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Report to Rep. David A. Stockman; by J. Dexter Peach, Director, Energy and Minerals Div.

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Questions were asked concerning the Department of Energy's (DOE's) policies and practices in funding nongovernmental intervenors in proceedings before the Economic Regulatory Administration. The DOE has provided intervenor fundings in three cases; the total amount authorized for payment was \$127,865. DOE does not have a specific appropriation for intervenor funding and handled funding on a case-by-case basis. The DOE has no definitive criteria for determining when it should invite interested parties to petition for intervention funding, but procedures exist for reviewing and approving requests. The Department's actions appeared to be reasonable in the three cases of intervenor funding. Its intervenor funding practices are supported by the Department of Energy Organization Act, but results of a pending suit could affect this position. The DOE did not perform an audit to verify the uses of intervenor funds in connection with a 1977 case involving the Consumer Federation of America. Procedures have been established to verify that expenditures for a 1978 case are in accordance with an agreement with the Federation. DOE follows the approach that the Federal Trade Commission (FTC) adopted in compensating attorneys, but in the two Federation cases, the DOE approved fees higher than FTC's rates because of the complexity of the proceedings. It also paid higher consultant fees in the 1978 case than did other Federal agencies for the same reason. (HTW)

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

ENERGY AND MINERALS
DIVISION

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B-192213

October 2, 1978

The Honorable David A. Stockman
House of Representatives

Dear Mr. Stockman:

Your letter of June 12, 1978, requested that we review and report on the Department of Energy's (DOE) policies and practices in the funding of non-governmental entities as intervenors in proceedings before the Economic Regulatory Administration (ERA). Specifically, you asked four questions concerning DOE's intervention funding policies, and requested us to examine DOE's actions in connection with the funding of intervention by the Consumer Federation of America (Federation).

We discussed these issues with DOE and Federation officials and reviewed and analyzed DOE records. We also evaluated DOE's legal authority to provide financial assistance to intervenors. As agreed with your Office, we did not attempt to determine whether DOE should be reimbursing intervenors for expenses incurred in participating in ERA rulemaking proceedings. Also, we did not assess the reasonableness of the Federal Trade Commission's and the Civil Aeronautics Board's intervention programs which DOE followed with respect to reimbursement of certain fees.

DOE has provided intervenor fundings in only three cases. In each case, DOE invited interested parties to petition for funding. The total amount authorized for payment was \$127,865, of which \$50,364 had been paid as of August 25, 1978.

In response to your questions, we found that DOE does not have a specific appropriation for intervenor funding and handled the funding on a case-by-case basis. Certain

EMD-78-111

fees were authorized in the 1978 Federation case which were not approved for payment in the 1977 Federation case or in the 1977 Consumer Union case. However, the 1978 Federation case involved more complex evidentiary proceedings than the other two cases.

The enclosure to this letter describes our findings in detail and presents our assessment of DOE's intervenor funding practices.

Our answers to your questions are summarized below.

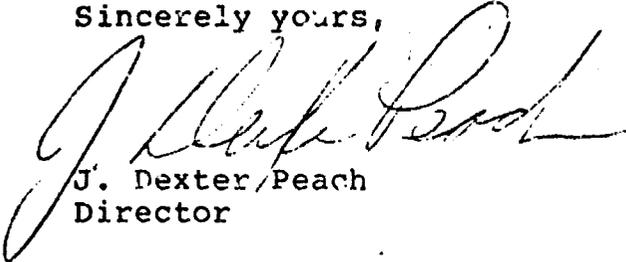
- DOE has no definitive criteria for determining when it should invite interested parties to petition for intervention funding. DOE officials decide, on a case-by-case basis, which proceedings merit such funding. However, procedures exist for reviewing and approving requests for intervention funding. Because DOE's procedures for intervenor funding are highly subjective and because the scope of our review did not include an assessment of the reasonableness of precedent established by other agencies, we could not determine positively whether DOE's procedures insured proper spending of DOE funds by intervenors. However, DOE's actions appeared to be reasonable for the three proceedings in which intervenor funding was provided.
- We believe that DOE's existing practices with respect to intervenor funding are supported by the Department of Energy Organization Act (P.L. 95-91). However, we note that a suit on this question is pending in the United States District Court for the District of Columbia, (Civ. A. No. 78-1543, August 17, 1978). We believe our longstanding position on this question is valid, but a contrary ruling in the present litigation may cause us to reevaluate that position.
- DOE did not perform an audit to verify the uses of intervenor funds in connection with the 1977 proceedings. However, in the 1978 case DOE entered into an agreement with the Federation which itemized the expenses that DOE would reimburse and established procedures for DOE to follow in verifying the expenditures. If the provisions of the agreement are effectively implemented, DOE should be reasonably assured that its funds are being expended in accordance with the agreement.

B-192213

--DOE follows the approach the Federal Trade Commission (FTC) adopted in compensating attorneys. However, in the two Federation cases, DOE approved fees higher than FTC's rates due to the complexity of the proceedings. DOE uses consultant rates which are generally comparable to what other Federal agencies pay intervenors for consultant fees. However, in the 1978 Federation case, DOE approved consultant fees which were higher than the comparable rate due to the complexity of the proceeding.

I hope this information will be useful to you.

Sincerely yours,



J. Dexter Peach
Director

Enclosure

DEPARTMENT OF ENERGY'S PROCEDURES
IN FUNDING INTERVENORS IN PROCEEDINGS
BEFORE THE ECONOMIC REGULATORY ADMINISTRATION

BACKGROUND

ERA, in its rulemaking and adjudicatory procedures, holds public hearings when the proposed regulation or issue in question is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses or when ERA determines that a public hearing will materially advance the consideration of the issue. The hearing may be convened only after publication in the Federal Register of a notice which includes a statement of the time, place, and nature of the hearing.

In certain instances, DOE may make a determination that the issue is of such importance that DOE should provide intervention funding for qualified applicants. If DOE makes such a determination, the following steps are taken.

- ERA issues an open invitation to interested parties to petition for intervention funding. This invitation is published in the Federal Register, along with the notice of the public hearing.
- Interested groups file a Petition for Special Redress with DOE's Office of Hearings and Appeals requesting the opportunity to intervene before ERA and funds with which to intervene. The petitioner must file its petition in accordance with DOE's general filing requirements and present certain information (see p. 3).
- The Office of Hearings and Appeals reviews the petition and determines if DOE should grant funds and the amount it should grant. It then must make certain determinations before it will approve intervenor funding (see pp. 3-4).
- If the Office of Hearings and Appeals approves the petition, it performs checks on the intervenor's spending of DOE funds (see pp. 6-7).

DOE has invited Petitions for Special Redress in three separate proceedings. In each case, only one organization petitioned for intervenor funding and DOE approved the three petitions with modifications. The following table shows the amounts approved and paid by DOE.

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<u>Organization</u>	<u>Proceeding</u>	<u>Date of Initial Petition</u>	<u>Total a/ Amount requested</u>	<u>Ceiling Authorized</u>	<u>Amount Paid</u>
Consumer Union of the United States	Non-product cost increases	3/7/77	\$ 18,000	\$ 8,000	\$ 8,000
Consumer Federation of America	Heating oil monitoring system	4/7/77	33,628	32,975	27,364 <u>b/</u>
Consumer Federation of America	Heating oil monitoring system	2/21/78	97,115	86,890	15,000 <u>c/</u>
			<u>\$148,743</u>	<u>\$127,865</u>	<u>\$50,364</u>

a/Includes total amount requested in initial and supplemental petitions.

b/A supplemental petition requesting \$5,611 was authorized but was not paid as of 8/25/78.

c/Amount paid as of 8/25/78. Case is still ongoing.

DOES THE DEPARTMENT HAVE A COHERENT AND OBJECTIVE POLICY FOR THE SELECTION OF THOSE ORGANIZATIONS TO WHICH IT HAS GIVEN FINANCIAL ASSISTANCE?

DOE does not have a separate appropriation to establish an ERA intervention funding program and does not have definitive criteria for determining the need to invite Petitions for Special Redress. DOE considers the importance of an issue or rulemaking proceeding and decides on a case-by-case basis as to whether DOE should extend an invitation for Petitions of Special Redress. DOE officials believe that it is important to have consumers present their points of views in certain rulemaking and adjudicatory proceedings and are willing to provide funds for this purpose when the issue could substantially affect the consumer, especially in terms of increased energy prices. For example, the ability of a heating oil price monitoring system to adequately detect overcharges for heating oil was of considerable consumer interest.

Although DOE does not have definitive criteria for inviting Petitions for Special Redress, it has established general procedures for DOE officials and intervenors to follow once the invitation has been announced.

When DOE invites requests for intervenor funding, it requires the Petition of Special Redress to contain

- a detailed description of the purposes and functions of the petitioning organization;
- evidence that the petitioner operates on a non-profit basis;
- a description of the type of information that the petitioner plans to present during the proceeding;
- the reasons why the petitioner's involvement in the proceeding will substantially contribute to a full and fair determination of the complex and important issues considered in the proceeding;
- a budget which itemizes the estimated expenses that the petitioner will incur in preparing and presenting its position; and
- documentation which establishes that unless financial assistance is provided, the petitioners will be unable to bear the costs of participating in the proceedings.

DOE reviews the petition and determines whether the petitioner qualifies for assistance, and, if so, how much funding it should receive. DOE officials told us that in making this determination, they refer to Comptroller General's Decisions, previous DOE cases, and precedent established by other agencies. DOE regulations provide that approvals of petitions can be made only after finding that

- public participation is necessary to adequately present opposing points of view on a matter;
- the intervenor could not fully participate without DOE funding;
- the intervenor is qualified to represent consumer interests in the proceeding; and

--the information the intervenor provides will be valuable to a complete review of the issues in the proceeding.

Since the funding level requested in the petitions is based on cost estimates, by necessity DOE's review and approval of these petitions is highly judgmental. For example, although DOE requires petitioners to submit extensive documentation supporting their requests, it is difficult to determine whether the funding level requested is reasonable for the services the petitioners intend to perform. DOE officials said they desire to approve rates high enough for the intervenor to provide a quality contribution to the proceedings, but not so high that the rates would provide a windfall for the attorneys and consultants retained by the intervenors. Also, it is difficult to assess whether the petitioners will provide a quality contribution to the proceeding.

Because DOE's procedures for intervenor funding are highly subjective and because the scope of our review did not include an assessment of reasonableness of precedent established by other agencies, we could not determine positively whether DOE's procedures ensured proper spending of DOE funds by intervenors. However, DOE's actions appeared to be reasonable for the three proceedings in which intervenor funding was provided.

ARE THE EXISTING PRACTICES OF THE
DEPARTMENT SUPPORTED BY THE STATUTORY
AUTHORITY ESTABLISHING THE DEPARTMENT?

Section 102 (15) of the Department of Energy Organization Act (P.L. 95-91), enacted on August 4, 1977, states that one of DOE's purposes is "to provide for, encourage, and assist public participation in the development and enforcement of national energy programs." DCE has interpreted this section, along with authorities transferred to DOE from the Federal Energy Administration, as authority to provide financial assistance to participants in various proceedings before it.

On numerous occasions, we have addressed the question of the legal authority of Federal agencies to provide financial assistance to intervenors in their proceedings. In these decisions, we examined the extent to which payments to intervenors may be considered "necessary expenses" within the discretion of Federal agencies in carrying out their statutory functions. We determined that an agency may use appropriated funds to finance the costs of participants in its proceedings

when it determines (1) that the participation of a particular party is necessary for the agency to determine the issue before it, or can reasonably be expected to contribute substantially to a full and fair determination of that issue and (2) the party is indigent or otherwise unable to finance its own participation.

Subsequent to our most recent decision on this issue, Costs of Intervention--Food and Drug Administration, 56 Comp. Gen. 111 (1976), the United States Court of Appeals for the Second Circuit issued a decision which held that the Federal Power Commission was not in error in determining that it lacked the statutory authority to reimburse intervenors for their expenses [Greene County Planning Board v. FPC (Greene County IV), 559 F. 2d 1227 (2nd Cir. 1977)]. In so ruling, the court indicated its disagreement with our previous decisions.

Although the Greene County IV case does cast some doubt on the validity of our previous decisions, we believe that the court opinion applies only to the Federal Power Commission and does not apply broadly to other Federal agencies. Also, we believe that the decision in Greene County IV does not preclude DOE from using its appropriated funds to reimburse intervenors. The Office of Legal Counsel of the Department of Justice has expressed a similar position on the effect of Greene County IV. In Greene County IV, the Second Circuit relied on three previous court decisions in reaching its result. These were Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Turner v. FCC, 514 F. 2d 1354 (D.C. Cir. 1975); and Greene County Planning Board v. FPC, (Greene County I), 455 F. 2d 412 (2nd Cir. 1972). None of these previous decisions dealt directly with the authority of a Federal agency to expend its own funds to reimburse the expenses of parties before it. In Alyeska and Turner, supra, the issue was whether a court or administrative agency could order one party to pay the expenses of another. In each case, the court ruled that this could not be done without specific statutory authority. In Greene County I, the question was whether a court could order either an opposing party or the agency to pay the intervenors' expenses. The court ruled that in the absence of a statutory requirement that such expenses be paid, it could not order that they be paid.

In distinguishing these three cases in our decision, Costs of Intervention--Nuclear Regulatory Commission, B-92288 (February 19, 1976), we stated that:

"In the matter before us, we are not considering whether NRC has the authority to determine whether one participant in its proceedings should pay the expenses of the other, nor are we concerned with whether the persons to whom financial assistance is extended prevail. There is also no question of compelling NRC to pay the expenses of any of the parties. We hold only that NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial costs of participation in the proceedings." (Emphasis in the original.)

While we still believe that DOE's existing practice are supported by the statutory authority establishing it, we should note that a suit on this question is pending in the United States District Court for the District of Columbia, (Civ. A. No. 70-1543, August 17, 1978). We think our long-standing position on this question is valid, but a contrary ruling in the present litigation may cause us to reevaluate that position.

DOES THE DEPARTMENT HAVE AN ADEQUATE
PROGRAM FOR AUDITING OR OTHERWISE
VERIFYING THE PURPOSES FOR WHICH
GRANT FUNDS ARE EXPENDED?

DOE did not review the intervenor's uses of DOE funds paid for the 1977 Consumer Union and Consumer Federation of America (Federation) cases. DOE officials stated that by reviewing the Petitions for Special Redress they satisfied themselves that the requested funding level was reasonable for the services the petitioners said they would provide.

However, DOE officials said that they would audit expenditures made by the Federation in connection with its 1978 petition. In February 1978, the Federation requested funds to support their intervention in ERA's 1978 heating oil proceedings. The hearings were held in late August 1978 and the Federation intervened with the understanding that it would be reimbursed by DOE for certain expenses. In

order to have a system to check on the Federation's expenses, DOE entered into a formal agreement with the Federation on July 13, 1978. This agreement itemized the Federation's expenses that DOE agreed to reimburse and established procedures for the Federation to follow in submitting documentation in support of its expenditures. The agreement states that the Federation will submit monthly progress reports describing in detail the expenses incurred and the work accomplished. DOE requires the Federation to submit its expenses on vouchers in accordance with the billing instructions for cost-reimbursement type contracts. Along with the voucher, the Federation must also submit a Statement of Costs which itemizes and explains claimed costs for the billing period.

As these reports and vouchers are submitted, DOE officials said they will review them to determine if the Federation is expending DOE funds in accordance with the terms of the agreement. This review will entail examining vouchers to determine if the Federation's out-of-pocket expenses are in accordance with the terms of the agreement. The agreement states that an amount not to exceed \$8,500 is authorized for out-of-pocket expenses which include postage costs, long distance telephone charges, telegrams, copying charges, transportation and per diem, courier services, transcripts, report fees, and preparation of exhibits. Also, DOE plans to review time statements to assure that the Federation staff, consultants, and attorneys are paid at rates not to exceed those authorized by the agreement. Part of the review will be judgmental in nature as DOE attempts to assess if the Federation is presenting a quality product for the amount of funds expended.

Although the agreement was recently implemented and has not been tested, it appears to be an adequate mechanism for checking the Federation's spending of DOE funds. According to DOE officials, this agreement will serve as a model for future intervention funding cases.

DOES THE DEPARTMENT DETERMINE THE AMOUNT OF FUNDS NECESSARY TO SUPPORT PARTICULAR INTERVENTIONS ON THE BASIS OF COMPARISONS WITH THE RATE OF COMPENSATION FOR SIMILARLY SITUATED ORGANIZATIONS SUCH AS PUBLIC INTEREST OR ADVOCACY GROUPS, OR BY REFERENCE TO OTHER PARTICIPANTS IN ERA PROCEEDINGS, I.E., PRIVATE COUNSEL FEES?

DOE officials stated that they follow the approach the Federal Trade Commission (FTC) adopted for compensating attorneys in its intervenor program. FTC reimburses intervenors for attorney fees in accordance with the salaries the Federal Government pays attorneys of comparable experience and skill. This practice is also consistent with the Civil Aeronautics Board's approach to reimbursing intervenors for attorney fees. We did not assess the reasonableness of the FTC fees of approximately \$50 per hour for senior counsel and \$35 per hour for associate counsel.

DOE reimbursed intervenors for consultant fees at rates not to exceed \$30 per hour in the Consumer Union case and the 1977 Federation case. DOE established this precedent during the Consumer Union case when it determined that \$30 per hour was a comparable rate paid by other Federal agencies to intervenors for consultant fees. We did not verify this determination.

DOE will approve higher fees if the intervenor can prove that it needs a higher fee to obtain the services of more skilled attorneys and consultants. DOE granted the Federation a slightly higher fee for attorneys in the 1977 proceedings and higher fees for both attorneys and consultants in the 1978 proceedings. The circumstances surrounding these cases and the fees that were granted are discussed in the following section.

FUNDING OF CONSUMER FEDERATION OF AMERICA INTERVENTIONS

The Federation operates on a non-profit basis and is the largest consumer organization in the United States. It represents more than 200 consumer and consumer-related organizations throughout the country which have more than 30 million members. The Federation has also represented consumers in a wide range of energy-related matters. The Federation intervened in the 1977 and 1978 proceedings on ERA's heating

oil monitoring system, and a discussion of the Federation's involvement in each proceeding follows.

1977 Heating Oil Proceedings

On April 7, 1977, the Federation filed a Petition for Special Redress requesting \$25,584 to assist its intervention in ERA's 1977 hearings. On April 25, the Federation filed a supplement to the Petition, increasing its request to \$28,584. DOE then issued a Decision and Order limiting the amount that the Federation could receive to \$6,000 which would reimburse it for all direct out-of-pocket expenses and payments made in retaining economic and financial consultants. At that time, DOE said it would entertain a further request by the Federation at the conclusion of the proceeding for additional financial reimbursement for reasonable legal fees.

The Federation, on May 13, 1977, filed an Application for Modification of a Decision and Order stating that it could not participate in the proceeding without additional funding. In replying to the Federation's Application for Modification, DOE, in its June 10 Decision and Order, stated that its review of the Federation's financial condition indicated that it could not further participate in the proceedings. Thus, DOE approved a total reimbursement of \$11,100 instead of the \$6,000 it had originally approved. This funding was to assist the Federation in retaining economic and financial experts, as well as to pay all direct out-of-pocket expenses. Again, DOE stated that the Federation may request additional reimbursement for legal services rendered in connection with the proceeding.

On November 11, 1977, the Federation petitioned DOE for reimbursement of counsel fees in the amount of \$16,264. On February 27, 1978, the Deputy Secretary, DOE, after discussing the situation with Federation officials, decided to grant the Federation the full \$16,264 that it requested. According to a DOE official, the Deputy Secretary granted the full amount because he believed that the quality of the Federation's contribution justified total payment. As a result of receiving the full \$16,264, the hourly rate for all attorneys assigned to the proceedings averaged about \$36 per hour. The rate for two senior attorneys was \$53.50 an hour and the rate for a law student working as a summer intern was \$15 per hour.

DOE has reimbursed the Federation a total of \$27,364 as of August 25, 1978, for its participation in the 1977 proceedings. DOE authorized a supplemental payment of \$5,611, but according to a Federation official, payment had not been received. This amount covered counsel fees and two-thirds of the salary expenses of the Federation staff for their participation in an extension of the 1977 proceedings.

DOE officials stated that they conducted an extensive review of the documentation that the Federation submitted in its original Petition for Special Redress to insure that the funds it requested were reasonable for the services it intended to perform. DOE officials said they examined the number of hours the Federation estimated its attorneys and consultants would spend on the proceeding and the fees the Federation was requesting for their services. DOE officials added that they also evaluated the analyses the Federation intended to perform and made a judgmental assessment that the amount of funds requested to do such analyses was reasonable. However, DOE did not conduct an extensive review of how the Federation expended the funds it was granted. DOE officials said that the proceeding was not lengthy and that they believed their reviews of the original petition and the subsequent supplemental requests were adequate to determine if the funds were spent properly. Also, DOE officials said the Federation made a high quality contribution to the 1977 proceedings.

1978 Heating Oil Proceedings

The Federation has recently participated in the August 1978 ERA hearings on DOE's system to monitor heating oil prices. On February 21, 1978, the Federation filed a Petition for Special Redress requesting reimbursement of \$97,115 for expenses connected with the proceeding. The Petition included an estimated budget requesting reimbursement of \$24,615 for Federation staff time, \$18,000 for consulting services, \$45,000 for legal fees, and \$9,500 for out-of-pocket expenses. In its April 27, 1978, Decision and Order, DOE approved ceilings of \$16,410 for Federation staff time, \$13,500 for consulting services, and \$8,500 for out-of-pocket expenses for a total ceiling of \$38,410. DOE stated in the Decision and Order that it would entertain at a later date a further request for reimbursement of legal services up to the \$45,000 level requested in the petition. However, on July 13, 1978, DOE agreed to reimburse the Federation in an amount not to exceed \$43,200 for legal fees.

On April 28, 1978, the Federation filed an Application for Modification with DOE requesting that it reconsider and modify the April 27 Decision and Order. The Federation requested that DOE reimburse its staff for the full amount claimed instead of two-thirds of the amount as determined in the prior Decision and Order. Also, the Federation requested that it receive \$60 per hour for senior counsel fees and \$40 per hour for associate counsel fees as opposed to the respective \$50 and \$35 per hour fees that DOE approved in the April 27 Decision and Order. In its May 5, 1978, Decision and Order, DOE said it will provide reimbursement for two-thirds of the time that the Federation staff expends.

Other than the fact that DOE had established a precedent in the previous Federation case, DOE provided the reasoning that at least a portion of the time an organization spends on an intervention proceeding is presumably a part of their overall responsibilities, especially where the intervention furthers the objectives of the organization. Also, DOE believes that it should provide some reimbursement for staff time since the staff would ordinarily be working on other projects.

With respect to attorney fees, DOE, in its May 5 Decision and Order, stated that it would reimburse the Federation \$60 per hour for senior attorneys and \$40 per hour for associate attorneys. It added that the Federation provided material which indicates that hourly rates of \$50 and \$35 are inadequate in view of the special nature of the August hearing and the particular qualifications of the counsel that the Federation retains. DOE conducted evidentiary hearings in August to test the validity of all the data and conclusions which are introduced into evidence. The Decision and Order also stated that the issues to be addressed and the conclusions reached in the evidentiary hearing are of unusual significance and complexity because 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 Federation indicated it will retain counsel who are skilled in this field and have considerable expertise with regard to both the procedural and substantive issues that the participating parties will address in the hearing.

DOE approved consultant fees of up to \$50 per hour for the 1978 proceedings. In its April 27 Decision and Order, DOE stated that the Federation presented material which indicates that the \$30 per hour fee for reimbursement of economic

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and financial consultants would not be adequate to insure the retention of experienced analysts. In view of the complexity of the heating oil monitoring system and the voluminous amount and complex nature of data which must be analyzed, DOE decided to allow the Federation up to \$50 per hour for consultant fees. It concluded that the Federation should be permitted adequate discretion in determining the selection, compensation, and time commitments of its consultants.

In its May 5 Decision and Order, DOE increased the amount of reimbursement from \$38,410 to \$43,690 to account for the additional staff that the Federation hired exclusively to work on the 1978 proceedings. When added to the approximate \$43,200 authorized for legal fees, DOE will eventually pay the Federation close to \$87,000 for its participation in the proceedings. DOE has reimbursed the Federation for about \$15,000 as of August 25, 1978, and will pay the additional amounts after the Federation submits the appropriate documentation.

As discussed on page 7, DOE and the Federation signed a formal agreement itemizing the information that DOE requires the Federation to submit on a monthly basis. Although the agreement was recently implemented and has not been tested, we believe it will be an adequate mechanism to review the use of DOE intervenor funds. However, DOE will still have to make subjective decisions as to what funding levels are reasonable and whether the intervenors are providing a quality contribution.