

§3.81

16 CFR Ch. I (1–1–10 Edition)

with subparts B, C, D, and E of part 3 of this chapter. Upon conclusion of hearings before an Administrative Law Judge, the record and the Administrative Law Judge's recommendations shall be certified to the Commission for final disposition of the matter.

(3) *Termination of existing orders*—(i) *Generally*. Notwithstanding the foregoing provisions of this rule, and except as provided in paragraphs (b)(3)(ii) and (iii) of this section, an order issued by the Commission before August 16, 1995, will be deemed, without further notice or proceedings, to terminate 20 years from the date on which the order was first issued, or on January 2, 1996, whichever is later.

(ii) *Exception*. This paragraph applies to the termination of an order issued before August 16, 1995, where a complaint alleging a violation of the order was or is filed (with or without an accompanying consent decree) in federal court by the United States or the Federal Trade Commission while the order remains in force, either on or after August 16, 1995, or within the 20 years preceding that date. If more than one complaint was or is filed while the order remains in force, the relevant complaint for purposes of this paragraph will be the latest filed complaint. An order subject to this paragraph will terminate 20 years from the date on which a court complaint described in this paragraph was or is filed, except as provided in the following sentence. If the complaint was or is dismissed, or a federal court rules or has ruled that the respondent did not violate any provision of the order, and the dismissal or ruling was or is not appealed, or was or is upheld on appeal, the order will terminate according to paragraph (b)(3)(i) of this section as though the complaint was never filed; provided, however, that the order will not terminate between the date that such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal. The filing of a complaint described in this paragraph will not affect the duration of any order provision that has expired, or will expire, by its own terms. The filing of a complaint described in this paragraph also will not affect the

duration of an order's application to any respondent that is not named in the complaint.

(iii) *Stay of Termination*. Any party to an order may seek to stay, in whole or part, the termination of the order as to that party pursuant to paragraph (b)(3)(i) or (ii) of this section. Petitions for such stays shall be filed in accordance with the procedures set forth in §2.51 of these rules. Such petitions shall be filed on or before the date on which the order would be terminated pursuant to paragraph (b)(3)(i) or (ii) of this section. Pending the disposition of such a petition, the order will be deemed to remain in effect without interruption.

(iv) *Orders not terminated*. Nothing in §3.72(b)(3) is intended to apply to *in camera* orders or other procedural or interlocutory rulings by an Administrative Law Judge or the Commission.

[32 FR 8449, June 13, 1967, as amended at 44 FR 40637, July 12, 1979; 45 FR 21623, Apr. 2, 1980; 60 FR 58515, Nov. 28, 1995]

Subpart I—Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings

AUTHORITY: 5 U.S.C. 504 and 5 U.S.C. 553(b).

SOURCE: 63 FR 36341, July 6, 1998, unless otherwise noted.

§3.81 General provisions.

(a) *Purpose of these rules*. The Equal Access to Justice Act, 5 U.S.C. 504 (called "the Act" in this subpart), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to adversary adjudicative proceedings under part 3 of this title. The rules in this subpart describe the parties eligible for awards, how to apply for awards, and the procedures and standards that the Commission will use to make them.

(1) *When an eligible party will receive an award*. An eligible party will receive an award when:

(i) It prevails in the adjudicative proceeding, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust. Whether or not the position of the agency was substantially justified will

Federal Trade Commission

§ 3.81

be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are sought; or

(ii) The agency's demand is substantially in excess of the decision of the adjudicative officer, and is unreasonable when compared with that decision, under all the facts and circumstances of the case. *Demand* means the express final demand made by the agency prior to initiation of the adversary adjudication, but does not include a recitation by the agency of the statutory penalty in the administrative complaint or elsewhere when accompanied by an express demand for a lesser amount.

(b) *When the Act applies.* (1) Section 504(a)(1) of the Act applies to any adversarial adjudicative proceeding pending before the Commission at any time after October 1, 1981. This includes proceedings begun before October 1, 1981, if final Commission action has not been taken before that date.

(2) Section 504(a)(4) applies to any adversarial adjudicative proceeding pending before the Commission at any time on or after March 29, 1996.

(c) *Proceedings covered.* (1) The Act applies to all adjudicative proceedings under part 3 of the rules of practice as defined in § 3.2, except hearings relating to the promulgation, amendment, or repeal of rules under the Fair Packaging and Labeling Act.

(2) [Reserved]

(d) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adjudicative proceeding in which it seeks an award. The term *party* is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

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

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

(ii) 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;

(iii) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code

(26 U.S.C. 501(c)(3)) with not more than 500 employees;

(iv) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees;

(v) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7 million and not more than 500 employees; and

(vi) For purposes of receiving an award for fees and expenses for defending against an excessive Commission demand, any small entity, as that term is defined under 5 U.S.C. 601.

(3) Eligibility of a party shall be determined as of the date the proceeding was initiated.

(4) An applicant who owns an unincorporated business will be considered as 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.

(5) 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.

(6) 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.

(7) 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.

(e) *Standards for awards.* (1) For a prevailing party:

(i) A prevailing applicant will receive an award for fees and expenses incurred after initiation of the adversary adjudication in connection with the entire adversary adjudication, or on a substantive portion of the adversary adjudication that is sufficiently significant and discrete to merit treatment as a separate unit unless the position of the agency was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel, which may avoid an award by showing that its position had a reasonable basis in law and fact.

(ii) An award to prevailing party will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make an award unjust.

(2) *For a party defending against an excessive demand:*

(i) An eligible applicant will receive an award for fees and expenses incurred after initiation of the adversary adjudication related to defending against the excessive portion of a Commission demand that is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with that decision under all the facts and circumstances of the case.

(ii) An award will be denied if the applicant has committed a willful violation of law or otherwise acted in bad faith or if special circumstances make an award unjust.

(f) *Allowable fees and expenses.* (1) 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.

(2) No award for the fee of an attorney or agent under these rules may exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A). No award to compensate an expert witness may exceed the highest rate at which the Commis-

sion paid expert witnesses for similar services at the time the fees were incurred. The appropriate rate may be obtained from the Office of the Executive Director. However, an award may also include the 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.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Administrative Law Judge shall consider the following:

(i) 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;

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

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

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

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

(4) 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.

(5) Any award of fees or expenses under the Act is limited to fees and expenses incurred after initiation of the adversary adjudication and, with respect to excessive demands, the fees and expenses incurred in defending against the excessive portion of the demand.

(g) *Rulemaking on maximum rates for attorney fees.* If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may, upon its own initiative or on petition of any interested person or group, adopt regulations providing that attorney fees may be awarded at a rate higher than the rate specified in 5 U.S.C. 504(b)(1)(A) per

Federal Trade Commission

§ 3.82

hour in some or all the types of proceedings covered by this part. Rule-making under this provision will be in accordance with Rules of Practice part 1, subpart C of this chapter.

§ 3.82 Information required from applicants.

(a) *Contents of application.* An application for an award of fees and expenses under the Act shall contain the following:

(1) Identity of the applicant and the proceeding for which the award is sought;

(2) A showing that the applicant has prevailed; or, if the applicant has not prevailed, a showing that the Commission's demand was the final demand before initiation of the adversary adjudication and that it was substantially in excess of the decision of the adjudicative officer and was unreasonable when compared with that decision;

(3) Identification of the Commission position(s) that applicant alleges was (were) not substantially justified; or, identification of the Commission's demand that is alleged to be excessive and unreasonable and an explanation as to why the demand was excessive and unreasonable;

(4) A brief description of the type and purpose of the organization or business (unless the applicant is an individual);

(5) A statement of how the applicant meets the criteria of § 3.81(d);

(6) The amount of fees and expenses incurred after the initiation of the adjudicative proceeding or, in the case of a claim for defending against an excessive demand, the amount of fees and expenses incurred after the initiation of the adjudicative proceeding attributable to the excessive portion of the demand;

(7) Any other matters the applicant wishes the Commission to consider in determining whether and in what amount an award should be made; and

(8) A written verification under oath or under penalty or perjury that the information provided is true and correct accompanied by the signature of the applicant or an authorized officer or attorney.

(b) *Net worth exhibit.* (1) 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 application and any affiliates (as defined in § 3.81(d)(6)) when the proceeding was initiated. 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 part. The Administrative Law Judge may require an applicant to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, if an applicant objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure, the applicant may submit that portion of the exhibit directly to the Administrative Law Judge in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) (1) through (9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on complaint counsel but need not be served on any other party to the proceeding. If the Administrative Law Judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with § 4.11.

(c) *Documentation of fees and expenses.* The application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. With respect to a claim for fees and expenses involving an excessive demand,