

§ 502.411 Mediation and other alternative means of dispute resolution.

(a) Parties are encouraged to utilize mediation or other forms of alternative dispute resolution in all formal proceedings. The Commission also encourages those with disputes to pursue mediation in lieu of, or prior to, the initiation of a Commission proceeding.

(b) Any party may request, at any time, that a mediator or other neutral be appointed to assist the parties in reaching a settlement. If such a request is made in a proceeding assigned to an Administrative Law Judge, the provisions of § 502.91 apply. For all other matters, alternative dispute resolution services may be requested directly from the Federal Maritime Commission Alternative Dispute Resolution Specialist, who may serve as the neutral if the parties agree or who will arrange for the appointment of a neutral acceptable to all parties.

(c) The neutral shall convene and conduct mediation or other appropriate dispute resolution proceedings with the parties.

(d) *Ex parte Communications.* Except with respect to arbitration, the provisions of § 502.11 do not apply to dispute resolution proceedings, and mediators are expressly authorized to conduct private sessions with parties.

Subpart V—Implementation of the Equal Access to Justice Act in Commission Proceedings

SOURCE: 52 FR 28264, July 29, 1987, unless otherwise noted.

§ 502.501 General provisions.

(a) *Purpose.* The Equal Access to Justice Act, 5 U.S.C. 504 (“EAJA”), 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 the Federal Maritime Commission (“the Commission”). An eligible party may receive an award when it prevails over an agency, unless the agency’s position was substantially justified or special circumstances make an award unjust. The rules in this subpart describe the parties eligible for awards and the pro-

ceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Commission will use to make them.

(b) *When EAJA applies.* EAJA applies to any adversary adjudication:

(1) Pending or commenced before the Commission on or after August 5, 1985;

(2) Commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in § 502.502 of this subpart, has been filed with the Commission within 30 days after August 5, 1985; or

(3) Pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

(c) *Proceedings covered.* (1)(i) EAJA applies to adversary adjudications conducted by the Commission under this part. These are adjudications under 5 U.S.C. 554 in which the position of this or any other agency of the United States, or any component of any agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding.

(ii) Any proceeding in which the Commission may prescribe a lawful present or future rate is not covered by the Act.

(iii) 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.”

(2) The Commission’s failure to identify a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the EAJA; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

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

(d) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under EAJA, the applicant must be a party to the adversary adjudication for which it seeks an

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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 section and § 502.502.

(2) The types of eligible applicants are:

(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; and

(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.

(vi) For purposes of paragraph (e)(3) of this section, a small entity as defined in 5 U.S.C. 601.

(3) 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.

(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 interests of the applicant, or any corporation or other entity of which the appli-

cant directly or indirectly owns or controls a majority of the voting shares or other interests, will be considered an affiliate for purposes of this subpart, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of EAJA 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.

(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) 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. The position of the agency includes, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant is on agency counsel.

(2) 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.

(3) In an adversary adjudication arising from a Commission action to enforce a party’s compliance with a statutory or regulatory requirement, if the demand by the Commission is substantially in excess of the decision of the presiding officer and is unreasonable under the facts and circumstances of the case, the presiding officer shall award to the party fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

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(f) *Allowable fees and expenses.* (1) Awards will be based on rates customarily charged by the 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 this subpart may exceed \$125 per hour. No award to compensate an expert witness may exceed the highest rate at which the Commission pays expert witnesses. 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 adjudicative officer shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fees for similar services, or, if an employee of the applicant, the fully allocated costs 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 services does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of applicant's case.

(g) *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 the Commission and takes a position that is not substantially justified, the award or an ap-

propriate portion of the award shall be made against that agency. [Rule 501.]

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§ 502.502 Information required from applicants.

(a) *Contents of petition.* (1) An application for an award of fees and expenses under EAJA shall be by petition under § 502.69 of this part, shall clearly indicate that the application is made under EAJA, and shall identify the applicant and the proceeding (including docket number) for which an award is sought. The application shall show that the applicant has prevailed and identify the position of an agency or agencies that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(2) The petition shall also include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(i) 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

(ii) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

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

(4) The petition may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(5) The petition 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