

§ 5.29 Additional rulemaking proceedings.

The Secretary may initiate any further rulemaking proceedings that he finds necessary or desirable. For example, he may invite interested persons to present oral arguments, participate in conferences, appear at informal hearings, or participate in any other proceeding.

§ 5.31 Hearings.

(a) Sections 556 and 557 of title 5, United States Code, do not apply to hearings held under this part. As a fact-finding proceeding, each hearing is nonadversary and there are no formal pleadings or adverse parties. Any rule issued in a case in which a hearing is held is not necessarily based exclusively on the record of the hearing.

(b) The Secretary designates a representative to conduct any hearing held under this part. The General Counsel designates a member of his staff to serve as legal officer at the hearing.

§ 5.33 Adoption of final rules.

Final rules are prepared by representatives of the office concerned and the Office of the General Counsel. The rule is then submitted to the Secretary for his consideration. If the Secretary adopts the rule, it is published in the FEDERAL REGISTER, unless all persons subject to it are named and are personally served with a copy of it.

APPENDIX A TO PART 5

Pursuant to § 5.1(b), the following officials of the Office of the Secretary of Transportation are authorized to conduct rulemaking proceedings under this part, as specified in this appendix:

(1) The General Counsel is authorized to conduct all rule-making proceedings, except the issuance of final rules, under the Act of March 19, 1918, ch. 24, as amended (15 U.S.C. 261-264); the Uniform Time Act of 1966 (80 Stat. 107, 15 U.S.C. 260-267); and section 6(e)(5) of the Department of Transportation Act (80 Stat. 939, 49 U.S.C. 1655 (e)(5)).

(2) The General Counsel is authorized to determine the practicability of applying the standard time of any standard time zone to the movements of any common carrier engaged in interstate or foreign commerce, and, under section 2 of the Act of March 19, 1918, ch. 24, as amended (15 U.S.C. 262), to issue operating exceptions in any case in

which he determines that it is impractical to apply the standard time.

[Amdt. 5-1, 32 FR 11473, Aug. 9, 1967]

PART 6—IMPLEMENTATION OF EQUAL ACCESS TO JUSTICE ACT IN AGENCY PROCEEDINGS**Subpart A—General Provisions**

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AUTHORITY: 5 U.S.C. 504; 28 U.S.C. 2412.

SOURCE: 48 FR 1070, Jan. 10, 1983, unless otherwise noted.

Subpart A—General Provisions**§ 6.1 Purpose of these rules.**

The Equal Access to Justice Act, 5 U.S.C. 504 (called "the Act" in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before government agencies, such as the Department of Transportation or any of its operating administrations. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that this agency will use to make them. The use of the term "Department", in this rule, will

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be understood to mean the Department of Transportation or any of its operating administrations, unless otherwise specified. The term “agency counsel” will be understood to mean counsel for the Department of Transportation or any of its operating administrations.

[48 FR 1070, Jan. 10, 1983, as amended at 62 FR 19233, Apr. 21, 1997]

§ 6.3 Applicability.

Section 6.9(a) applies to any adversary adjudication pending before the Department on or after October 1, 1981. In addition, applicants for awards must also meet the standards of § 6.9(b) for any adversary adjudication commenced on or after March 29, 1996.

[62 FR 19233, Apr. 21, 1997]

§ 6.5 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by the Department of Transportation. These are adjudications under 5 U.S.C. 554 in which the position of the Department is represented by an attorney or other representative who enters an appearance and participates in the proceeding. Coverage of the Act begins at designation of a proceeding or issuance of a charge sheet. Any proceeding in which the Department may prescribe or establish a lawful present or future rate is not covered by the Act. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise “adversary adjudications.” For the Department of Transportation, the types of proceedings covered include, but may not be limited to: Coast Guard suspension or revocation of licenses, certificates or documents under 46 U.S.C. 7701 *et seq.*; Coast Guard class II civil penalty proceedings under the Clean Water Act, 33 U.S.C. 1321(b)(6)(B)(ii); Coast Guard class II penalty proceedings under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9609(b); suspension and revocation of Certificates of Registry proceedings for Great Lakes Pilots pursuant to 46 CFR Part 401; National Highway Traffic Safety Administration (NHTSA) automotive fuel economy enforcement under 49 U.S.C. Chapter 329

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(49 CFR Part 511); Federal Highway Administration (FHWA) enforcement of motor carrier safety regulations under 49 U.S.C. 521 and 5123 (49 CFR 386); the Department’s aviation economic enforcement proceedings conducted by its Office of Aviation Enforcement and Proceedings pursuant to 49 U.S.C. Subtitle VII, 14 CFR Chapter II. Also covered are any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), any hearing conducted under Chapter 38 of title 31, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

(b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

[48 FR 1070, Jan. 10, 1983, as amended at 62 FR 19233, Apr. 21, 1997]

§ 6.7 Eligibility of applications.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to an adversary adjudication for which it seeks an award. The term “party” is defined in 5 U.S.C. 504(b)(1)(B). The applicant must show that it meets all conditions of eligibility set out in this subpart and in paragraph (b) of this section.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees.

(3) A charitable or other tax-exempt organization as described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with a net worth of not more than \$5 million and not more than 500 employees.

(5) Any other partnership, corporation, association, or public or private

organization with a net worth of not more than \$7 million and not more than 500 employees.

(6) For the purposes of § 6.9(b), eligible applicants include small entities as defined in 5 U.S.C. 601.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was designated.

(d) An applicant who owns an unincorporated business will be considered an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The number of employees of an applicant includes all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the administrative law judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(h) An applicant who appears *pro se* in a proceeding is ineligible for award of attorney fees. However, eligibility

for other expenses is not affected by *pro se* representation.

[48 FR 1070, Jan. 10, 1983, as amended at 62 FR 19234, Apr. 21, 1997]

§ 6.9 Standards for awards.

(a) An eligible applicant may receive an award for fees and expenses incurred by that party in connection with a decision in favor of the applicant in a proceeding covered by this Part, unless the position of the Department over which the applicant has prevailed was substantially justified or special circumstances make the award sought unjust. The burden of proof that an award should not be made to an eligible applicant is on the Department where it has initiated the proceeding. No presumption arises that the Department's position was not substantially justified simply because the Department did not prevail. Whether or not the position of the Department was substantially justified shall be determined on the basis of the administrative record, as a whole, in the adversary adjudication for which fees and other expenses are sought. The "position of the Department" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication may be based.

(b) In the context of a Departmental proceeding to enforce a party's compliance with a statutory or regulatory requirement, if the demand by the Department is substantially in excess of the amount awarded to the government pursuant to the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to an eligible applicant party the fees and expenses related to defending against the excessive demand, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance. As used in this section, "demand" means the express demand of

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the Department which led to the adversary adjudication, but does not include a recitation by the Department of the maximum statutory penalty

(i) In the administrative complaint, or

(ii) Elsewhere when accompanied by an express demand for a lesser amount.

(c) The decision of the Department on the application for fees and other expenses shall be the final administrative decision under this section.

(d) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding.

[62 FR 19234, Apr. 21, 1997]

§ 6.11 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents or expert witnesses.

(b) No award for the fee of an attorney or agent under these rules may exceed \$125.00 per hour. This amount shall include all other expenses incurred by the attorney or agent in connection with the case. No award to compensate an expert witness may exceed the highest market rate at which the Department pays expert witnesses, or \$24.09 per hour, whichever is less.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or

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other matter was necessary for preparation of the applicant's case.

(e) Fees may be awarded only for work performed after designation of a proceeding.

[48 FR 1070, Jan. 10, 1983, as amended at 62 FR 19234, Apr. 21, 1997]

§ 6.13 Delegations of authority.

The Secretary of Transportation delegates to the head of each operating administration of this Department the authority to take final action, other than rulemaking, on matters pertaining to the Act in actions that require section 554 proceedings. The head of each operating administration may redelegate this authority.

Subpart B—Information Required from Applicants

§ 6.17 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of an agency or agencies in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state that it did not have more than 500 employees at the time the proceeding was initiated, giving the number of employees of the applicant and describing briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed \$1 million (if an individual) or \$5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 114j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

(f) If the applicant is a partnership, corporation, association, or organization, or a sole owner of an unincorporated business, the application shall state that it did not have more than 500 employees at the time the proceeding was initiated, giving the number of its employees and describing briefly the type and purpose of its organization or business.

§ 6.19 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in this part) when the proceeding was designated. If any individual, corporation, or other entity directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or if the applicant directly or indirectly owns or controls a majority of the voting shares or other interest of any corporation or other entity, the exhibit must include a showing of the net worth of all such affiliates or of the applicant including the affiliates. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The administrative law judge may require an applicant to file

additional information to determine its eligibility for an award.

(b) The net worth exhibit shall describe any transfers of assets from, or obligations incurred by, the applicant or any affiliate, occurring in the one-year period prior to the date on which the proceeding was initiated, that reduced the net worth of the applicant and its affiliates below the applicable net worth ceiling. If there were no such transactions, the applicant shall so state.

(c) The net worth exhibit shall be included in the public record of the proceeding.

§ 6.21 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought.

(b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing in behalf of the party, stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(1) The affidavit shall state the services performed. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide information about two attorneys or agents with similar experience, who perform similar work, stating their hourly rate.

(c) The documentation shall also include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

(d) The administrative law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(e) The administrative law judge may, within his or her discretion, make a determination as to whether a study, conducted by the applicant, was necessary to the preparation of the applicant's case.

Subpart C—Procedures for Considering Applications

§ 6.23 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding.

§ 6.25 Answer to application.

(a) Within 30 calendar days after service of an application, the agency counsel may file an answer to the application. Unless the agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award request.

(b) If agency counsel and applicant believe that they can reach a settlement concerning the award, the agency counsel may file a statement of intent to negotiate. The filing of such a statement shall extend the time for filing an answer an additional 30 days.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the Department's position. If the answer is based on any alleged facts not already in the record of the proceeding, the Department shall include with the answer either supporting affidavits or a request for further proceedings under § 6.3.

[48 FR 1070, Jan. 10, 1983, as amended at 62 FR 19234, Apr. 21, 1997]

§ 6.27 Comments by other parties.

Any party to a proceeding, other than the applicant and the Department may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application.

§ 6.29 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the agency's standard settlement procedure. If a prevailing party and the agency counsel agree on a proposed settlement of an award before an application has been filed the application shall be filed with the proposed settlement.

§ 6.31 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the administrative law judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing.

Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(b) A request that the administrative law judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 6.33 Decision.

The administrative law judge shall issue an initial decision on the application as soon as possible after completion of proceedings on the application. The decision shall also include, if at issue, findings on whether the Department's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment or any award made among the agencies, and shall explain the reasons for the allocation made.

§ 6.35 Agency review.

Where Department review of the underlying decision is permitted, either the applicant or agency counsel, may seek review of the initial decision on the fee application, or the Department may decide to review the decision on its own initiative. If neither the applicant nor the agency counsel seeks review within 30 days after the decision is issued, it shall become final.

§ 6.37 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 6.39 Payment of award.

An applicant seeking payment of an award from the Department of Transportation or any of its operating administrations under this part shall submit a copy of the Department of Transportation's or any of its operating administration's final decisions granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The copy of the decision and the statement should be submitted to the head of the affected operating administration or the Secretary of Transportation, where the Department of Transportation, Office of the Secretary, has initiated the proceedings.

PART 7—PUBLIC AVAILABILITY OF INFORMATION

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Subpart A—General Provisions

§ 7.1 General.

(a) This part implements 5 U.S.C. 552, and prescribes rules governing the availability to the public of DOT records. Many documents are made available to the public for inspection and copying through DOT's Primary Electronic Access Facility and public record unit locations that are discussed in subpart B of this part, which contains the DOT regulations concerning the availability to the public of opinions issued in the adjudication of cases, policy issuances, administrative manuals, and other information made available to the public, without need for a specific request.

(b) Subpart C of this part describes the records that are not required to be