall be marked for the attention of the appropriate Administration official and addressed to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C. 20590. Each application shall contain, in a sworn statement, the following information in the order specified:

(a) The applicant's name and address, and in the case of an organization, the names, addresses, and titles of the members of its governing body and a description of the organization's general purposes, structure, and tax status.

(b) An identification of the proceeding for which funds are requested.

(c) A description of the applicant's economic, social and other interests in the outcome of the proceeding for which funds are requested.

(d) A discussion of the reasons why the applicant is an appropriate representative of those interests, including the expertise and experience of the applicant in the matters involved in the proceeding for which funds are requested and in related matters.

(e) An explanation of how the applicant's participation would enhance the quality of the decision making process and serve the public interest by contributing views and data which would not be presented by another participant.

(f) A statement of the total amount of funds requested.

(g) With respect to the proceeding for which funds are requested, an itemized statement of the expenses to be covered by the requested funds and of the expenses to be covered by the applicant's funds.

(h) A description of the evidence, activities, studies or other submissions that will be generated by each of those expenditures.

(i) An explanation of how the applicant's obtaining the requested funds would result in enhancing the quality of the applicant's participation in the proceeding for which funds are requested.

(j) An explanation of why the applicant cannot use funds that it already possesses or expects to receive for the purpose for which funds are requested, including:

(1) A listing of the applicant's anticipated income and expenditures (rounded to the nearest $100) during the current fiscal year.

(2) A listing of the total assets and liabilities of the applicant as of the date of the application.

(k) An explanation of why the applicant cannot in other ways obtain the funds that are requested, including a description of the applicant's past efforts to obtain those funds in other ways and the feasibility of future attempts to raise funds in other ways.

(l) A list of all proceedings of the Federal government in which the applicant has participated during the past year (including the interest represented and the contribution made) and any amount of financial assistance received from the Federal government in connection with these proceedings.

SEC. 6. *Processing of applications.* (a) When the Administrator determines that the Administration will receive applications for funding under this regulation for a particular proceeding, an invitation for applications is published in the FEDERAL REGISTER. When practicable, the invitation is included in the notice commencing the proceeding. Each invitation specifies a deadline for submission of applications. Although applications will be received after the deadline, there is not any assurance that they will be considered.

(b) Within five working days after the deadline for receipt of applications, the appropriate Administration official forwards all applications received before the deadline, together with his comments, if any, on those applications to the evaluation board.

(c) Within five working days after the evaluation board receives the applications from the appropriate Administration official, it approves or denies in whole or in part, each of those applications. The evaluation board may approve an application, in whole, or in part, if it finds that:

(1) The applicant represents an interest whose representation contributes or can reasonably be expected to contribute substantially to a full and fair determination of the issues involved in the proceeding, taking into consideration the number, complexity, and potential significance of the issues affected by the proceeding, and the novelty, significance and complexity of the ideas advanced by the applicant;

(2) Participation by the applicant is reasonably necessary to represent that interest adequately;

(3) It is reasonably probable that the applicant can competently represent the interests it espouses, when assessed under the criteria of this regulation; and

(4) The applicant does not have available, and cannot reasonably obtain in other ways, sufficient resources to participate effectively in the proceeding in the absence of funding under this program.

In determining whether an applicant would be unable to participate effectively, the evaluation board examines the applicant's proposed expenditures for preparing its presentation in the proceeding, decides whether these projected costs are reasonable and compares them to the applicant's income and expenditures, including anticipated future income and expenditures, for the current fiscal year.

(d) In the event that two or more applications, which satisfy the criteria of paragraph (c) of this section and seek to represent the same or similar interest, contain significant differences in viewpoint, approach, or proposals, the evaluation board may partially or completely grant one or more of those applications.

(e) In selecting among the applications specified in paragraph (d) of this section, the evaluation board considers and compares the skills and experience the applicants possess, and the contents of their proposals. In particular, the evaluation board considers and compares:

(1) The applicants' experience and expertise in the substantive area with the Administration's or Department of Transportation's activities and procedures;

(2) The applicants' prior general performance and competence;

(3) Evidence of the applicants' relation to the interest they seek to protect or represent; and

(4) The specificity, novelty, relevance, and significance of the ideas the applicants propose to develop and present.

(f) The decision of the evaluation board whether to select any of the applicants that satisfy the criteria of paragraph (c) of this section is discretionary. In making its decision, the evaluation board may consider:

(1) Whether an applicant's proposal can be reasonably developed and presented with the time allotted; and

(2) The availability of funding for assistance under the program.

(g) A written decision of the evaluation board, stating why assistance has either been granted or denied in light of the criteria in paragraphs (c) through (f) of this section, is mailed to all applicants.

(h) Upon good cause shown by an applicant, the decision of the evaluation board regarding its application may be reconsidered.

SEC. 7. *Recoverable costs.* (a) Expenses compensable under this regulation are limited to reasonable attorneys' fees, expert witness fees, the expenses of clerical services, travel, studies, surveys and demonstrations, and other reasonable costs of participation actually incurred. In all cases, compensation is not greater than the prevailing market rates for the kind and quality of service provided.

(b)(1) Compensation is limited to reasonable out-of-pocket costs.

(2) Compensation is not provided for

(i) Time expended by any individual on his own behalf or by the staff of any group or organization on its own behalf; or

(ii) The hiring of outside personnel when staff personnel are available and qualified to do the work.

SEC. 8. *Payments to applicants.* Payment of compensable expenses for approved applications is made by the Administration within 90 days after the applicant has submitted a completed claim, including bills, receipts or other proof of costs incurred. For good cause shown, payment to an applicant may be expedited.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[49 CFR Subtitle A]

[OST Docket No. 48]

FINANCIAL ASSISTANCE TO PARTICIPANTS IN ADMINISTRATIVE PROCEEDINGS

Advanced Notice of Proposed Rulemaking

CROSS REFERENCE: For a document containing an advanced notice of proposed rulemaking concerning financial assistance to participants in administrative proceedings, see FR Doc. 77-1296 appearing in the FEDERAL REGISTER immediately preceding this cross reference.

APPENDIX K

SUMMARY OF CITIZEN GROUP RESPONSES TO PAID PARTICIPATION ISSUES

SUMMARY OF CITIZEN GROUP RESPONSES TO PAID PARTICIPATION ISSUES

METHODOLOGY

In early May, 1978, the report team gathered the addresses of approximately 500 citizen organizations which had significant experience in intervention and other forms of participation in agency proceedings at the federal and state levels. These included many of the most knowledgeable groups and persons in the fields of citizen action and public participation.

To those organizations and to some state and local offices familiar with consumer and energy issues, we mailed an eight page Statement of the Issues, describing the kinds of issues involved in proposals for citizen participation funding. These groups were asked to comment on those issues.

Approximately 80 of those contacted gave us some form of detailed reply. In addition, we conducted lengthy telephone interviews with 45 of the most experienced groups and organizations in the time remaining. Some of these also sent in written replies. We took particular pains to solicit the comments of organizations with experience in the FTC and NHTSA paid participation programs.

The following summary is based on an analysis of those telephone and written responses. In some instances, it is difficult to give precise numerical responses as many groups did not address some issues or did not answer a particular question, while often expressing a general concern in a given area without listing specific items or examples.

1. QUALIFYING EXPENSES AND RATES OF COMPENSATION

In the area of qualifying expenses, the groups contacted were practically unanimous in their belief that public participants should be compensated for all types of expenses which are associated with participation. Those persons contacted stressed the importance of having sufficient time and money to produce and perform with maximum effectiveness.

2. EARLY INVOLVEMENT IN THE POLICY PROCESS

In order to do so, groups felt they should be involved almost as early in the policy formulation process as the full-time DOE staff who are considering the various problems confronting DOE and the policy options for possible solutions to those problems. The interested public should have the same opportunity to become as thoroughly involved as the business community. Though the funded level of their involvement will not approach that of business and industry, the opportunity for such involvement is the essential first step in any effort to guarantee full public representation.

3. MEANS TO DEVELOP EVIDENTIARY BASE

In order for participants to develop a base of substantial evidence for the record, they must have the time and the financial wherewithal to conduct the often sophisticated research required for the technical types

of proceedings anticipated by DOE.

Even in many of the more common day-to-day marketplace concerns considered in Federal Trade Commission proceedings such as posting prices of drugs and eyeglasses and truth in the advertising and sale of food and used motor vehicles, experienced public participants and FTC staffers (e.g., California Citizen Action Group; Terry Latanich, staff attorney for FTC) report that the proceedings would have benefitted greatly from an increased investment in research designed and undertaken for the hearings on the proposed rules.

Many groups also commented that related research prior to approval and the time and money spent preparing applications should be paid for once the application is approved or the petition for rulemaking or other proceeding is granted.

4. ATTORNEYS' AND EXPERT WITNESS' FEES

The majority of the groups responding felt that compensation for the services of the attorneys and expert witnesses of citizen groups should be based on reasonable market rates, whether those professionals are part of the group's salaried staff or outside counsel or experts retained for the participation effort. Others wished to see some limit on consultant fees.

More specifically, 36 of the 65 groups responding to this question suggested that DOE pay rates set by reference to the market. This was also the consensus of the six participants in the mini-conference of citizen group representatives in which the question was raised.

Of the remaining 29 groups which responded to this question, 10 favored the payment of rates comparable to government salaries, overhead and benefits; six favored either an absolute or presumptive limit on fees. The remainder suggested other mechanisms such as fixed fees negotiated by the groups for the total contract with funds allocated at the discretion of the participating organization.

A few of the groups felt that attorneys' fees were generally excessive and that limited funds would be better spent helping additional groups to intervene. Three expressed the fear that a new attorney industry bred on paid public participation would arise. Two stated that such public service work should not or need not be compensated at rates found in private practice. Several persons were concerned that the individuals involved receive good salaries but that neither staff persons nor those professionals retained by public interest participants should use the program to subsidize exorbitant personal incomes.

Twenty-four groups specifically addressed the question of whether the time of staff professionals should be compensated at the same rates as outside professionals retained for the proceeding. All but seven of the 24 felt that staff personnel and outside persons should be compensated at the same rate or by using the same compensation process.

Three suggested that the time of volunteers, whether experts or generalists, should also be paid for at the fair market value of their services (no more, no less) in order to encourage private citizens with diverse occupations to become or remain involved in the area of public policy.

Some of the most seasoned veterans of state-level public service commission proceedings insisted that public

participants should be able to spend both an aggregate amount and pay individual professional rates equal to those of business and industry on the theory that all points of view should be financially able to present their best case. Otherwise, the limited number of top experts and attorneys with significant experience in the given field and before that particular forum would be monopolized by industry (which pays higher rates than government and higher rates than those found in many general local markets for attorneys, economists and other experts). That is, these groups pointed out that market rates for top-flight specialists are reasonably expected to be higher than for generalists within the fields of law, economics, physics, or within other fields.

Thus, responses on the issue of attorneys' and expert witness' fees ran the gamut from covering costs only to matching the highest fees paid by industry with the majority suggesting a rate which falls well above traditional public interest expenditure levels but clearly below the highest rates the market will bear.

5. LUMP SUM AWARDS

A number of groups suggested payments of lump sums for particular proceedings and/or for year-long monitoring of agency action. Some suggested that such awards be generous but equal so that different groups could budget them as they see fit and stretch them as far as possible. All the groups participating in the two mini-conferences expressed great enthusiasm for the idea, as lump sum awards would help groups to become deeply involved in major, complex, long-term issues and the R&D and budgetary processes.

6. OVERHEAD AND OTHER EXPENSES

In those instances in which overhead is calculated only as an allowable percentage of staff salary, many non-profit groups reported that they are prejudiced. These groups pay relatively low salaries, yet their actual costs for rent, phone, utilities, supplies and even support staff are normally almost as high as the costs incurred by private firms. Therefore, in such compensation plans, overhead should be based on actual costs, not predetermined as a certain percentage of salary items.

All other costs such as travel, meals, lodging, transcripts, etc., must be covered, of course. Suggestions for transcripts include making them available as they are developed in regional offices and providing them without cost as a matter of right to impecunious participants or DOE-funded parties instead of billing and then reimbursing for the costs of transcripts.

7. DOE OUTREACH AND THE APPLICATION PROCESS

The vast majority of groups expressed the desire for a greatly expanded outreach effort on the part of DOE, particularly at the state and local levels. Many organizations noted that there exists a definite shortage of information regarding DOE proceedings, and that effective communication is not taking place. They suggest that DOE establish and maintain some type of information clearinghouse as well as a regular liaison between Washington,

regional offices, and citizen groups across the nation. The groups felt that DOE should publish information about current developments in relevant proceedings and provide interested persons with a schedule of proceedings with pertinent information in simple, readable newssheets. There were suggestions that DOE advertise in various newsletters and other publications with wide and diverse readerships and even ensure radio and television coverage of proposed actions.

Other groups called for the allocation of additional DOE staff for outreach or liaison functions. An idea endorsed by several groups is the identification and utilization of intermediary organizations with which DOE would work on a continual contractual basis. These citizen group intermediaries would solicit information and opinions from grassroots organizations and active individuals and keep those persons informed and involved.

Facilitating grassroots involvement in the application process would also be enhanced through the distribution by DOE of forms and handbooks on how citizen groups could become involved. Suggestions also included making the criteria for selection clear, instructing grantees as to proper bookkeeping procedures, simplifying forms and putting them in readable language. Groups should know early if they are to be rejected or funded so that they can allocate resources or look for other sources of funding for the proceeding.

Although the specific responses vary greatly, it is the broad consensus among citizen groups that the current time frame in which groups must prepare for a proceeding is wholly insufficient and that additional preparatory time is essential. While several groups stated that the necessary

time depends on the type and expected length of a particular proceeding, estimates generally range from 30 days to 6 months, with the mean falling at approximately three months.

8. MATCHING FUNDS

There was overhwelming sentiment (36-2) against the concept of groups supplying matching funds in order to be eligible. Reasons varied, with particular emphasis upon the idea that any matching funds requirement would effectively preclude numerous groups, especially smaller and less established ones, from participation.

Many groups stated that such a concept contradicts the intention of the entire public participation program. The program itself is premised upon the idea that many groups lack the capability to participate without outside funding. It is a contradiction to then turn around and demand that groups supply part of the funds for the proceeding.

9. TIMING OF FUNDING

One of the key problems encountered by citizen groups in public participation has been the paucity of programs dispensing funds on an "up-front" basis. Many groups, especially the smaller ones, related severe financial strains caused by their receiving funds only at or near the end of a proceeding. Such funding policies are prime examples of how the specific design of some public participation programs fails to implement the basic intent of the program itself. According to many groups

contacted, if groups do not have sufficient funds for participation, it makes little sense to require them to initially spend a substantial portion of their overall budget well before receipt of participant funds.

Such feelings were reflected in the belief of 30 of the 33 respondents to this question that groups should receive at least part of the funding upon approval of the application. Of those 30, 11 wanted all funds upon approval, while 19 felt that a portion of the funds should be given to a group at the outset, with most stating that the rest of the money should be disbursed at intervals over the course of the proceeding. There were a variety of suggestions as to the proportion of funds that should be given upon approval of the application, including one suggestion that a group should be given adequate funds initially to cover all start-up costs, in addition to one-sixth of all other costs. Another suggestion was for a group to receive 40 percent at the outset and 60 percent at intervals during the proceeding. Only three groups held that all funds should be disbursed during the proceedings, including one group which feared the potential for abuse if too much up-front funding was granted, while no groups wanted all funds withheld until completion of a proceeding .

10. ELIGIBILITY AND SELECTION

A. Eligibility

The central concern expressed by almost all groups for determining eligibility reflects the central purpose of the program: the representation of otherwise

unrepresented or under-represented interests. All other eligibility and selection criteria were seen as subservient to, or at most, equal to, the concern for the representation of diverse interests.

Most groups advocated the sort of flexible, functional tests contained in S.270, but none reported any substantial barriers posed by the implementation of the existing standards of FTC and NHTSA. Several commented that any "financial need" test require only that funds be "reasonably unavailable" or previously committed.

Though most persons rejected a simple "type" or "categorization" test for eligibility, of those who did recommend such guidelines, 20 (almost one-third of those responding) felt that even small businesses should not be eligible for financial assistance. Some of these persons suggested that trade associations, the Small Business Administration and other existing mechanisms were sufficient to assist in the representation of those views. Sixteen felt some hesitation about allowing public bodies to participate. One person said that public bodies too often reflect the views of industry unless large numbers of citizens are aware of and involved in the proceeding. Others felt that local governments had an obligation to participate in such proceedings and had more resources to begin with than citizen groups could muster and, therefore, should not deplete DOE citizen-intervenor funds. Small businesses, particularly those in impoverished areas and those enterprises dealing with new and "appropriate" technologies, also had their specific proponents as did individuals, small unions, and consumer protection offices of local governments and the like.

At least three experienced groups advised that DOE be prepared to "pierce the corporate veil" of supposed

"public interest" groups to uncover potential conflicts of interest due to some groups receiving substantial funding from industry and other special interests.

B. Selection

Factors which persons felt should be stressed in the selection process included track record (the most frequently mentioned), ability to organize and mobilize meaningful "grass roots" involvement and representation of not only under-represented, but entirely new ideas, issues and perspectives.

While several groups specifically mentioned that DOE should seek balance of representation from different regions of the country, at least as many specifically noted that the most capable representatives should be selected regardless of their geographic location.

Several persons advised that DOE should strengthen the in-house capability of public interest groups by favoring those applicants who said they intended to add persons to the staffs of their organizations or already had the necessary personnel and by structuring the compensation program to accommodate such continuity and growth.

Several groups felt that new groups and new interests should also be solicited, perhaps by granting awards to those who have been funded less often than other applicants when they are comparably equipped for a given proceeding. This device could also help to prevent dominance of agency proceedings by a single organization or clique of "kept" critics.

Finally, several persons surveyed recommended that DOE use specific criteria, perhaps by assigning numerical

or weighted values in the selection process. Such criteria would reduce the impact of political, personal, or philosophical bias.

11. AUDITING

While all groups agreed that the power to audit was necessary, there was a mixed reaction as to the system of auditing which should be used. More than half of the groups agreed to having audits as part of the process, but most were not enthused by the idea and expressed the desire for audits not to be a burdensome process. All who addressed this question stated that the agency should bear the cost of such audits.

A few respondents felt that audits should take place only if there were unusual circumstances, while a couple of groups felt that an affidavit from the groups would be sufficient. One person recommended that the auditing expenditure responsibility provisions of S.270 should be followed. Several groups urged that technical assistance from the agency would help groups to maintain proper bookkeeping procedures.

All groups but one preferred the audit to take place at the end rather than during the proceeding. A few suggested independent accountants would be most appropriate. It was very clear, however, that the groups strongly feel that regardless of whoever conducts the actual audit, the full cost should be borne by the agency.

12. OFFICE OF PUBLIC PARTICIPATION: WHO DECIDES

The persons responding were nearly unanimous in their opinion that the person or office making the group

funding decisions must be as independent as possible, preferably in a high-level office devoted primarily to public participation:

-- The Public Participation office should be removed from the substantive decision-making.

-- Staff members of the DOE offices involved should make suggestions, some felt, but most were of the opinion that staff members and persons associated with a proposed action not be allowed to decide who is to be funded.

Though FTC personnel and guidelines were generally approved of, there were suggestions that the office in DOE should be more insulated from staff pressure than at FTC.

Several suggested that citizens' (without financial conflicts of interest) representatives form either a governing board, a review panel, or a selection team. Two persons on the current DOE Consumer Advisory Committee said that to add another on-going citizen board would be cumbersome but that there should be some citizen review.

One attorney who had worked previously for DOE advised against placing the office under the auspices of existing offices (i.e., Office of Hearings and Appeals, Economic Regulatory Administration, General Counsel, or Policy and Evaluation), but suggested an independent Bureau of Consumer Representation similar to that of the FTC controlled by a small board on which citizen representatives outnumber possible DOE representatives. DOE representatives might be (e.g., Tina Hobson) persons from the DOE Office of Consumer Affairs. While some groups suggested that consumer groups be involved in the selection process,

all of these groups acknowledged conflict of interest and logistical problems. In commenting on the question of who should decide about funding, most groups omitted any role for citizen organizations in the actual award decisions.

Several of the Washington-based organizations quite familiar with DOE preferred the Office of Secretary or Deputy Secretary.

Another attorney with experience before the FTC said that the decision-making panel, group, or office should have at least one attorney who understands the processes involved.

Of those 22 who addressed the question of appeals, five advised against allowing an appeal from the decision to fund or not to fund and 17 said there should be some sort of an appeal. Some of those favoring appeals cautioned against allowing much, if any, delay in the proceeding. Others noted that the appeal should be to another independent person not influenced by the substantive policy which is the subject of the proceeding.

At least 20 people, including the mini-conference participants, suggested that, in addition to a central office, each regular office of DOE should <u>also</u> be authorized to make awards for public participation.

13. EVALUATION

While it was the unanimous belief on the part of the 22 groups specifically responding to this question that an evaluation of the program should take place, the question of who should conduct the evaluation was the subject of some disagreement.

In terms of an evaluation of each participant's contribution, most felt that a citizens review panel should

conduct such an evaluation, if any, while about half as many thought the agency should conduct the review. Several groups expressed fears of subjectivity if the grantor did take part in such a review and opted for either an independent review panel, a special office of evaluation within the agency, or an evaluation combining agency efforts with those of a review panel. Several were opposed to any case-by-case evaluation of individual groups' participation.

The evaluation of the overall paid participation program elicited even stronger responses in favor of a predominant role for citizen groups in the process. A majority held that a citizen panel should conduct the review (perhaps every six or 12 months) while most others suggested a combined agency-citizen group effort. Only 4 felt that the agency alone should conduct such a review. Many groups were wary also of agency evaluations of the overall program.

APPENDIX L

DOE EXCERPT ON INTERVENOR FUNDING FOR HOME HEATING OIL HEARING PROCEEDING (January 1978)

EFFECTIVE DATE: January 20, 1978.

ADDRESS: Committee for Purchase from the Blind and Other Severely Handicapped, 2009 14th Street North, Suite 610, Arlington, Va. 22201.

FOR FURTHER INFORMATION CONTACT:

C. W. Fletcher, 703-557-1145.

SUPPLEMENTARY INFORMATION: On October 28, 1977 and November 11, 1977, the Committee for Purchase from the Blind and Other Severely Handicapped published notices (42 FR 56772) and (42 FR 58774) of proposed additions to Procurement List 1978, November 14, 1977 (42 FR 59015).

After consideration of the relevant matter presented, the Committee has determined that the commodities listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46-48(c), 85 Stat. 77.

Accordingly, the following commodities are hereby added to Procurement List 1978:

CLASS 7530

Notebook, Stenographer's (IB), 7530-00-223-7939, quantity increased from 2,100,000 annually to 100 percent of the Government's annual requirements.

CLASS 1670

Message Dropper (SH), 1670-00-797-4495.

E. R. ALLEY, Jr.,
Acting Executive Director.

[FR Doc. 78-1619 Filed 1-19-78; 8:45 am]

[3710-08]

DEPARTMENT OF DEFENSE

Department of the Army

CHEMICAL SYSTEMS LABORATORY HUMAN USE COMMITTEE

Meeting

Notice is hereby given of a meeting of the Chemical Systems Laboratory Human Use Committee from 10 a.m. to 4 p.m. on February 6, 1978, and if necessary because of weather or need for continuation of discussion on February 9, 1978. These meetings will be held in room 14 of the Biomedical Laboratory, building E3100, in the Edgewood area of Aberdeen Proving Ground, Md.

The Committee will review and discuss a protocol for testing the demilitarization protective ensemble in a chemical environment. Meetings will be open to the public, but will be limited to space available.

Col. Francis C. Cadigan, Jr., Director, Biomedical Laboratory, Aberdeen Proving Ground, Md. 21010, 301-671-3018, will furnish summaries of the meetings and rosters of committee members upon request.

Dated: January 16, 1978.

FRANCIS C. CADIGAN, Jr.,
Colonel, MC,
Director, Biomedical Laboratory.

[FR Doc. 78-1649 Filed 1-19-78; 8:45 am]

[3128-01]

DEPARTMENT OF ENERGY

VOLUNTARY AGREEMENT AND PLAN OF ACTION TO IMPLEMENT THE INTERNATIONAL ENERGY PROGRAM

Meetings

In accordance with section 252(c)(1)(A)(i) of the Energy Policy and Conservation Act (Pub. L. 94-163), notice is hereby provided of the following meetings:

A meeting of Subcommittee A of the Industry Advisory Board (IAB) to the International Energy Agency (IEA) will be held on January 23, 1978, at the offices of Exxon Corp., 1251 Avenue of the Americas, New York, N.Y., beginning at 9:30 a.m. The agenda is as follows:

1. Opening remarks.
2. Finalize proposed test guide for Allocation Systems Test-2 (AST-2) including:
(a) Review comments on preliminary guide made by Reporting Companies and National Emergency Sharing Organizations (NESOs).
(b) Review items covered in Exxon telex dated December 22, 1977, to IEA Secretariat.
(c) Handling of base period final consumption.
3. Review Gulf proposal for data to be used by the Industry Supply Advisory Group (ISAG) in AST-2.
4. Review ISAG work procedures in evaluating Phase 2 offers in AST-2.
5. Review ISAG data formats.
6. Review reference materials required by ISAG in AST-2.
7. Future work program.
(a) Plans for NESO and Reporting Company briefing meetings—schedule, agenda, participation and responsibility.
(b) Schedule for other meetings required prior to AST-2.
(c) Tentative schedule of meetings required following AST-2.

A meeting of Subcommittee A of the Industry Advisory Board to the International Energy Agency (IEA) will be held on January 24 and 25, 1978, at the offices of Exxon Corp., 1251 Avenue of the Americas, New York, N.Y., beginning at 9 a.m. on January 24. The agenda is as follows:

1. Opening remarks.
2. Approve proposed final test guide for AST-2.
3. Review items related to AST-2.
(a) Proposed data to be used by ISAG.
(b) Status of government legal clearances required.
(c) ISAG work procedures for evaluation of Phase 2 offers.
(d) ISAG data formats.
(e) Reference material required by ISAG.
(f) Plans for Reporting Company/NESO briefing meetings.
4. Review Secretariat proposal for revised handling of base period final consumption.
5. Future work program.

A meeting of the Industry Advisory Board (IAB) to the International Energy Agency (IEA) will be held on January 26, 1978, at the offices of Mobil Oil Corp., 150 East 42nd Street, New York, N.Y., beginning at 9:30 a.m. The agenda is as follows:

1. Opening remarks by Chairman including:
(a) Communications to and from IEA.
(b) Report on meeting of the Standing Group on Emergency Questions (SEQ) of December 13, 1977.
2. Matters arising from record note of IAB meeting on December 1, 1977.
3. Position of Reporting Companies under:
(a) EEC competition regulations.
(b) U.S. Voluntary Agreement.
4. Report by IEA Secretariat on status of National Emergency Sharing Organizations (NESOs).
5. Report on and discussion of work of Subcommittee A, including:
(a) Spring 1978 Allocations Systems Test, including:
i. Approval of final test guide and associated procedures.
ii. Review of clearances required for data seen by ISAG members.
iii. Review of status of other governmental or legal clearances required for AST-2.
iv. Future work program.
(b) Review of IEA Secretariat's revised proposal for handling base period final consumption data.
6. Report on and discussion of work of Subcommittee C, including:
(a) Extraordinary and additional costs.
(b) Settlement of disputes.
(c) Pricing in an emergency.
(d) Membership of subcommittee.
7. Report on Industry Supply Advisory Group (ISAG).
8. Dates and venues of future meetings of IAB and subcommittees.

As provided in section 252(c)(1)(A)(ii) of the Energy Policy and Conservation Act, these meetings will not be open to the public. As provided by section 209.32 of DOE regulations, IEP requirements and unanticipated procedural delays in processing this notice require the usual seven day notice period to be shortened.

Issued in Washington, D.C., January 18, 1978.

WILLIAM S. HEFFELFINGER,
Director of Administration,
Department of Energy.

[FR Doc. 78-1922 Filed 1-19-78; 8:45 am]

[3128-01]

Economic Regulatory Administration

SYSTEM TO MONITOR NO. 2 (HOME) HEATING OIL PRICES

Notice of Adoption

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Notice of adoption of monitoring system.

SUMMARY: The Economic Regulatory Administration ("ERA") of the Department of Energy ("DOE") hereby announces the adoption of a system to be used by ERA to monitor No. 2 heating oil (also referred to as home heating oil) prices during the current heating season (November 1977 through March 1978). The Energy Information Administration ("EIA") of DOE will conduct a survey of sellers of No. 2 heating oil to obtain information on actual prices and gross margins for the refining, wholesaling and retailing sectors and will publish such information monthly. During the current heating season ERA will review this price information and any other available information on the marketing of No. 2 heating oil to determine whether any further regulatory actions are appropriate. DOE will task a subcommittee of its Fuel Oil Marketing Advisory Committee, comprised of representatives from ERA, industry, consumers and State Energy Offices, to advise and assist ERA in its evaluation of the marketing of No. 2 heating oil during the current heating season.

To assist in the evaluation of price increases to nonultimate consumers at the refining level, an index estimating what price levels would have been allowed under continued price controls will be computed and published monthly. To assist in the evaluation of price increases at the wholesaling and retailing levels, ERA will develop benchmark margins for No. 2 heating oil at the wholesaling and retailing levels which will reflect the marketing costs and allow sufficient margins to further the objectives of the Emergency Petroleum Allocation Act of 1973 (Pub. L. 93-159, "EPAA"). DOE will hold a public evidentiary hearing in August 1978 to consider the need for further regulatory action with regard to No. 2 heating oil in light of all available information. In order to ensure that consumer interests are adequately represented at the hearing, representatives of consumer interests are invited to submit applications to the DOE Office of Administrative Review of the ERA for financial assistance to facilitate their participation.

ADDRESSES: Send complaints to: Middle Distillate Complaint Section, Office of Fuels Regulation, Economic Regulatory Administration, Department of Energy, Room 6222, 2000 M Street NW., Washington, D.C. 20461, Telephone: Washington, D.C. metropolitan area, Alaska, and Hawaii: 202-254-8583, all other areas 800-424-8002. Send petitions for intervenor funding to Office of Administrative Review, Economic Regulatory Administration, Department of Energy, 2000 M Street NW., Washington, D.C. 20461, 202-254-5134.

FOR FURTHER INFORMATION CONTACT:

Ed Vilade (Media Relations), Department of Energy, 12th & Pennsylvania Avenue NW., Room 3104, Washington, D.C. 20461, 202-566-9833.

Gerald P. Emmer (Office of Petroleum Allocation), Economic Regulatory Administration, 2000 M Street NW., Room 2304, Washington, D.C. 20461, 202-254-7200.

Ben McRae (Office of General Counsel), Department of Energy, 12th & Pennsylvania Avenue NW., Room 5134, Washington, D.C. 20461, 202-566-9565.

Paul Burke (Office of Fuels Regulation), Economic Regulatory Administration, 2000 M Street NW., Washington, D.C. 20461, 202-254-5338.

William C. Gillespie (Prices, Costs, and Marketing Branch), Energy Information Administration, 12th and Pennsylvania Avenue NW., Washington, D.C. 20461, 202-566-9307.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Following the July 1, 1976 exemption of middle distillates, including No. 2 heating oil and No. 2-D diesel fuel, from price and allocation controls (41 FR 24518, Junde 16, 1976), the Federal Energy Administration ("FEA") instituted a system which monitored the actual average prices of No. 2 heating oil to ultimate consumers and No. 2-D diesel fuel to ultimate consumers for on-highway use on a national and regional level (41 FR 41155, September 21, 1976; 42 FR 9415, February 16, 1977). Pursuant to a commitment given to Congress for the 1976-77 heating season, FEA compared these prices against indices which FEA had developed as estimates of what the national and regional prices of No. 2 heating oil to ultimate consumers and No. 2-D diesel fuel to ultimate consumers for on-highway use would have been if regulatory controls were still in effect, plus a flexibility factor of two cents per gallon. FEA published both the actual prices and the index prices.

In July and August 1977, FEA held regional and national hearings at which consideration was given to what action, if any, should be undertaken with respect to middle distillate prices. In light of the statements presented at these hearings and written comments received with regard to this matter, FEA determined not to reimpose price controls on middle distillates, but to continue the monitoring of middle distillate prices so that the Agency would possess the information with which to determine what further action, if any, would be appropriate with regard to middle distillates.

On September 30, 1977 (42 FR 54444, October 6, 1977), FEA issued a proposed system to monitor middle distillate prices. Under this system, FEA would have continued to survey the prices of No. 2 heating oil and No. 2-D diesel fuel However, since prior hearings and written comments had indicated that the greatest concern of consumers related to residential prices of No. 2 heating oil, FEA proposed calculation and publication of national and regional indices only for residential sales of No. 2 heating oil. These indices would have been calculated in the same manner as the indices for No. 2 heating oil during the 1976-77 heating season except that only residential prices would have been estimated as though controls had been continued and the calculation mechanism would have been refined to reflect criticisms that had been made of specific components thereof.

On October 17 and 20, 1977, regional hearings on this proposed system were held in Boston, Chicago and New York. On October 19 and 20, 1977, a national hearing was held in Washington, D.C. Written comments were requested by October 21, 1977. Following an analysis of the statements made at the hearings and of the written comments, representatives of DOE (which, effective October 1, 1977, had assumed the functions of FEA) met with representatives of the industry, of consumer groups and of the general public in an effort to identify their concerns more precisely. On December 5, 1977, the DOE Fuel Oil Marketing Advisory Committee submitted its extensive White Paper on the competitive viability of independent fuel oil marketers.

II. DISCUSSION OF COMMENTS

In their comments, retailers contended that the market for retail sales of No. 2 heating oil is highly competitive. Retailers generally opposed any index that reflected DOE's calculation of hypothetically controlled prices at the retail level on the grounds that such a system would threaten the economic viability of many retailers by focusing too much public attention on

retail sales and by forcing the freezing of retail margins at an unrealistically low figure. They stated that the monitoring of actual prices at each market level would give DOE adequate information. In addition, retailers commented unfavorable on the reporting burden which the proposed monitoring system would place on them.

Refiners opposed the proposed monitoring system as unnecessary in light of the performance of the industry during the 1976-77 heating season. Moreover, several difficulties with the calculation of the index contained within the proposed system were asserted. Several refiners also indicated that they would prefer a system which would furnish the public with the average prices charged at different market levels.

Consumer groups generally supported the proposed monitoring system as an improvement over the system employed during the last heating season, especially with regard to its emphasis on residential sales and the use of smaller geographic regions. They indicated preference, however, for a system which would produce information of a more current and localized nature with regard to actual prices and stated that the proposed system would not provide sufficient data for distribution levels other than the retail level. They also contended that an analysis based on the margins of firms at each distribution level would provide a more valid indication of possible abuses than a comparison of actual prices against the proposed index at the retail level.

III. Monitoring System Adopted

Based on all the information available, DOE has determined that a program of continued and expanded monitoring of No. 2 heating oil is needed. Accordingly, DOE will implement a program designed to monitor each level of the No. 2 heating oil distribution system—refining, wholesaling, and retailing. Monitoring will be effectuated through a number of approaches. Whenever any element of this process of gathering and evaluating information on the marketing of No. 2 heating oil produces a finding that regulatory action is necessary to achieve the objectives of the EPAA, DOE will undertake appropriate action. This program for monitoring and evaluating the performance of refiners, wholesalers and retailers with regard to the marketing of No. 2 heating oil has been established only for the 1977-1978 heating season. Any program for future heating seasons will be considered in light of the findings on this heating season.

A. COLLECTION OF DATA

To insure that ERA has sufficient information on the prices charged for No. 2 heating oil so that it might determine what action, if any, is appropriate, EIA will collect information with regard to the prices of No. 2 heating oil through the utilization of the following forms: (1) Form P-302-M-1 which surveys all refiners and all resellers and retailers who derive $50 million or more in annual revenues from the sale of petroleum products to determine the amounts sold and the weighted average selling prices for various petroleum products, including No. 2 heating oil, sold at the wholesaling and retailing levels by the reporting firms; (2) Form P-110-M-1 which surveys all refiners to determine the monthly allocation to covered products of increased costs over the base period for calculating the appropriate cost pass through under the regulations; and (3) Form P-112-M-1 which surveys a scientifically selected sample of firms which sell No. 2 heating oil to determine the cost of purchased product, the selling price and the amounts of No. 2 heating oil sold to various categories of buyers by the reporting firms. Form P-302-M-1 is being revised to require disclosure of the percentage of the volume of total refinery output accounted for by No. 2 heating oil, and more complete information on refiners' non-product costs.

B. PUBLICATION OF DATA

DOE believes that both industry and consumers will find the information reported to DOE valuable in evaluating the performance of market forces in establishing the prices charged for residential sales of No. 2 heating oil. Therefore, after EIA has compiled these data, it will publish a summary of its findings with regard to average sales prices and average gross margins at the refining, wholesaling, and retailing levels. This summary will enable consumers to determine the degree to which any increases in price reflect changes in product costs or increases in gross margins. (In any analysis based on gross margins, it should be recognized that average gross margins do not reflect average net profits of said firms, since a firm's average gross margin generally includes various cost elements, such as transportation, storage, wages, insurance, interest expenses, services, etc.) Publication of the summary will necessarily occur two months after the month to which the findings pertain, to allow for the reporting, verification and compilation of the data.

For sales of No. 2 heating oil to non-ultimate consumers by refiners, DOE will publish for the nation and each DOE region (1) the actual average price, (2) the range of prices, and (3) the average gross margin (i.e., the weighted average of the difference between selling prices for sales to non-ultimate consumers and the weighted average cost of crude oil and purchased product for each refiner; Appendix I contains a more detailed explanation of the calculation of this gross margin).

For sales of No. 2 heating oil to non-ultimate consumers (i.e., resellers, retailers, and reseller/retailers) by non-refiners, DOE will publish for the nation and each DOE region (1) actual average prices, (2) the range of prices, and (3) the average gross margin (i.e., the weighted average of the difference between selling prices for sales to non-ultimate consumers and the weighted average cost of purchased product for each nonrefiner; Appendix II contains a more detailed explanation of the calculation of this gross margin).

For residential sales of No. 2 heating oil, DOE will publish for the nation, each DOE region and those states with significant sales of residential No. 2 heating oil (a list of which appears in Appendix V) (1) the actual average prices, (2) the range of prices, and (3) the average gross margin for nonrefiner firms selling to residential users (i.e., the weighted average of the difference between the residential selling price and the weighted average cost of purchased product for each nonrefiner; Appendix III contains a more detailed explanation of the calculation of this gross margin).

DOE recognizes the value of information of a more current and localized nature regarding actual average prices for residential sales of No. 2 heating oil than that which DOE will collect. To that end, DOE has established a pilot program assisting the New England States in pursuing alternative methods of monitoring residential heating oil prices on either a weekly or biweekly basis during the current heating season. These efforts are designed to identify and test methods to be utilized by State Energy Offices in developing price monitoring systems to meet their own state needs. States participating include Vermont, Connecticut, Massachusetts, Rhode Island, New Hampshire, and Maine.

C. EVALUATION OF REFINING, WHOLESALING AND RETAILING SECTORS

1. *Refining sector.* DOE will evaluate the available information on prices charged by refiners for sales of No. 2 heating oil to non-ultimate consumers so that possible unjustified price increases can be identified and appropriate action taken. To aid in this evaluation of prices at the refining level for sales to non-ultimate consumers, DOE will establish an index for the nation and each DOE region which will estimate what price levels would have been allowed under the provisions of 10 CFR 212.83 if price controls had been continued. The indices will be based on June 1977 instead of May 1973) prices adjusted to reflect

changes in crude oil, non-product and purchased product costs, computed in the same manner as in 10 CFR 212.83, plus cost increases not recouped between June 1977 and the month to which the indices refer. (Appendix IV contains a more detailed explanation of these indices.) DOE will compare against these indices the corresponding actual average prices for sales of No. 2 heating oil to non-ultimate consumers by refiners. In order to assist the industry and the public in evaluating the published information on refiner prices, DOE will publish on a national and regional basis the index prices for refiner sales of No. 2 heating oil.

The Office of Fuels Regulation of ERA will analyze refiner prices and gross margins throughout the current heating season, and will present this analysis to a subcommittee of the Fuel Oil Marketing Committee ("Subcommittee"), comprised of representatives of industry, consumer groups, state energy offices, and DOE, established to advise the Office of Fuels Regulation on the evaluation of the marketing of No. 2 heating oil during the current heating season. The Subcommittee will assist the Office of Fuels Regulation in the analysis of refiner prices and gross margins throughout the current heating season. DOE will make available data from its present refinery audit program, and ERA Office of Enforcement or the Office of Special Counsel for Compliance may initiate refinery audits either on their own initiative, or in response to requests by the Subcommittee, State Energy Offices or complaints to DOE.

2. *Wholesaling and retailing sectors.* Section 4(b)(1) of the EPAA sets forth the objectives to be achieved with regard to the allocation and pricing of petroleum products. In order to establish more clearly whether these objectives are being achieved with regard to No. 2 heating oil, the Office of Fuels Regulation will study the marketing of No. 2 heating oil by wholesalers and retailers during the current and prior heating seasons so that trends within the heating oil industry can be identified and their impact on the goals of the EPAA can be analyzed. Inasmuch as the policy stated in section 4(b)(1) of the EPAA contemplates more than equitable price levels, such study will include not only the causes of any price increases for No. 2 heating oil, but also the nature and intensity of competition in the heating oil market and the economic viability of various sectors of that market. Copies of the DOE Fuel Oil Marketing Advisory Committee White Paper analyzing the competitive viability of independent marketers will be available to the public through the Office of Fuels Regulation.

Although this study by the Office of Fuels Regulation will yield a comprehensive analysis of the factors which influence the marketing of No. 2 heating oil by wholesalers and retailers, DOE believes that the wholesale and retail marketing of No. 2 heating oil should be evaluated on a continuous basis throughout the current heating season so that appropriate regulatory actions can be considered on a timely basis. The effectiveness of any action by DOE during the heating season will be dependent on the length of time necessary for an identification and evaluation of indicators of whether the objectives of the EPAA are being achieved. If the marketing of No. 2 heating oil is subject to an event, such as an embargo on foreign crude oil, resulting in a large increase in prices charged for No. 2 heating oil, which is not justified by corresponding increases in product and non-product costs, DOE will immediately undertake the necessary regulatory response, including reimposition of controls. With regard to events for which the causes and effects are not so clear, DOE will not undertake regulatory action without the verification and evaluation of data concerning those events.

The information collected and verified by EIA with regard to prices charged for No. 2 heating oil may indicate possible frustration of the objectives of the EPAA. The timely utilization of this information, however, requires fair benchmarks against which the information can be compared. Therefore, the Office of Fuels Regulation will develop benchmark margins at the wholesaling and retailing levels for the nation and DOE regions for each month of the current heating season. Development of these benchmark margins will seek to accommodate the recoupment of all increased product and non-product costs and allow margins appropriate to the objectives of the EPAA, including preserving the competitive viability of independent marketers.

To insure a balanced analysis of each month's information, the Office of Fuels Regulation will present to the Subcommittee, by the fifteenth day of the month in which EIA publishes survey data on the price of No. 2 heating oil during a particular month of the current heating season, the following information: (1) the initial analysis of published data; (2) identification of distribution levels and/or regions where the data indicate potential unreasonable margin increases; (3) preliminary benchmark margins utilized in its analysis; and (4) the factors included in determining such benchmark margins. The Subcommittee will convene to consider this presentation from the Office of Fuels Regulation. ERA will choose a disinterested mediator who shall guide the discussion so that proper consideration shall be given to the views of each Subcommittee member and qualified nonmember with regard to the cost elements to be considered in determining appropriate benchmrks and the relationship between such benchmarks and actual surveyed gross margins. The Subcommittee will then forward to the Office of Fuels Regulation its recommendations with respect to the reasonableness of gross margins for any particular distribution level or region of the nation. Moreover, the Subcommittee may suggest to the Office of Fuels Regulation the need for audits, conferences, or hearings to clarify discrepancies between actual average prices and benchmarks or to determine the actual wholesaler or retailer costs with regard to a specific item in the benchmark calculation.

After the conclusion of the Subcommittee meeting, the Office of Fuels Regulation will hold a public hearing to allow public comment on the reasonableness of No. 2 heating oil prices and the degree of competition and the viability of the retailing and wholesaling sectors, using the most recently published survey data by EIA on prices of No. 2 heating oil as the basis for such hearings. It is anticipated that the Subcommittee or members thereof may participate in these hearings.

Based on the results of the Subcommittee meeting, public hearings, analyses undertaken as a result of Subcommittee recommendations, and other action undertaken by DOE, the Office of Fuels Regulation will make and publish reports for each month of the heating season. These reports will detail the current status of the development of procedures to construct benchmarks for analyzing the reasonableness of No. 2 heating oil prices at the retailing and wholesaling levels and set forth actual average prices and actual average gross margins as well as benchmark margins for the latest month with regard to which EIA has published information on prices of No. 2 heating oil. A final report will be made on or before June 30, 1978, detailing procedures for the calculations of benchmarks for No. 2 heating oil at the wholesaling and retailing levels and containing benchmarks for each month of the current heating season based upon this procedure.

Moreover, DOE will request the Office of Enforcement to conduct audits of individual wholesalers and retailers in response to requests by the Subcommittee, State Energy Offices, or a significant number of complaints against a particular firm. DOE may also select firms for audit on a basis independent of their inclusion or exclusion for the list of firms which must file Form P-112-M-1.

If an audit discloses that a firm has a gross margin substantially in excess

of its historical gross margin and the gross margin currently employed in calculating the benchmark for that particular distribution level or region, DOE will promptly schedule a conference with that firm to determine whether the firm is charging excessive prices. DOE will attempt to negotiate a remedial course of action with respect to any entity which is found to be charging excessive prices. Moreover, as a result of such audits, DOE may undertake audits and hold hearings concerning the distribution level and/or region or particular area which contains the firm(s) potentially charging excessive prices to determine whether controls should be reimposed upon the particular distribution level and/or region.

3. *Complaints from the public.* To insure the achievement of all of the objectives of EPAA, DOE hereby establishes a mechanism to receive and evaluate complaints from individuals, organizations or State Energy Offices concerning the marketing of No. 2 heating oil. Complaints with respect to prices charged by refiners, wholesalers and retailers should be addressed to: Middle Distillate Complaint Section, Office of Fuels Regulation, Economic Regulatory Administration, Department of Energy, Room 6222, 2000 M Street NW., Washington, D.C. 20461; Telephone: Washington, D.C. metropolitan area, Alaska and Hawaii, 202-254-8583; all other areas, 800-424-8002.

4. *Evidentiary Hearing.* In July 1978, the Office of Fuels Regulation will publish its preliminary findings regarding the reasonableness of No. 2 heating oil prices during the 1977-78 heating season. In August 1978, the Office of Administrative Review will hold an evidentiary hearing to evaluate the performance of all levels of distribution of the heating oil industry and the need for any further regulatory action. The preliminary findings of the study of the marketing of No. 2 heating oil during the current and prior heating seasons by the Office of Fuels Regulation, the June report of the Office of Fuels Regulation on benchmarks for the 1977-78 heating season, and any other information obtained during the 1977-78 heating season will be considered at this hearing. The hearing will be conducted in a manner designed to test the validity of all data and conclusions introduced therein, including cross examination and rebuttal. Petitions which request specific administrative action by DOE with regard to the manner in which the evidentiary hearing will be conducted, or any other matter which bears on the hearing, should be filed with the Office of Administrative Review. With regard to the evaluation of the need for further regulatory action, actual average gross margins in excess of the corresponding benchmarks contained in the final report will create the presumption of a need for further regulatory action. After consideration of the testimony, written comments and other available information, the Office of Administrative Review will transmit its findings to the ERA for a determination by the Administrator as to what further regulatory action, if any, is needed.

5. *Intervenor funding.* In order to ensure that consumer interests are adequately represented at the evidentiary hearing, any non-profit organization whose principal function involves the furtherance of consumer interests may submit an application for financial assistance to the Office of Administrative Review. An application to receive financial assistance to enable the organization to participate in the hearing should be filed in the form of a Petition for Special Redress. Each petition of this type should contain a detailed description of the purposes and functions of the organization which requests financial assistance and should indicate whether the organization operates on a non-profit basis. The Petition should also contain a description of the type of information which the petitioner plans to present at the hearing and the reasons why the petitioner's involvement in the hearing will substantially contribute to a full and fair determination of the complex and important issues to be considered in that proceeding. A budget which itemizes the expenses that the petitioner projects it will incur in order to present its position to the DOE should also be included. Finally, the Petition should be accompanied by documentation which establishes that unless the requested financial assistance is provided the organization involved will be unable to bear the costs of participating in the proceedings. The Petition must be filed with the Office of Administrative Review on or before February 21, 1978. The following Decision and Orders may be consulted for guidance as to the principles which have been applied in the past to applications for financial assistance of this type. *Consumers Union of United States, Inc.*, 5 FEA ¶ 87,014 (February 18, 1977), Supplemental Order, 5 FEA ¶87,014 (March 17, 1977); *Consumer Federation of America*, 5 FEA ¶ 87,034 (April 15, 1977), 5 FEA ¶ 87,040 (May 6, 1977), 5 FEA ¶ 87,051 (June 10, 1977).

D. REMEDIAL ACTIONS

If the analysis of the information supplied by any element of the monitoring system indicates that some price increases for No. 2 heating oil might be unjustified, ERA will undertake appropriate actions with regard to No. 2 heating oil which may include:

1. *Audits.* DOE may, at any time, conduct audits of firms to obtain more detailed information than the monitoring system provides. Firms will be selected for auditing on a basis independent of their inclusion or exclusion from the list of firms which must file Form EIA-9. The information obtained from these audits will be utilized to develop a more comprehensive background on the various factors which influence the price levels for No. 2 heating oil.

In order to have the capability to pursue audits on a timely basis, DOE will complete standby audit plans and designate standby audit groups which will allow such a "quick reaction" capability.

2. *Hearings.* ERA will hold public hearings throughout the current heating season to examine the factors which influence price levels for home heating oil. Such hearings may focus on the entire industry or on a particular market level and/or region. If appropriate, public hearings and audits will be coordinated to insure the inclusion of audit findings in the hearing records. Moreover, no later than August 1978, ERA will hold an evidentiary hearing to evaluate the performance of the industry during the 1977-78 heating season in light of the objectives of section 4(b)(1) of the EPAA and the effectiveness of the monitoring system.

3. *Further Measures.* DOE recognizes that there are other intermediate actions which may be more effective than audits or hearings. If there are significant price increases at any market and/or regional level, ERA may suggest price restraint on a voluntary basis for the appropriate sectors of the industry concerned. If it appears that the degree of voluntary price restraint is insufficient to achieve the goals of the EPAA, DOE will consider reimposition of controls.

4. *Reimposition of Controls.* Unless there is a strong showing that immediate reimposition of partial or complete controls is required to achieve the objectives of the EPAA during the current heating season, taking into account the possible dislocations that might result, ERA would not consider reimposition of controls until possibly the following heating season. Furthermore, ERA may reimpose controls on the entire industry or only on a particular market level and/or region.

In this regard, to the extent that market forces may in some instances be inadequate to restrain prices, ERA believes that individual firms should not be encouraged to charge prices that reflect excessive margins in the belief that excessive revenues obtained during a period of decontrol would be permitted to be retained following the reimposition of controls. Accordingly, should reimposition of controls

become necessary, ERA may require such firms to demonstrate that prices charged during the period of decontrol did not reflect excessive margins. To the extent that firms are found to have charged prices that reflect excessive margins, ERA may (following the reimposition of controls) require such firms to make adjustments to prices to reflect revenues received during the period of decontrol, which are found to have resulted from prices unreasonably in excess of those sufficient to insure the survival of the firm as an economically viable and competitive entity, and reflective of a competitive market place.

Issued in Washington, D.C., January 13, 1978.

JOHN F. O'LEARY.
Deputy Secretary,
Department of Energy.

APPENDIX I.—GROSS MARGIN FOR REFINERS' SALES TO NONULTIMATE CONSUMERS

$$M_n^t = \frac{\sum_{i=1}^{m} N_{ni}^t \left(P_{ni}^t - q_{pi}^t C_{pi}^t - [1-q_{pi}^t] C_{ci}^t\right)}{\sum_{i=1}^{m} N_i^t}$$

Where:

M_n^t=Refiners' average gross margin for sales of No. 2 heating oil to nonultimate consumers.

P_{ni}^t=Average selling price for the i^{th} refiner in month t for all sales of No. 2 heating oil to nonultimate consumers reported on Form EIA-9.

C_{ci}^t=Average per unit cost of crude oil purchased by the i^{th} refiner in month t reported on Form P-110.

q_{pi}^t=Ratio of purchases of No. 2 heating oil to total sales of No. 2 heating oil by the i^{th} refiner in month t. If purchases are greater than sales, then $q_{pi}^t=1$.

C_{pi}^t=Average per unit cost of No. 2 heating oil purchased by the i^{th} refiner in month t reported on Form EIA-9.

N_i^t=Volume of sales of No. 2 heating oil to nonultimate consumers in month t by the i^{th} refiner as reported on Form EIA-9.

m=Number of refiners with sales to nonultimate consumers as reported on Form EIA-9.

This formula refers to the national average gross margin for sales of refiners to nonultimate consumers. Regional margins would be calculated by using average prices derived for the given region.

APPENDIX II—GROSS MARGIN FOR WHOLESALERS' SALES TO NONULTIMATE COMSUMERS

$$M_w^t = \frac{\sum_{i=1}^{n} W_i^t \left(P_{wi}^t - C_{pi}^t\right)}{\sum_{i=1}^{n} W_i^t}$$

where:

M_w^t=Wholesalers' (i.e., nonrefiners) average gross margin for sales of No. 2 heating oil to nonultimate consumers in month t.

P_{wi}^t=Average selling price for all sales of No. 2 heating oil by the i^{th} nonrefiner to nonultimate consumers in month t as reported on Form EIA-9.

C_{pi}^t=Average per unit cost of No. 2 heating oil purchased by the i^{th} nonrefiner in month t as reported on Form EIA-9.

W_i^t=Volume of sales of No. 2 heating oil to nonultimate consumers in month t by the i^{th} nonrefiner as reported on Form EIA-9.

n=Number of nonrefiners with sales of No. 2 heating oil to nonultimate consumers reporting Form EIA-9.

This formula refers to the national average gross margin for sales by nonrefiners to nonultimate consumers. Regional margins would be calculated by using data only for the given region.

APPENDIX III.—NONREFINERS' GROSS MARGIN FOR RESIDENTIAL SALES OF NO. 2 HEATING OIL

$$M_r^t = \frac{\sum_{i=1}^{n} R_i^t \left(P_{ri}^t - C_{pi}^t\right)}{\sum_{i=1}^{n} R_i^t}$$

Where:

M_r^t=Average gross margin for residential sales of No. 2 heating oil in month t by nonrefiners.

P_{ri}^t=Average selling price in month t for all residential sales of No. 2 heating oil reported by the i^{th} nonrefiner on Form EIA-9.

C_{pi}^t=Average per unit cost of No. 2 heating oil purchased in month t reported by the i^{th} nonrefiner on Form EIA-9.

R_i^t=Volume of sales of No. 2 heating oil to residential users in month t reported by the i^{th} nonrefiner of Form EIA-9.

n=Number of nonrefiner firms with sales of No. 2 heating oil to residential users reporting on Form EIA-9.

This formula refers to the national average gross margin for sales to residential consumers by nonrefiners. Regional margins would be calculated by using data only for the given region.

APPENDIX IV.—GUIDELINE FOR REFINERS' PRICE FOR SALES OF NO. 2 HEATING OIL TO NONULTIMATE CONSUMERS

$$\text{Guideline Price} = \text{June Wholesale Price} + \text{Increased Cost (c/gal)} + \text{Accumulated Unrecouped Increased Costs}$$

$$P_a^t = P_a^o + \frac{d^t + B^t}{S^t}$$

Where:

P_a^o=Actual weighted average wholesale price of refiners in June 1977, for No. 2 heating oil, derived from form EIA-9. Only those refiners reporting the form EIA-9 will be included (nearly all refiners that sell No. 2 heating oil report form EIA-9). The wholesale price is the weighted average price for nonultimate consumer sales, which includes rack, delivered, and bulk sales.

P^t=Guideline wholesale price of refiners in month t for sales of No. 2 heating oil to nonultimate consumers.

S^t=Volume of sales of No. 2 heating oil sold by refiners in month t to nonultimate consumers.

d^t=Increased costs over June 1977 in month t allocated by refiners to sales of No. 2 heating oil to nonultimate consumers, computed as follows:

$$\text{Increased Costs} = \text{Percentage of Wholesale Sales Attributable to No. 2 Heating Oil} \left(\text{Changes in crude costs} + \text{Changes in nonproduct Costs}\right) + \text{Changes in purchased product costs}$$

$$d^t = \frac{S^t}{V^t}\left(Q^{t-1}\left(\frac{C^{t-1}}{Q^{t-1}} - \frac{C^o}{Q^o}\right) + \left(\frac{V_c^{t-1}}{V^{t-1}} N_c^{t-1} - \frac{V_c^o}{V^o} N_c^o\right)\right) + q^{t-1}\left(\frac{C^{t-1}}{Q^{t-1}} - \frac{C^o}{Q^o}\right)$$

Where:

S^t=Volume of sales of No. 2 heating oil by refiners to nonultimate consumers in month t, reported on form EIA-9.

V^t=Total volume of sales of refined products in month t, reported on form P-302.

Q^{t-1}=Volume of crude oil purchased in month $t-1$, reported on form P-110.

Q^o=Volume of crude oil purchased by refiners in June 1977, reported on form P-110.

C^{t-1}=Total cost of crude oil purchased by refiners in month $t-1$, reported on form P-110.

C^o=Total cost of crude oil purchased by refiners in June 1977, reported on form P-110.

V^{t-1}=Volume of sales of all refined products in month $t-1$, reported on form P-302.

V_c^{t-1}=Volume of sales of controlled products in month $t-1$, reported on form P-302.

V^o=Volume of sales of all refined products in June reported on form P-302.

V_c^o=Volume of sales for controlled products in June 1977 reported on form P-302.

N_c^{t-1}=Increased nonproduct costs for controlled products in month $t-1$, reported on form P-110.

N_c^o=Increased nonproduct costs for controlled products in June 1977, reported on form P-110.

q^{t-1}=Volume of No. 2 heating oil purchased by refiners in month $t-1$, reported on form EIA-9.

q^o=Volume of No. 2 heating oil purchased by refiners in June 1977, reported on form EIA-9.

c^{t-1}=Total cost of No. 2 heating oil purchased by refiners in month $t-1$, reported on form EIA-9.

c^o=Total cost of No. 2 heating oil purchased by refiners in June 1977, reported on form EIA-9.

B^t=Accumulated unrecouped costs applicable to time period t.

Accumulated unrecouped increased costs=Sum of increases in costs attributable to No. 2 heating oil—prior to current month. Sum of increases of revenue obtained from sales of No. 2 heating oil prior to current month.

$$B^t = \sum_{i=o}^{t-1} [d^i - S^i (P_a^i - P_a^o)]$$

Where:

d^t=Increased costs over June 1977 incurred by refiners allocated to sales of No. 2 heating oil to nonultimate consumers in month t.

s^t=Sales of No. 2 heating oil by refiners to nonultimate consumers in month t.

B^t=Accumulated unrecouped costs applicable to time period t.

$P_a{}^t$=Actual weighted average price of refiners in month t for sales of No. 2 heating oil to nonultimate consumers derived from form EIA-9.

$P_a{}^o$=Actual weighted average price of refiners in June 1977 for sales of No. 2 heating oil to nonultimate consumers, derived from form EIA-9.

Symbols used in the formula refer to time periods as follows:

t—Refers to each month accumulated in the summation formula for unrecouped costs.
o—Refers to June 1977.
t—Refers to the month for which the selling price is being computed.
$t-1$—Refers to the month one month before the month for which the selling price is being computed.

Subscripts used in the formulas refer to the following:

a—Refers to actual prices.
c—Refers to controlled products.
r—Refers to residential prices and sales volumes.

These formulas calculate the guideline price for the national average.

The formulas used to calculate the guideline prices for the DOE regions are the same except the June 1977 national price to nonultimate consumers ($P_a{}^o$) would be replaced by average prices to nonultimate consumers for the regions.

These formulas are not entirely consistent with the calculations under 10 CFR 212.83 in that allocations are based on sales of No. 2 heating oil rather than production of No. 2 heating oil, refiners' nonproduct cost increases for No. 2 heating oil are estimated based on refiners' nonproduct cost increases for controlled products reported to the DOE, and the base period is June 1977 rather than May 1973.

The revised form P-302-M-1 will provide information as to the production of No. 2 heating oil and refiners' total nonproduct costs. When this information becomes available, the formulas will be adjusted to make allocations on the basis of production and revised nonproduct cost estimates. The estimated prices for prior months will be recalculated to reflect allocation on the basis of production and revised nonproduct estimates.

APPENDIX V

States with statistically valid residential heating oil survey prices

State	State code	DOE region
Alaska	AK	10
Connecticut	CT	1
Delaware	DE	3
District of Columbia	DC	3
Idaho	ID	10
Illinois	IL	5
Indiana	IN	5

APPENDIX V—Continued

States with statistically valid residential heating oil survey prices

State	State code	DOE region
Maine	ME	1
Maryland	MD	3
Massachusetts	MA	1
Michigan	MI	5
Minnesota	MN	5
New Hampshire	NH	1
New Jersey	NJ	2
New York	NY	2
Ohio	OH	5
Oregon	OR	10
Pennsylvania	PA	3
Rhode Island	RI	1
Vermont	VT	1
Virginia	VA	3
Washington	WA	10
West Virginia	WV	3
Wisconsin	WI	5

[FR Doc. 78-1453 Filed 1-16-78; 12:46 pm]

[6560-01]

ENVIRONMENTAL PROTECTION AGENCY

[FRL 846-2]

RECEIPT OF ENVIRONMENTAL IMPACT STATEMENTS

Pursuant to the President's Reorganization Plan No. 1, the Environmental Protection Agency is the official recipient for environmental impact statements (EIS) and is required to publish the availability of each EIS received weekly. The following is a list of environmental impact statements received by the Environmental Protection Agency from January 9 through January 13, 1978. The date of receipt for each statement is noted in the statement summary. Under the Guidelines of the Council on Environmental Quality the minimum period for public review and comment on draft environmental statements is forty-five (45) days from this FEDERAL REGISTER notice of availability (March 6, 1978). The thirty (30) day period for each final statement begins on the day the statement is made available to the Environmental Protection Agency and to commenting parties.

Copies of individual statements are available for review from the originating agency. Back copies are also available at 10 cents per page from the Environmental Law Institute, 1346 Connecticut Avenue, Washington, D.C. 20036.

Dated: January 17, 1978.

PETER L. COOK,
Acting Director,
Office of Federal Activities.

DEPARTMENT OF AGRICULTURE

Contact: Mr. Brrett Deck, Coordinator, Environmental Quality Activities, U.S. Department of Agriculture, Room 307A, Washington, D.C. 20250, 202-447-6827.

FOREST SERVICE

Draft

Cooperative Gypsy Moth Suppression Program, 1978, January 8: This draft EIS presents the selection criteria for regulatory programs and discusses each viable alternative which may be considered for state-federal cooperative projects in suppressing gypsy moth infestations in the Northeastern United States. Several alternative plans are suggested, utilizing the aerial application of carbaryl, trichlorfon, diflubenzuron, and acephate. Adverse impacts include the possible adverse effect of diflubenzuron upon aquatic organisms and carbaryl upon honeybees. (ELR Order No. 80019.)

Tahoe NF Timber Management Plan, several California counties, January 11: Proposed is a revision of the existing Timber Management Plan which establishes a timber harvesting level and schedule for the Tahoe National Forest, Calif., for the next decade beginning FY 1978. Six alternatives are outlined with a yield of between 2,000 million board feet to 1,000 million board feet per decade. Adverse impacts include a possible effect upon water and soil quality, including some erosion; changes in fish and wildlife habitat; and changes in the vegetative structure, microclimate and plant relationships. (ELR Order No. 80032.)

Salt Lake Planning Unit, several Utah counties, January 13: Proposed is a land management plan for the Salt Lake Planning Unit, an area encompassing 138,000 acres of National Forest and other lands in the State of Utah. Four alternative plans outline resource management in areas such as air, water, recreation, wildlife, range forage, timber, insect and disease control, and mineral development. The proposed plan calls for 95 percent of the Unit to remain relatively undisturbed except for trail construction, ski area expansion, and people-use associated with recreation activities. (ELR Order No. 80035.)

Final

Beaver Creek Wilderness, Mineral Prospecting, McCreary County, Ky., January 11: Proposed is the conditional approval, with prescribed modifications, of a prospecting plan submitted by the Greenwood Land and Mining Co. of Parkers Lake, Ky. The Company claims to own mineral rights beneath and around the Beaver Creek Wilderness, and proposes to use motorized equipment to prospect for coal at 22 sites. It also intends to deep and surface mine in the Wilderness, based on information gathered by prospecting. Approximately 11 acres of land surface will be cleared, excavated, regraded and revegetated at 17 prospecting sites within the Wilderness. Comments made by: USDA, COE, DOI, EPA, and State and local agencies. (ELR Order No. 80025.)

Supplement

Naches-Tieton-White River (S-1), several Washington counties, January 13: This statement supplements a draft EIS originally filed with CEQ in August 1977. The Forest Service has subsequently re-inventoried roadless and undeveloped areas within the planning unit and has added 84,970 acres for a total of 375,750 acres under consideration for wilderness study. (ELR Order No. 80038.)

DEPARTMENT OF DEFENSE, ARMY CORPS

Contact: Dr. C. Grant Ash, Office of Environmental Policy Department, Attn: DAEN-CWR-P, Office of the Chief of Engineers,

APPENDIX M

SECTION 205 GUIDELINES FOR CONSUMER GROUPS IN STATE PUC PROCEEDINGS

tion of projects designed to increase production from any such reservoir, and where such investments were based upon the mistaken assumption that crude oil produced and sold from such a reservoir could be sold at prices above the upper tier ceiling price, and where producers have invested additional funds which cannot adequately be recovered, even by the recertification permitted by this Ruling, FEA will consider relief, on a case-by-case basis through the FEA Office of Exceptions and Appeals, on grounds of gross inequity or serious hardship.

REINSTITUTION OF SUPPLIER/PURCHASER RELATIONSHIPS

In situations similar to one of the examples above, a producer may have erroneously certified production from one or more reservoir-properties as stripper well crude oil and, on that basis, terminated a supplier/purchaser relationship with the original purchaser under 10 CFR 211.63(d)(1)(ii) or (iii). Such a termination would be improper if based solely on what the producer believed to be the status of the reservoir as a stripper well property. Accordingly, unless the termination was otherwise permitted by the provisions of § 211.63(d), the obligation imposed on the supplier by its supplier/purchaser relationship under § 211.63 would require prompt resumption of the supply relationship with the original purchaser.

Issued in Washington, D.C., June 30, 1977.

ERIC J. FYGI,
Acting General Counsel,
Federal Energy Administration.

[FR Doc.77-19398 Filed 7-7-77;8:45 am]

PART 460—GRANTS FOR OFFICES OF CONSUMER SERVICES

Establishment of Guidelines

AGENCY: Federal Energy Administration.

ACTION: Final rule.

SUMMARY: The Federal Energy Administration hereby establishes guidelines for a program of discretionary grants for the establishment or operation of State offices of consumer services to assist the representation of consumer interests before electric utility regulatory commissions. Any State, the District of Columbia, any territory or possession of the United States and the Tennessee Valley Authority are eligible to apply for a grant under this program. Grants will be awarded on a competitive basis to a limited number of States.

DATES: The effective date is July 3, 1977. A State must submit an application to FEA on or before August 26, 1977.

FOR FURTHER INFORMATION CONTACT:

Ms. Nancy Tate Gavin, Office of Conservation, Room 6451, Federal Energy Administration, Washington, D.C. 20461, 202-254-9700.

SUPPLEMENTARY INFORMATION:

A. INTRODUCTION

With the issuance of this final rule, the Federal Energy Administration (FEA) amends Chapter II of Title 10, Code of Federal Regulations, to establish Part 460 which provides for a program of grants for offices of consumer services, pursuant to Section 205 (42 U.S.C. 6807) of the Energy Conservation and Production Act (Act), Pub. L. 94-385, 90 Stat. 1125 et seq., 42 U.S.C. 6801 et seq.

The purpose of this program is to establish or operate a State office of consumer services (Office) to support consumer representation in proceedings before an electric utility regulatory commission (commission). A consumer, for the purpose of the guidelines, is any person who buys electricity for purposes other than resale. Congress has appropriated $2 million for this program in the current fiscal year. For this reason, FEA can only fund programs in a limited number of States if each grantee is to have a reasonable likelihood of providing effective assistance for consumers.

On May 16, 1977, FEA published an advance notice of program guidelines (advance notice), 42 FR 24768, which described the grant program for State Offices being developed by FEA and solicited comments from interested persons. FEA received and considered thirty-nine substantive comments, most of which endorsed the basic concepts and goals of the program. These comments are summarized and discussed below.

Pursuant to Section 553(a)(2) of the Administrative Procedure Act, 5 U.S.C. 553, exempting grant programs from the requirement of publishing a proposed rule, FEA is publishing this final rule because it considers that consumer interests will best be served by making program funds available as soon as practicable.

In developing and implementing this program, FEA considered, among other resources, the following materials: law review articles and reports including "Report to the Nuclear Regulatory Commission: Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings," prepared by Boasberg, Hewes, Klores and Kass ("The Boasberg Report") 1976; Federal Regulation and Regulatory Reform, Report by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce ("Subcommittee Report") (1976); Crampton, "The Why, Where and How of Broadened Public Participation in the Administrative Process," 60 Geo. L.J. 525 (1972); Gelhorn, "Public Participation in Administrative Proceedings," 81 Yale L.J. 359 (1972); Bloch and Stein, "The Public Counsel Concept in Practice: The Rail Reorganization Act of 1973," 16 William and Mary L. Rev. 215 (1975); Note, "Federal Agency Assistance of Impecunious Intervenors," 88 Harv. L. Rev. 1815 (1975); Murphy and Hoffman, "Current Models for Improving Public Representation in the Administrative Process," 28 Ad. L. Rev. 391 (1976); Lenny, "The Case for Funding Citizen Participation in the Administrative Process," id, at 483; Paglin and Shor, "Public Interest Representation," 37 Pub. Ad. Rev. 140 (1977); proposed legislation and Federal agency regulations providing for payment of attorneys' fees and other assistance to participants in agency proceedings; and the standards applied by FEA and other Federal agencies to determine whether they could properly reimburse intervenors in agency proceedings in the absence of a statutory directive to the agency concerned to make financial assistance available for this purpose.

B. ELEMENTS OF THE PROGRAM

The program is a discretionary grant program whereby grants will be awarded to a State which has been selected by FEA on a competitive basis. No State shall receive a grant in excess of $200,000.

1. *Award of Funds.*—In Section 460.15, the guidelines prescribe criteria FEA will use to evaluate an application submitted by a State. Two categories of criteria will be evaluated, the quality and feasibility of a State's proposed Office and a State's need for an Office. The advance notice described a rating system with a total of 100 points under which a State could receive up to 55 points for quality and feasibility and 45 points for need.

FEA received a number of comments on this evaluation procedure. Two comments objected to the rating system on the ground that a State's need should be the primary factor in evaluating an application. Two others maintained that funding should be allocated only to States whose applications clearly demonstrated that a proposed Office would effectively advocate rate reform, with need relegated to a secondary role. Four comments found the proposed criteria satisfactory.

The guidelines reflect FEA's consideration of these comments and provide that, in evaluating an application, feasibility and need will be given equal weight.

The advance notice stated that no grant would be awarded in excess of $250,000. Thirteen comments addressed the appropriateness of this ceiling. Six approved of the ceiling; five suggested that it be lowered in order to increase the number of States able to participate in the program; one found the ceiling much too low; and one recommended against imposing a ceiling. The guidelines reflect FEA's attempt to strike a balance between these competing views by lowering the grant award ceiling to $200,000.

2. *Statutory Requirements.*—Pursuant to Section 205 of the Act, the guidelines, in Section 460.12(a), require that an Office be empowered to carry out three functions and be operated independently of a commission. In its application, as prescribed by § 460.11(b)(2), a State must provide a legal opinion describing the manner in which it meets,

or will in a timely manner satisfy, these requirements. Within six months of the date of grant award, an Office must be empowered and authorized under local law—(A) to make general factual assessments of the impact of proposed electric utility rate changes and other proposed regulatory actions upon consumers; (B) to provide technical or financial assistance to eligible consumer groups in the presentation of their positions in a commission proceeding; and (C) to advocate on its own behalf a position which it determines represents the position most advantageous to consumers, taking into account developments in electric utiilty rate design reform.

The advance notice provided that an Office must be authorized by State law to unertake these three functions. One comment expressed concern that the proposed language implied that a State legislature had to adopt enabling legislation to empower an Office to carry out these functions.

To clarify this point, the guidelines provide that an Office must be empowered and authorized to perform the three functions under local law, which is broadly defined as the laws in force and effect in a State and includes the statutes, rules and regulations, judicial decisions, administrative findings and determinations and executive orders and proclamations, as enforced by the State and its judicial system. This provision negates any implication that FEA requires specific legislative or executive act to establish an Office.

In addition, an application must demonstrate that the proposed Office is independent of any commission within the State by showing that no commission has direct control over the Office's budget or its disbursement of funds; that no commission has authority over the Office's personnel; and that no employees of the proposed Office perform any services for, report to, or in any way act on behalf of, a commission.

Eight comments responded to the proposed criteria for determining whether an Office is independent. Four endorsed them; two advocated even more stringent guarantees of independence; while another, finding the criteria unduly restrictive, suggested that an Office that could not meet the test should nonetheless be permitted to demonstrate its actual independence. Another comment proposed that a State should be required to submit sworn affidavits of the chief executive officer of a commission and the head of an Office attesting to the latter's independence.

FEA considers that the requirements described in the advance notice are both necessary and sufficient to establish an Office's independence, and accordingly, no substantive changes have been made in the guidelines.

The advance notice stated that FEA would permit an Office to engage exclusively in activities relating to assisting consumer groups in the presentation of their positions in a commission proceeding. Nine comments objected to the emphasis placed on the consumer assistance function on the ground that the two other functions are also important. FEA has been persuaded by these comments, and Section 460.12(c) requires an Office to undertake activities either to assist consumer groups or to advocate, on its own behalf, a position it determines represents the position most advantageous to consumers. Accordingly, an Office must perform at least one of these two functions but may, if it chooses, perform any combination of the three functions it is empowered to carry out.

3. *Eligible Consumer Groups.*—The definition provided in the advance notice of "eligible consumer" elicited twenty-three comments. The majority of comments concluded that the proposed definition was unnecessarily restrictive. On the other hand, four comments expressed the opinion that the definition should be narrowed to exclude all but residential consumers. The guidelines express FEA's conclusion that a State should have considerable flexibility in determining which consumer groups are most in need of representation. Accordingly, the final definition does not restrict eligibility to a specific consumer class or group. At the same time, FEA believes that an Office should represent residential consumers and the guidelines in § 460.12(a)(2)(A) and (C) so provide.

The advance notice restricted eligibility for assistance to a group which represents an interest, the representation of which is necessary to contribute to a fair determination of the proceeding taken as a whole. This "necessity test" was a restatement of standards developed by Federal agencies to decide claims for reimbursement by intervenors in agency proceedings in the absence of a statutory directive authorizing broad consumer participation. Under the necessity test, a Federal agency has implied authority to allow reimbursement to a consumer group as a necessary ancillary function of carrying out a regulatory program. The necessity test appears unduly restrictive in light of Section 205's statutory directive to encourage consumer participation.

For this reason, § 460.14 provides more flexible standards. FEA has decided to use a "fairness test." This test requires that a consumer group represent a consumer interest, the representation of which would substantially contribute to a full and fair determination of the issues to be considered in the proceeding. FEA considers that the fairness test is more likely to result in a broad spectrum of views being incorporated in a commission's decisionmaking process. Thus, the fairness test increases the likelihood that consumer participation will provide a commission with access to the information it needs to identify and evaluate accurately and impartially the costs and benefits that alternative resolutions of a given issue entail.

The advance notice required a consumer group to demonstrate that, but for the assistance to be provided, it lacked sufficient resources to participate effectively in the proceeding. Upon reconsideration, FEA finds this "but for" test too restrictive. The guidelines provide that a consumer group must show that it does not have reasonably available and cannot reasonably obtain sufficient resources to participate effectively in a proceeding. The distinction is that the "but for" test required a consumer group to be virtually without resources, with the result that only the "poorest of the poor" could be certain of qualifying. The guidelines now permit a consumer group to obtain assistance if needed resources are not reasonably available. Thus, if a consumer group could raise funds to participate in a proceeding by drastically reducing its staff or their salaries, it would fail the "but for" test. However, where an Office concludes that such a solution is unreasonable, funding could be provided under § 460.14.

The "reasonably obtainable" test is designed to prevent an Office from concluding, for example, that a group of consumers who own or have equity in their homes are ineligible for assistance on the theory that the consumers could obtain the necessary resources to fund their participation by selling or taking out additional mortgages on their houses. Accordingly, a further purpose served by the reasonably obtainable test is to ensure that an ad hoc group does not have to carry a heavier burden of proving financial need than incorporated organizations where the assets of members are screened by the corporate veil. An Office is thus precluded from looking behind a consumer group to inquire into the wealth of its individual members regardless of whether the group is incorporated or an ad hoc association.

The guidelines in § 460.14(b)(2) establish an alternative test of need employing a class action standard. Under this class action test, a consumer group may be eligible for funding if an Office finds, on the one hand, that the economic interest of both the consumer group and any consumer is small in relation to the costs of effective participation in a proceeding; and, on the other hand, that the costs of the consumer group's effective participation are small in relation to the social, economic or environmental consequences for consumers of the outcome of the proceeding. In this situation, the interest, though substantial, will remain unrepresented because no individual or group has a sufficiently strong financial incentive to intervene.

The class action test does not take financial need into consideration. A consumer group may qualify for financial or technical assistance irrespective of the extent of its financial resources. Where the cumulative consequences of the outcome for consumers are exceptionally important, the consumer interest should be protected regardless of ability to pay.

The utility of the class action test can be illustrated as follows: a small initial outlay (in this case reimbursement of an intervenor's out-of-pocket expenses) is clearly justified if it can be expected to yield a substantial return (either by achieving or foreclosing certain economic, social or environmental consequences) and if that outlay is also a

necessary element of the intervenor's decision to participate.

An example in which the class action concept may be appropriate is the case where a utility company requires a $10 deposit from new consumers as a condition of commencing service. The deposit will be refunded when service is discontinued, provided that a consumer has paid his bill. If the average period of service is six years and, during that time, the utility pays no interest on deposits, the dollar value of interest not received by a consumer is insubstantial. Therefore, the benefits to be gained from an intervention by an individual or group of individuals in a proceeding is too insignificant to recover the costs. However, if a consumer group representing all similarly situated consumers files a petition with a commission that is instrumental in the utility's having to pay interest on past and future deposits, the consumer group's action will have generated enormous economic consequences. In these or similar cases, it might be appropriate for an Office to be able to assist a consumer group's participation regardless of the extent of the group's own resources.

4. *Allowable Expenditures.*—One comment recommended that FEA permit the use of grant funds to enable a State to meet the statutory requirements that an Office be empowered to carry out three functions and be independent of a commission. However, the Act precludes FEA's authorizing a grantee to expend any program funds prior to such time as an Office is empowered to perform the three statutory functions and is independent of the commission, and this restriction is set forth in § 460.13(b).

Seventeen comments responded to the question raised in the advance notice of whether expenses incurred by consumer groups in presenting their positions in proceedings before a Federal utility regulatory commission should be funded. Ten comments stated that these costs should be allowed; six believed they should be disallowed; and one comment suggested that if the costs of participation in Federal proceedings were not allowable expenditures, an exemption should be granted to States in which a Federal agency is the sole supplier of electric power.

After considering these comments, FEA is persuaded that expenses incurred by an Office and its sub-grantees in participating in Federal utility regulatory proceedings will be allowable program expenditures.

FEA also provided in the advance notice that an Office not expend more than 45 percent of its budget for consultants. One comment urged that an Office should be encouraged to develop strong staff capabilities and therefore, while FEA should permit an Office to hire consultants on occasion, it should not promote an Office's reliance on outside experts by allowing it to expend up to 45 percent of its grant funds for this purpose. Another comment stated the contrary view that the 45 percent ceiling on expenditures incurred in hiring experts and consultants should be raised substantially.

FEA considers that the 45 percent limit, which is provided in § 460.13(a)(3) is appropriate. It furthers the twin goals of promoting an Office's long term viability by requiring it to develop its own expertise and operational capacity, and at the same time ensuring that it has access to additional manpower and expertise when needed for the effective performance of its functions. These goals are reinforced by limiting, in § 460.13(a)(3), the amount that may be paid to an individual consultant to 20 percent and by allowing expenses incurred by an Office to provide technical assistance to eligible consumer groups. Such assistance includes making data, technical analyses, or other information available to eligible consumer groups, preparing testimony on their behalf for use in a commission proceeding and providing them with legal assistance or expert testimony.

The amount that may be spent to contract for the use of computers and other equipment for storing and analyzing data is limited to 20 percent in § 460.13(a)(4). An Office's administrative expenses, exclusive of compensation paid to its staff for which there is no limit, may not exceed 10 percent of its grant funds.

The guidelines also specify and limit the other expenditures that an Office may incur with program funds. In developing these limits, FEA considered comparable provisions in rulemakings proposed by other Federal agencies to regulate reimbursement to intervenors for the costs of participating in agency proceedings; proposed legislation that would authorize Federal agencies to make awards to intervenors for attorney's fees and other reasonable costs incurred in participating in agency proceedings; and law review articles and Congressional committee reports considering the circumstances in which a party is or should be entitled to recover its costs of participating in administrative and judicial proceedings.

The ceilings on allowable expenditures for attorneys' and experts' fees and other out-of-pocket expenses adopted by the guidelines are intended to strike a balance. On the one hand, a substantial number of large eligible consumer groups will be able to receive financial assistance and, on the other, allowances are provided that are realistic in light of prevailing market rates for, and costs of, services necessary to a consumer group's effective participation.

5. *Minimum Program Requirements.*—FEA has established minimum program requirements in § 460.12(a) which call for compliance with the statutory requirements of the Act. In § 460.12(b), FEA has prescribed minimum program requirements for which a State must provide procedures. To comply with these requirements an Office must conceptualize its program for assisting consumers by developing procedures that are essential to its effective operation. A grantee or Office shall establish and publish these procedures within either six months of the date of the grant or three months of the date on which the requirements of § 460.12(a) are met, whichever occurs later. FEA may grant an extension of time to a grantee upon application and for good cause shown.

An Office must develop all of the enumerated procedures, regardless of whether they pertain to a function proposed for an Office in its application, because FEA believes that in the long run, an Office should have the capability to carry out all three functions. To be viable, an Office needs to be able to perform analyses, intervene in proceedings on its own behalf and assist eligible consumer groups. Only in this way will an Office be able to discharge fully its obligation to act effectively on behalf of consumers.

FEA received thirteen comments on the issue of whether or not an Office should be required to establish priorities among eligible consumer groups. Six comments objected to this requirement. Seven comments endorsed the concept of priorities and suggested a variety of criteria upon which these priorities should be based. Two comments suggested that proven competence and experience in analyzing issues related to utility regulatory matters and making presentations to this commission should be the critical requirements. Two comments stated that the financial need and age of the consumers represented by an eligible consumer group were the most significant factors. Another comment suggested giving priority to certain classes of consumers such as residential users of electricity and to certain types of groups such as environmental, civic, or nonprofit organizations. The final comment focused on such factors as the group's size, the importance of the interest it represented, and the amount of the rate increase proposed by an electric utility that would be at issue in the proceeding.

In § 460.12(b)(3), the guidelines provide criteria that an Office shall consider in establishing priorities among eligible consumer groups but that also allow considerable latitude for each grantee to establish its own requirements. In general, application of these criteria will ensure than an Office will provide assistance to groups that represent large numbers of consumers with a substantial aggregate interest in the outcome of a particular proceeding. The criteria are also intended to ensure that direct assistance will be furnished to groups that are capable of effectively representing a consumer interest by presenting well-reasoned, well-organized testimony. At the same time, FEA has included as a consideration the uniqueness or novelty of a consumer group's position, in order not to preclude an Office from assisting well-qualified advocates of unconventional and innovative approaches.

To the extent practicable, FEA urges an Office to establish procedures which will enable it to identify in advance and

participate in those commission proceedings most likely to achieve its goals and objectives.

B. APPLICATIONS

Application procedures are set forth in § 460.11. To be eligible for a grant, a State must submit an application to FEA not later than August 26, 1977. Since FEA will accept only one application per State, a State must designate the department or agency which shall apply to FEA for a grant.

The guidelines require an application to include information on how the State proposes to establish, where none currently exists, and operate an Office. The application must include a description of the goals and objectives of the proposed Office; a discussion of how it proposes to meet the minimum program requirements; a description of the functions the Office will perform; a program budget and a description of the Office's proposed organizational structure and staffing; a statement of task sequence and a timetable. The application also shall include an assurance that the proposed budget for the Office exceeds by the amount of the grant award, the amount expended by the State, if any, in the prior fiscal year or appropriated to be expended in the current fiscal year, whichever is greater, to perform functions similar to those to be conducted for this program. A State must also provide information concerning any State department or agency which represents consumers with respect to commission proceedings.

In addition, the application shall contain information concerning a State's need for an Office, which shall be evaluated by FEA as described in Section 460.15(c).

C. SELECTION OF GRANTEES

Grantees will be selected on the basis of FEA's evaluation of their applications through the use of the rating system set forth in § 460.15. An application may receive up to 50 points for the feasibility and quality of the proposed Office, taking into account the overall conceptualization of the proposal and the feasibility of implementation. An application may receive up to 50 points for a State's demonstration of its need for an Office. Of this, up to 25 points will be awarded on the basis of the magnitude of need demonstrated with respect to the information provided in response to Section 460.11(b)(11). The remaining 25 points will be awarded on the basis of FEA's analysis of the following three factors: first, the average revenue per KWH calculated for all electric utilities in the State, as an indication of where the costs to consumers for a KWH of electricity are already high or likely to increase sharply; second, the percentage of per capita income of a State's residential consumers which is spent for electricity for residential use, as an indication of the impact of an average electric bill on a typical family; and third, the extent to which a State uses natural gas to generate electricity, as an indication of where consumers are likely to experience sharp increases in the price of electricity due to increases in the price of natural gas or conversion to other electricity generating sources.

FEA has selected these three factors as ones which will provide comparable information about the current and anticipated electricity price and supply characteristics in each State. FEA already has the data needed to perform the analyses of these factors.

D. TERMINATION OF GRANTS

In § 460.19, FEA provides for suspension and termination of grants upon written notice to a grantee in the event FEA determines there has been a substantial failure to comply with the requirements of this guidelines.

5. *Environmental and Inflationary Review.*—In accordance with FEA's obligations under the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321 et seq., an evaluation of the potential environmental impacts of this program has been prepared by FEA. FEA finds that this program does not entail a major federal action that will have a significant impact on the environment. FEA cannot anticipate nor will it restrict the positions which may be advocated by an Office or subgrantee and therefore cannot foresee the environmental consequences of such advocacy. Copies of this analysis are available during normal business hours at FEA's Freedom of Information Office.

As required by section 7(c)(2) of the Federal Energy Administration Act of 1974, Pub. L. 93275, a copy of this notice has been submitted to the Administrator of the Environmental Protection Agency (EPA) for his comments concerning the impact of this program on the quality of the environment. The Administrator has no comments.

The guidelines have also been reviewed in accordance with Executive Order 11821 and OMB Circular A-107, issued November 27, 1974, and has been determined not to be a major proposal requiring an evaluation of its inflationary impact.

(Title II (42 U.S.C. 6801), Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125 et seq.; Federal Energy Administration Act of 1974, Pub. L. 93-275 (15 U.S.C. 761 et seq. as amended by Pub. L. 94-385, supra); E.O. 11790, 39 FR 23185.)

In consideration of the foregoing, Chapter II of Title 10 of the Code of Federal Regulations, is amended by establishing Part 460 as set forth below, effective July 3, 1977.

Issued in Washington, D.C. June 30, 1977.

ERIC J. FYGI,
Acting General Counsel,
Federal Energy Administration.

Subpart D, Chapter II of Title 10, Code of Federal Regulations, is amended by establishing Part 460 as follows:

Sec.
460.1 Purpose and scope.
460.2 Administration of grants.
460.3 Definitions.
460.10 Grant awards.
460.11 Applications.
460.12 Minimum program requirements.
460.13 Allowable expenditures.
460.14 Eligible consumer groups.
460.15 Selection of grantees.
460.16 Oversight responsibility.
460.17 Recordkeeping.
460.18 Reporting requirements.
460.19 Grant termination.

AUTHORITY: Title II (42 U.S.C. 6801), Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125 et seq.; Federal Energy Administration Act of 1974, Pub. L. 93-275, 15 U.S.C. 761 et seq. as amended by Pub. L. 94-385, supra; E.O. 11790, 39 FR 23185.

§ 460.1 Purpose and scope.

This part contains the regulations adopted by the Federal Energy Administration to conduct a discretionary grant program to provide Federal financial assistance to a State. This financial assistance shall be used to establish or operate a State office of consumer services which shall assist the representation of consumer interests with regard to matters before an electric utility regulatory commission pursuant to section 205, 42 U.S.C. 6805 of the Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125 et seq. Grants will be awarded on a competitive basis to a limited number of States.

§ 460.2 Administration of grants.

Grants awarded under this part shall be administered in accordance with the following—

(a) Federal Procurement Regulation 1-15.7, entitled "Grants and Contracts with State and Local Governments;"

(b) Federal Management Circular 73-2 entitled "Audit of Federal Operations and Programs by Executive Branch Agencies;"

(c) Federal Management Circular 74-4, entitled "Cost Principles Applicable to Grants and Contracts with State and Local Governments;"

(d) Federal Management Circular 74-7, entitled "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments;"

(e) Office of Management and Budget Circular A-89, entitled "Catalog of Federal Domestic Assistance;"

(f) Office of Management and Budget Circular A-95, entitled "Evaluation, Review and Coordination of Federal and Federally Assisted Programs and Projects;"

(g) Office of Management and Budget Circular A-97, entitled "Rules and Regulations Permitting Federal Agencies to Provide Specialized or Technical Services to State and Local Units of Government under Title III of the Intergovernmental Coordination Act of 1968;"

(h) Office of Management and Budget Circular A-110, entitled "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations;"

(i) Treasury Circular 1082, entitled "Notification to States of Grant-in-Aid Information;"

(j) Treasury Circular 1075, entitled "Regulations Governing Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs;" and

(k) Such procedures applicable to this part as FEA may from time to time prescribe for the administration of grants.

§ 460.3 Definitions.

As used in this part—

"Act" means the Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125 et seq., 42 U.S.C. 6801 et seq.

"Administrator" means the Administrator of the Federal Energy Administration.

"Commission" means a utility regulatory commission.

"Consultant" means a person who contracts to provide personal services for an Office and includes an attorney, accountant, economist, or other expert witness.

"Consumer" means a person who buys electricity for purposes other than resale.

"Consumer Group" means an association or organization consisting of not less than three individuals that represents a consumer interest, and may include a corporation, nonprofit corporation, unincorporated association, unit of general purpose local government, tribal organization, law firm, committee, or association of concerned consumers.

"Consumer Interest" means a potential benefit or detriment to a consumer from the social, economic or environmental consequences of the outcome of a proceeding.

"Consumer-Interest Office" means a department, agency, or office of a State which engages in activities on behalf of a consumer interest.

"Electric Utility" means a person, State agency, or Federal agency which sells electric energy for purposes other than resale.

"FEA" means the Federal Energy Administration.

"Federal Agency" means an agency or instrumentality of the United States.

"Fuel Adjustment Clause" means a clause in a rate schedule that provides for an adjustment of the consumer's bill if the cost of the fuel used for electrical generation varies from a specified unit of cost.

"Governor" means the chief executive officer of a State or territory, the Mayor of the District of Columbia, or the Chairman of the Tennessee Valley Authority.

"Grantee" means the State or other entity named in the notification of grant award as the recipient.

"Kilowatt-Hour" means a unit of measuring electricity usage which represents a unit of work or energy equal to that expended by one kilowatt in one hour.

"KWH" means a kilowatt hour.

"Local Law" means the laws in force and effect in a State and includes the statutes, rules and regulations, judicial decisions, administrative findings and determinations and executive orders and proclamations, as enforced by the State and its judicial system.

"Office" means an Office of Consumer Services.

"Person" means an individual, partnership, corporation, unincorporated association or any other group, entity or organization.

"Proceeding" means a proceeding before a utility regulatory commission.

"State" means a State, the District of Columbia, American Samoa, Guam, Puerto Rico, the Virgin Islands, the Trust Territory of the Pacific Islands and the Tennessee Valley Authority.

"Sub-grantee" means the eligible consumer group named as the recipient in a grant which shall be made by an Office.

"Tribal Organization" means the recognized governing body of an Indian Tribe, or any legally established organization of Native Americans which is controlled, sanctioned or chartered by such governing body.

"TVA" means the Tennessee Valley Authority.

"Unit of General Purpose Local Government" means any city, county, town, parish, village or other general purpose political subdivision of a State.

"Utility Regulatory Commission" means TVA or a regulatory authority empowered by Federal or local law to fix, modify, approve, or disapprove rates for the sale of electric energy by an electric utility other than itself.

§ 460.10 Grant awards.

(a) FEA shall provide financial assistance to a State, from sums appropriated for any fiscal year, only upon annual application.

(b) Grants shall be awarded to States, selected at the discretion of FEA on the basis of the evaluation made in accordance with § 460.15, for the establishment or operation of an Office.

§ 460.11 Applications.

(a) To be eligible to receive a grant under this part, a State shall submit an application, in conformity with paragraph (b) of this section, which shall be received by FEA on or before 5:30 p.m. e.d.t. on August 26, 1977. FEA shall send a copy of this regulation to the Governor of every State and invite him or her to submit an application.

(b) Each application shall include—

(1) An overview statement of the specific goals and objectives of the proposed office and an explanation of how they relate to the goals and objectives of an existing State Consumer-Interest Office and any commission before which the Office intends to assist the representation of consumer interests;

(2) A legal opinion setting forth the manner in which the State has complied, or will, in a timely manner, comply with the requirements of § 460.12(a);

(3) Where applicable, an explanation of the authority, functions, organization, activities, budget and financial resources of a Consumer-Interest Office operating within the State;

(4) An assurance that the final proposed budget for the Office exceeds, by the amount of the grant award, the amount expended by the State, if any, in the prior fiscal year or appropriated to be expended in the current fiscal year, whichever shall be greater, to perform functions to assist consumers similar to those set forth in § 460.12(a)(2);

(5) A statement of which of the functions set forth in § 460.12(a)(2) are proposed to be carried out by the Office with financial assistance under this part and the reasons for choosing to perform those functions;

(6) A detailed description of how the Office will meet the minimum program requirements prescribed by § 460.12(b) and a timetable for satisfying these requirements;

(7) The amount of Federal financial assistance being applied for under this part, which shall not exceed $200,000, and a budget including an identification and a description of resources or financial assistance which shall be provided to an Office from sources other than the financial assistance provided under this part;

(8) A description of the organizational structure of the Office including the extent of coordination proposed between the Office and other parts of the State government representing consumers or regulating electric utilities;

(9) A description of the responsibilities and the experience and qualifications, if known, of key personnel and consultants proposed to be used by the Office;

(10) A statement of the task sequence and a timetable for establishing the Office, where applicable, and for implementing the activities for a 12 month period, by calendar quarter, beginning October 1, 1977;

(11) A detailed description of the State's need for the Office which shall identify the conditions and circumstances existing within the State that give rise to that need including, to the extent this information is reasonably available, information concerning—

(i) Recent increases in average electric bills of different types of consumers;

(ii) The type, quality and amount of participation by consumer groups in proceedings within the State;

(iii) The responsiveness of a commission to the views and data submitted by consumers in proceedings within the State;

(iv) Changes, including rate reform, initiated by a commission within the State responsive to problems of supplying sufficient electricity to meet demand for the foreseeable future, taking into account the cost to consumers and need for energy conservation;

(v) The number and type of proceedings within the State;

(vi) The policies with respect to fuel adjustment clauses adopted by a commission within the State;

(vii) The nature and extent of State legislative activities affecting utility companies, commissions, or consumers.

§ 460.12 Minimum program requirements.

(a) Prior to the expenditure of any grant funds and no later than 6 months from the date of a notification of grant award made under this part, a grantee

shall have in existence or establish an Office which—

(1) Is a consumer-interest office;

(2) Is empowered and has authority under local law to—

(i) Make general factual assessments of the impact of proposed electric utility rate changes and other proposed regulatory actions upon consumers, including residential consumers;

(ii) Provide technical or financial assistance to an eligible consumer group meeting the requirements of § 460.14 in the presentation of its position in a proceeding; and

(iii) Advocate, on its own behalf, a position which it determines represents the position most advantageous to consumers, including residential consumers, taking into account developments in electric utility rate design reform; and

(3) Is independent of a commission with respect to the following—

(i) The Commission has no direct control over the Office's budget or its disbursement of funds;

(ii) The commission has no authority over the hiring, management, or dismissal of the personnel employed by an Office; and

(iii) Employees of the Office do not perform services for, report to, or act on behalf of, the commission.

(b) Each Office shall develop and publish within 6 months of the date of a grant award or 3 months from the date upon which the Office meets the requirements of paragraph (a) of this section, whichever shall be later, procedures to be approved by FEA, to—

(1) Determine whether a consumer group is an eligible consumer group in accordance with the requirements of this part;

(2) Provide technical assistance to an eligible consumer group, and financial assistance on a full funding or cost sharing basis to a sub-grantee to make one or more presentations in a proceeding;

(3) Establish priorities for providing technical and financial assistance to eligible consumer groups taking into consideration—

(i) Consumer interests;

(ii) The consumer interest of, or represented, by an eligible consumer group;

(iii) The composition, diversity and number of members of an eligible consumer group;

(iv) The relative effectiveness of an eligible consumer group's proposed presentation including the extent to which—

(A) The eligible consumer group is familiar with and understands the subject matter and issues involved in the proceeding;

(B) Its proposed presentation is feasible and well-conceived; and

(C) The eligible consumer group can effectively represent a consumer interest in a proceeding;

(D) The uniqueness or novelty of an eligible consumer group's position or point of view; and

(E) Where financial assistance is to be provided, the experience and expertise of a consultant which an eligible consumer group intends to engage;

(4) Advocate on its own behalf a position in a proceeding which it determines represents the position most advantageous to consumers which shall involve the performance of activities including—

(i) Consideration of views and data obtained from consumers through the use of such information gathering techniques as a public hearing, survey or consumer advisory committee, to ensure that the Office obtains and considers the broadest possible spectrum of consumer views;

(ii) Obtaining qualified witnesses and preparing testimony and other submissions for presentation in a proceeding;

(iii) Analysis and consideration of developments in innovative utility rate design reform;

(5) Making general factual assessments of the impact of proposed rate changes and other proposed regulatory actions upon consumers; and

(6) Identifying consumer groups and providing them with information concerning this program and its operation.

(c) After complying with the requirements of paragraph (b) of this section, an Office shall carry out activities for the functions prescribed in § 460.12(a)(2)(i) or (ii). FEA may upon application by a grantee or Office and for good cause shown extend the time limit set to meet the requirements of paragraphs (a) and (b) of this section.

§ 460.13 Allowable expenditures.

(a) Financial assistance provided under this part shall be used for the establishment or operation of an Office, and grant funds awarded in any year shall only be expended for the following—

(1) Compensation of employees of the Office;

(2) No more than 10 percent shall be used for administrative expenses of an Office, exclusive of compensation provided under paragraph (a)(1) of this section;

(3) No more than 45 percent may be paid for the services of consultants, provided that no consultant shall receive in excess of 20 percent; and

(4) No more than 20 percent may be paid to contract for the use of computers and similar equipment for the storage and analysis of data;

(5) Payments to sub-grantees to carry out the function described in § 460.12(a)(2)(B) in accordance with the requirements of this part, provided that total payments to sub-grantees shall not exceed 45 percent of the grant funds awarded in any year;

(6) Payments to a consultant by an Office or sub-grantee shall not exceed the prevailing market rate for the level and quality of the personal service but not to exceed 75 dollars per hour exclusive of reasonable costs for travel and incidental disbursements such as mailing and photocopying; and

(7) Reasonable costs of an Office or sub-grantee for travel and transportation for an employee, consultant or a person performing services, such as a volunteer, provided that such costs are incurred in connection with preparing or making a presentation at a proceeding.

(b) No grant funds shall be expended until a State has established an Office which meets the requirements of § 460.12(a).

(c) For the purposes of paragraph (a)(3) of this section, a consultant shall include—

(1) Any person which employs or otherwise uses the personal services of the consultant including employment by a partnership, corporation, sole proprietorship, or other business enterprise engaged in performing personal services;

(2) Any person in which the consultant owns 10 percent or more of the stock, including options to purchase stock, or other securities issued by a corporation, or any person engaged in performing personal services in which the consultant has a financial interest which is equal to or exceeds 10 percent;

(3) Any person, such as a parent company or affiliate, which owns 10 percent or more of the stock, including options to purchase stock, of the consultant, or other securities issued by the consultant, or owns a financial interest of any kind in the consultant which is equal to or exceeds 10 percent;

(4) Any business entity engaged in performing personal services including a corporation, partnership, consortium or other enterprise in which the consultant is an officer or director, partner or active principal; and

(5) Any business entity including a corporation, partnership, consortium or other business enterprise engaged in providing personal services in which the consultant participates in a profit-sharing program.

§ 460.14 Eligible consumer group.

No consumer group shall receive financial or technical assistance from an Office unless—

(a) The consumer group's—

(1) Representation of a consumer interest would substantially contribute to a full and fair determination of the issues to be considered in the proceeding; and

(2) Participation in the proceeding is necessary to the effective representation of the consumer interest; and

(b) The consumer interest would not be effectively represented because—

(1) The consumer group does not have reasonably available and cannot reasonably obtain sufficient resources to participate effectively in the proceeding; or

(2)(i) The economic gain or loss to the consumer group and any consumer with regard to the outcome of the proceeding is small relative to the costs of effective participation in the proceeding; and

(ii) The costs of effective participation are small relative to the social, economic or environmental consequences of the outcome of the proceeding.

§ 460.15 Selection of grantees.

(a) FEA shall evaluate an application submitted in accordance with § 460.11 through the use of a rating system with a total of 100 points under which up to

50 points may be scored for the quality of the proposed Office and up to 50 points may be scored for a State's need to establish and operate an Office.

(b) FEA shall evaluate the quality of a proposed Office on the basis of its conceptualization and the feasibility of its implementation taking into account—

(1) The precision with which goals and objectives for the Office are defined;

(2) Whether the activities proposed for the Office will effectively carry out the functions selected in accordance with § 460.11(b)(5);

(3) The responsibilities, experience and competence of the key personnel and consultants proposed for the Office;

(4) The organizational structure of the Office including the extent of coordination proposed between the Office and other parts of the State government representing consumers or regulating electric utilities;

(5) The feasibility of the Office's complying with the requirements of § 460.12;

(6) The task sequence for activities and the likelihood that an Office can meet the schedule of the proposed timetable as required by § 460.11(b)(10); and

(7) The adequacy of the budget required by § 460.11(b)(7) in relationship to the proposed activities.

(c) FEA shall evaluate a State's need for an Office based upon—

(1) The magnitude of need demonstrated in the description provided in response to § 460.11(b)(11) for which up to 25 points may be scored; and

(2) FEA's analysis, for which up to 25 points may be scored, of—

(i) The average revenue per KWH calculated for all electric utilities within the State;

(ii) The percentage of per capita income of residential consumers within the State which is spent for electricity for residential use; and

(iii) The extent to which the State uses natural gas to generate electricity.

§ 460.16 Oversight responsibility.

(a) The Administrator shall monitor and evaluate the establishment and operation of Offices receiving financial assistance under this part through on-site project reviews, or through other means, in order to insure the effective performance of Offices under the grants.

(b) The Administrator and the Comptroller General of the United States, or their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, information, and records of Offices receiving financial assistance under this part.

(c) Each grantee shall conduct, on an annual basis, an audit of the pertinent records of any sub-grantee receiving financial assistance under this part.

§ 460.17 Recordkeeping.

Each grantee or sub-grantee receiving Federal financial assistance under this part shall keep such records as FEA shall require, including records which fully disclose the amount and disposition by each grantee and sub-grantee of the funds received, the source and amount of funds not supplied by FEA for an Office, and such other records as FEA deems necessary for an effective audit and performance evaluation. Such recordkeeping shall be in accordance with Federal Management Circular 74-7 and any further requirements of this regulation or which FEA may otherwise establish under the terms and conditions of a grant.

§ 460.18 Reporting requirements.

Each grantee receiving financial assistance under this part shall submit a quarterly program performance report and a quarterly financial report to the Administrator. The program performance report shall contain such information as the Administrator may prescribe in order effectively to monitor the progress of a grantee.

§ 460.19 Grant termination.

(a) FEA shall give notice to a grantee in the event FEA finds there is a failure by the grantee to comply substantially with the provisions of this part.

(b) FEA shall issue such notice in the form of a written notice mailed by registered mail, return receipt requested, to the grantee and shall include (1) a statement of the reasons for the finding referred to in paragraph (a) of this section together with an explanation of any remedial action which, if undertaken, would result in compliance; and (2) the date upon which the grant will be terminated.

(c) A grantee which receives the notice referred to in paragraph (a) of this section may file a written response containing an explanation of how it will comply with the requirements of this part, or a statement of its views and supporting data explaining why the grant should not be terminated. This response shall be made by registered mail, return receipt requested, not later than 10 days after the receipt of the notice referred to in paragraph (b) of this section.

(d) Within 20 days after the grantee's receipt of notice in accordance with the procedure set forth in paragraph (b) of this section, the Administrator, after consideration of any response filed by the grantee, shall determine whether or not to terminate the grant for failure to comply substantially with the requirements of this part and issue a written statement explaining the reasons for this determination.

(e) Upon issuance of the notice referred to in paragraph (a) of this section, FEA may suspend payments to any grantee pending a final determination. If the Administrator makes a final determination of substantial failure to comply, the grantee will be ineligible to participate in the program unless and until FEA is satisfied that the failure to comply has been corrected.

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