

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.” Generally, the types of Board proceedings covered by the Act include, but are not limited to, investigation proceedings instituted under 49 U.S.C. 11701 and 49 U.S.C. 10925 and disciplinary proceedings conducted pursuant to 49 CFR 1100.11.

(b) The Board may also designate a proceeding not listed in paragraph (a) of this section as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding, designating the matter for hearing or at any other time during the proceeding. The Board’s failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) 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.

§ 1016.104 Decisionmaking authority.

Unless otherwise ordered by the Board in a particular proceeding, each application for an award under this part shall be assigned for decision to the official or decisionmaking body that entered the decision in the adversary adjudication. That official or decisionmaking body is referred to in this part as the “adjudicative officer.”

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26379, June 23, 1989]

§ 1016.105 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award, it must have stood in an adversary relationship to the position taken by agency counsel, and it must have prevailed on one or more of the issues raised by agency counsel. The term “party” is defined in 5 U.S.C. 504(b)(1)(B). The applicant must show that it meets all conditions of eligi-

bility set out in this subpart and in Subpart B.

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

(1) An individual whose net worth did not exceed \$2 million at the time the adversary adjudication was initiated;

(2) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization whose net worth does not exceed \$7 million and which had no more than 500 employees at the time the adversary adjudication was initiated;

(3) Any organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association.

(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 initiated.

(d) The employees of an applicant include 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. Independent contractors under lease to motor carriers are not employees of the carriers under these rules. Also, agents for motor common carriers of household goods are not employees of their respective principal carriers.

(e) 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 adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act

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in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(f) 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.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26379, June 23, 1989]

§ 1016.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record made in the adversary adjudication for which fees and other expenses are sought. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel, which may avoid an award by showing that its position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26379, June 23, 1989]

§ 1016.107 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed \$75.00 per hour, unless a higher fee is justified. 5 U.S.C. 504(b)(1)(A). However, an award may also include the

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reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer 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 other matter was necessary for preparation of the applicant's case.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26379, June 23, 1989]

§ 1016.109 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before this agency and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

Subpart B—Information Required From Applicants

§ 1016.201 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