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SUMMARY OF GAO LEGAL POSITION

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GAO and Energy disagree over the interpretation of the statute authorizing the Residential Conservation Service Program. The National Energy Conservation Policy Act specifically provides that the program announcement duties prescribed were to terminate on January 1, 1985, but it contains no termination date(s) for the other aspects of the RCS program.

Energy asserts that the RCS Program expired shortly after January 1, 1985, the date at which the program announcement requirement expired.

GAO believes that the statute is clear on its face and provides no termination date for the RCS Program. Accordingly, the permanence of the Program is presumed under general principles. Moreover, GAO acknowledges that the RCS statute should be interpreted in light of other related statutes, particularly those complementary statutes contemporaneously enacted, as Energy suggests. However, in this instance, none of the statutes relied on by Energy or their legislative histories require or strongly suggest the termination of the RCS program at any particular time. In addition, Energy has not consistently taken the position that the RCS Program expires shortly after January 1, 1985. Rather, over time, Energy's position has been contradictory or, at best, ambiguous.

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UNITED STATES GENERAL ACCOUNTING OFFICE

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STATEMENT OF
HARRY R. VAN CLEVE
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OF THE UNITED STATES GENERAL ACCOUNTING OFFICE
BEFORE THE
SUBCOMMITTEE ON ENERGY CONSERVATION AND POWER
OF THE
HOUSE COMMITTEE ON ENERGY AND COMMERCE
ON THE
RESIDENTIAL CONSERVATION SERVICE

033155

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here this morning, to testify on what basically is a disagreement over the interpretation of a law; that is, whether the entire Residential Conservation Service Program expired on January 1, 1985, as the Department of Energy asserts or, as we believe, only the program announcement requirement that utilities inform their customers of the program's existence expired on that date and the remainder of the RCS program is still legally in effect.

As you know, the National Energy Conservation Policy Act of 1978 established the RCS program and required each large natural gas or electric utility to undertake certain energy conservation functions for their residential customers. The act specifically provided that the program announcement duties were to terminate on January 1, 1985, but it contained no termination date for other aspects of the RCS program. The Department of Energy takes the position that the statute did not require utilities to continue their RCS programs indefinitely into the future. Rather, they believe that the required duration of the RCS

program is related to the 1985 termination date explicitly provided for in the program announcement requirement. Accordingly, the Department of Energy believes that utilities may terminate their RCS programs within a reasonable time after the last offer of services is made before January 1, 1985.

On the other hand, GAO believes that only the program announcement requirement terminated on January 1, 1985 and that the remaining portions of the RCS program continue today. Our legal opinion of June 3, 1985, provided pursuant to your request and that of Chairman Dingell, reviewed the Department of Energy's March 6, 1985 legal memorandum on the duration of the RCS program and discussed our own views of the legal status of that program. I have attached a copy of our opinion to my statement and request that it be made a part of the record.

We used standard legal principles in reaching our position on this issue. I might state at the outset, Mr. Chairman, that the threshold maxim to be used in the interpretation of a statute is that when a statute is clear on its face, we need not resort to canons of statutory

construction or to legislative history to interpret it. Everyone agrees that the only termination date provided in the RCS statute is for the program announcement requirement and that the statute contains no termination date for the remainder of the RCS program. We therefore conclude that the remainder of the statute has no termination date.

Nevertheless, because the Department of Energy extensively argued for a different construction of the statute, our opinion considered Energy's arguments. We recognized that the interpretation given a statute by the agency charged with its administration and enforcement is entitled to considerable weight and deference. However, courts have long held that the persuasiveness of an administrative interpretation is dependent on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements by the agency, and all those factors which give it power to persuade. In addition, whatever effect an administrative interpretation may have when the command of legislation is in some way ambiguous, when that command is clear, as it is in this case, it is simply beyond the power of the administrative agency to alter it.

Using this court approved test, we concluded that Energy's construction of the statute authorizing the RCS program was unpersuasive. Instead, we concluded that the RCS program remains legally in effect unless terminated by future legislation.

Our conclusion was reached after considering all of Energy's legal arguments. First, we believed that Energy's position was premised on a fundamental error of statutory construction, namely, that legislation is to be construed to be of limited duration unless there is evidence of a contrary legislative intent. In fact, the reverse is true: Substantive legislation is construed as permanent unless there is specific language indicating a limited duration.

The permanence of legislation must, of course, be understood in the context of the legislative process. A statute is permanent or in effect for the indefinite future only until subsequent legislative action repeals or modifies it. Such repeal or modification could potentially occur at any time. Yet Energy in its memorandum consistently questions whether Congress intended to impose duties on covered utilities in perpetuity.

In a draft legal memorandum provided to you in preparation for today's hearing, Energy suggests that we misconstrued its position on this point. Whether or not we did, it is clear beyond doubt that a statute is deemed to be permanent unless it specifies otherwise.

In its draft legal memorandum, Energy contends that a termination date must be implied because of the effect of other laws. We also considered this argument and do not reach the same conclusion. Energy points to other related provisions with which the RCS statute is in pari materia, and concludes that, when read together in a consistent fashion, these statutes require a termination date for all of the RCS Program. Energy states in the draft legal memorandum that this is the underlying premise of its legal analysis.

The first of these other statutes is the Energy Tax Act of 1978, which provides tax credits for residential energy conservation improvements made by December 31, 1985. While the tax benefits provided by the Energy Tax Act are clearly related to the RCS program, this does not, in our view, support a conclusion that the entire RCS program expired

shortly after January 1, 1985. First, the expiration date of the Energy Tax Act was extended during Congressional consideration from the originally proposed date of December 31, 1982 (and a later proposed date of December 31, 1984) to December 31, 1985, not in order to assure that it somehow worked in tandem with the RCS program, but instead to accommodate supply problems in the insulation industry. Second, the two programs envisioned two different, but not coextensive, savings for energy consumers. That is, it was believed that conservation measures taken in response to the RCS program would pay for themselves over time in reduced utility bills, while the Energy Tax Act would provide an immediate, but separate tax saving. There, therefore, is no necessary connection between the expiration of the tax credit and the expiration or continued existence of the RCS program.

The second statute which Energy urges be considered as implying a termination date of the RCS program is the Energy Conservation and Production Act. This statute was enacted on August 14, 1976, 2 years before the enactment of the RCS statute. Section 304 of the Energy Conservation and Production Act, as enacted, and as it existed when the RCS

statute was passed, required the promulgation of performance standards for new residential and commercial buildings by February 14, 1981, with discretion in the Secretary, if he made certain findings, to delay promulgation until August 14, 1981. This deadline was not extended to April 1, 1984 until the enactment of the Housing and Community Development Act of 1980. Thus the operation and termination dates of the RCS program and the performance standards for new residential buildings had no relationship to each other.

Although Energy has established that the statutes it relies on have complementary purposes to the RCS program, it has not proven that either one of them mandates or even strongly suggests a termination date of January 1, 1985 for the RCS program.

Further, Energy's current position on the duration of the RCS program is not consistent with a significant earlier pronouncement on this point, namely in the Regulatory Analysis accompanying its 1979 final regulations. Energy asserts that we selectively quoted from this document to establish an inconsistency. However, GAO quoted in full the entire chapter of the Regulatory Analysis entitled "Sunset

Provisions," which specifically deals with the time frame of the RCS program. The more cogent provisions of that chapter state:

"Although the economic and energy analyses assumed a five-year program duration, the rules analyzed do not contain a completion date for the RCS Program. * * * [T]here are no provisions for terminating the Program in NECPA.

"* * * In the absence of a Program completion date, * * * requests for installations under the Program could continue indefinitely. * * *."

Nothing can be more clear. We recognize that Energy notes certain other references to language in various documents to support its view of an agency expectation that the program would expire shortly after January 1, 1985. However, many of these references are from the economic analysis of its 1979 regulations and from other documents generated in the 1980's. We do not find them persuasive of Energy's position in 1978 and 1979.

In conclusion, therefore, we believe that the statute is clear on its face. It provides no termination date for the RCS program, and thus the program continues unless terminated by future legislation. We find Energy's arguments to the contrary unpersuasive.

Mr. Chairman, this concludes my statement. We will be pleased to answer any questions about it that you may have.