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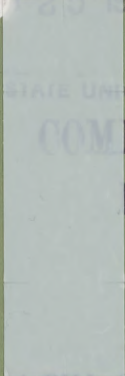
PUBLIC PARTICIPATION IN FEDERAL AGENCY
PROCEEDINGS ACT OF 1977, S. 270

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HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

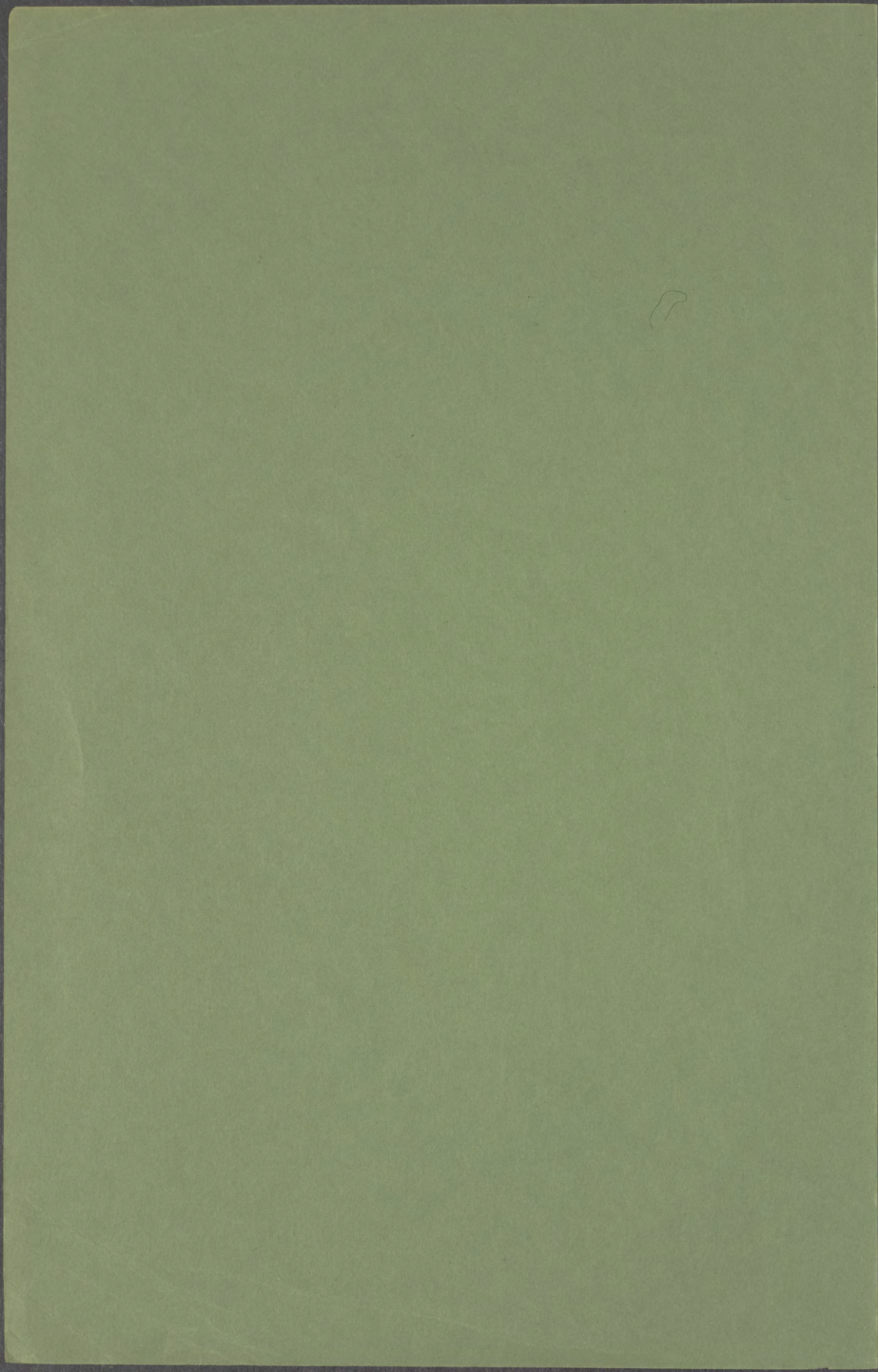
A BILL, S. 270, THE PUBLIC PARTICIPATION IN FEDERAL
AGENCY PROCEEDINGS ACT OF 1977

JUNE 14 AND 21, 1977

PART 2

Printed for the use of the Committee on the Judiciary





PUBLIC PARTICIPATION IN FEDERAL AGENCY
PROCEEDINGS ACT OF 1977, S. 270

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BEFORE THE
COMMITTEE ON THE JUDICIARY
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(ii)



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**PUBLIC PARTICIPATION IN FEDERAL AGENCY
PROCEEDINGS ACT OF 1977, S. 270**

TUESDAY, JUNE 14, 1977

**U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.**

The committee met, pursuant to notice, at 11:30 a.m. in room 6226, Dirksen Senate Office Building, Hon. Paul Laxalt [acting chairman of the committee] presiding.

Present: Senators Laxalt, Thurmond, Hatch, Wallop, Kennedy, and Abourezk.

Staff present: Irene R. Margolis, chief counsel and staff director of the Subcommittee on Administrative Practice and Procedure; Chuck Ludlam, counsel, Subcommittee on Administrative Practice and Procedure; Jay Steptoe, assistant counsel, Subcommittee on Antitrust and Monopoly; Richard Moore, minority counsel, Subcommittee on Administrative Practice and Procedure; and George Duckworth, counsel with Senator Thurmond.

Senator LAXALT. The hearing will be in order.

I would like to apologize to those present for the lateness of the start. We had an executive committee meeting of the Judiciary Committee, and that is the principal reason for the delay.

We will start the proceedings this morning with testimony from Joseph Spaniol, Jr., Assistant Director of the Administrative Office of the U.S. Courts.

As a preface to this hearing, I would like to say that this is an outgrowth of a discussion had with the Committee of Judiciary when it was sought to report out S. 270.¹

Several of the members of the committee, and even those of the subcommittee, expressed strong reservations about certain unanswered features in connection with S. 270.

It was for that reason, by consent of the committee—although not unanimous—that it was decided to hold further hearings in the main committee with a view to sitting once in executive session during the month of July and attempting to dispose of the legislation.

It is for that purpose we are here today.

Please proceed, Mr. Spaniol.

¹ See copy of S. 270 as introduced on p. 73.

**TESTIMONY OF JOSEPH F. SPANIOL, JR., ASSISTANT DIRECTOR,
ADMINISTRATIVE OFFICE OF THE U.S. COURTS**

Mr. SPANIOL. Thank you, Senator.

I appreciate this opportunity afforded by the committee to present the views of the Administrative Office of the U.S. Courts with respect to certain technical features of S. 270.

I want to emphasize at the outset that the suggestions for technical amendments to the bill, which we are presenting, are those of the staff of the administrative office. They have not been considered nor acted upon by the Judicial Conference of the United States.

With respect to the basic question of authorizing the payment of attorneys' fees in agency proceedings and in judicial proceedings for the review of agency action, the Judicial Conference has taken the position that this is a matter of governmental policy for the determination of the Congress and that the judiciary should express no view thereon.

This position of the Conference has already been transmitted to the chairman of the Senate Judiciary Committee.¹

Recently, staff members of the Senate asked our office for suggestions regarding the language of the bill. We have two primary suggestions which relate to sections 3 and 4 of the bill providing for the award of attorneys' fees and other costs of litigation in proceedings in court to review agency action.

We are, first of all, concerned that the language of section 707(b) of section 3 of the bill might be interpreted to require factfinding by a reviewing court, particularly a court of appeals, in making an award of attorneys' fees.

Our second concern pertains to the requirement that the courts themselves, rather than the agencies involved, would be required to pay attorneys' fees and costs awarded by the court.

With respect to factfinding to determine attorneys' fees, we are concerned that the criteria for awarding attorneys' fees, as set forth in section 3 of the bill—5 U.S.C. 707(b)—might be interpreted to require factfinding prior to the making of an award.

Attorneys' fees, where now authorized by statute, are fixed within the sound discretion of the court, based upon an application submitted by the party entitled to recover attorneys' fees.

Senator LAXALT. At the present time, that is the case generally?

Mr. SPANIOL. Yes. That is the case generally.

Although brief hearings are sometimes held, courts do not usually take testimony. Indeed, requests for the imposition of taxable costs under the provisions of 28 U.S.C. 1920 may even be settled by the clerk of the court, as well as by a judge.

It would be particularly inappropriate to require a court of appeals, for example, to conduct an evidentiary hearing to determine "the economic interest of the person in the outcome of the action," or to take testimony regarding the importance of the "public policy" or purpose served by the action.

So long as these requirements are interpreted as factors to guide the court in setting fees, there is no problem.

¹ See part 1 of hearings at pp. 183-186.

We offer no suggestions regarding changes in the language of this portion of the bill, but we do suggest the committee's report make it abundantly clear that the awarding of attorneys' fees under the stated criteria lies within the sound discretion of the court.

With respect to payment of awards of attorneys' fees and costs, in civil actions, courts do not generally award attorneys' fees and costs and make payment thereof out of their own funds.

If S. 270 is enacted, the largest share of the cost of the program will undoubtedly be borne by agencies, based upon awards made for participation in agency proceedings. It would, therefore, seem appropriate for the costs of court proceedings, including attorneys' fees, to be paid by the agency involved from the funds appropriated for this purpose.

Furthermore, in view of the requirement contained in the bill that agencies submit special reports to the Congress on the expenditure of funds, it would seem doubly appropriate for agency reports to include not only the cost incurred in proceedings before the agency but also the cost of judicial review.

To accomplish these objectives and to improve other technical features of the bill, the following amendments are suggested to the May 4 committee print of S. 270:¹

First, on page 23, line 4, insert the following at the end of the line: "and shall be paid by the agency involved out of funds appropriated for this purpose."

This amendment makes it clear that fees and costs awarded by the court in agency review proceedings are to be taxed against the agency.

That would make subsection (c) read as follows:

Reasonable attorneys' fees, fees and costs for experts, and the costs of litigation awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished and shall be paid by the agency involved out of funds appropriated for this purpose.

The other amendments are really conforming changes to that principal purpose:

Second, page 23, lines 8 through 16, strike section 4 in its entirety. This section would require an annual report to the Congress concerning payments made by the courts. If fees and costs are taxed against agencies, this section is unnecessary.

Third, page 23, lines 17 and 18, change "section 5(a)" to "section 4" and strike the words "the sums authorized under subsection (b), and in addition to."

Fourth, page 23, lines 21 and 22, strike the words, "the amendment made by section 2 of."

Fifth, page 24, line 3, insert the word "agency" before the word "proceedings."

Sixth, page 24, line 4, add at the end of the sentence the following: "and in civil proceedings to review agency action brought prior to the end of fiscal year 1980."

Seventh, page 24, lines 5 through 13, strike subsection (b) in its entirety.

¹ See copy of committee print of S. 270 as amended by subcommittee on May 4, 1977 on p. 85.

Eighth, page 24, line 14, change "section 6" to "section 5."

If adopted, these changes will require two other amendments to the bill:

First, page 20, line 20, insert after the words "to this section" the words "and section 707 of this title."

Second, page 21, line 9, change "section 5(a)" to "section 4."

We strongly urge that these suggested amendments be incorporated in the bill in the event Congress decides to act upon it.

Thank you for affording us an opportunity to present these suggestions.

Senator LAXALT. Thank you very much for your statement. I noticed in reviewing the record—this is before I came on the subcommittee or the committee—that what I interpret to be rather forceful objections to S. 270 in concept were interposed by your group's endeavors.¹ Did I misinterpret that?

I think basically the thrust of it was that S. 270 really put a load upon the courts, in terms of a caseload, that would be inappropriate. Was that originally the position of your group?

Mr. SPANIOL. Yes; our general counsel's office prepared a statement furnished to the committee to that effect. On further reflection, we are not sure that it will involve that much work for the courts; provided the courts do no have to engage in factfinding to set attorney fees.

Senator LAXALT. What would be available then in order to make that determination? Is it your position that the matter of whether attorney's fees are to be paid at all and the amount thereof would be left to the agency?

Mr. SPANIOL. No; it would be left to the agency under the agency provision of the bill, but in court proceedings, it would be determined by the court based on affidavits and in the customary manner in which courts now set attorneys' fees.

Senator LAXALT. In addition to that, to determine whether attorneys' fees should be awarded at all—whether or not the given proceeding meets the criteria of S. 270—doesn't that in itself create a difficult burden for the Federal courts?

Mr. SPANIOL. It will increase the burden somewhat, but it will not increase it significantly.

Senator LAXALT. On what basis did your group arrive at that conclusion?

I come off the heels of the new judgeship bill where I had a strong feeling on every level—the Supreme Court, the appellate courts, and the trial courts—are in difficulty workwise and loadwise.

Mr. SPANIOL. That's correct. I believe under this bill that most of the agency reviews would go to a court of appeals. There would be some going to the district courts perhaps, but most of them would be going to the courts of appeals.

The courts of appeals do not have the facilities for conducting evidentiary hearings. To that extent, I think that the award of attorneys' fees, if left to the discretion of the appellate court, would not create a significant burden.

Senator LAXALT. This is an entirely new field in terms of determining attorneys' fees and whether they should be allowed at all in respect to the Federal courts generally.

¹ See part 1 of hearings at pp. 183-186.

Mr. SPANIOL. No; there are many statutes now that authorize the courts to fix attorneys' fees.

Senator LAXALT. I mean public-interest legislation.

Mr. SPANIOL. Yes, sir. It is entirely new.

Senator LAXALT. Brand new.

Mr. SPANIOL. Yes; there is no current provision that I know of.

Senator LAXALT. And there is no way, I don't suppose, we could determine, with any reasonable accuracy, as to how many matters are going to be presented and, if so, in what fashion.

Mr. SPANIOL. That's quite true.

Senator LAXALT. I am trying to determine, as are the members of the subcommittee, the impact of this.

We are starting with the courts because it is my feeling that we have no conception at this point as to what proportions this could eventually develop into in terms of additional court caseload.

Mr. SPANIOL. There is no experience to indicate what the impact would be.

Senator LAXALT. Under existing procedures, is there any mechanism whereby courts of appeal would pass upon matters of this kind under existing procedures?

Mr. SPANIOL. Generally the courts of appeal would direct the award of attorneys' fees. In the mandate that is returned to the district court, the fees would be allowed as part of the mandate.

Senator LAXALT. They don't ordinarily engage in factfinding at the circuit level.

Mr. SPANIOL. That's right.

Senator LAXALT. So with the extension you are just causing a revolutionary change in the process, at least in some jurisdictions.

Mr. SPANIOL. To that extent, there is some increase.

Senator LAXALT. More fundamentally than that, do you think the courts should be involved in this at all—in the factfinding process—in relation to whether attorneys' fees should be granted and the amount of those fees or should that be left within the realm of the executive agency?

As one of your judges has indicated in the past, and I will use his words: "S. 270 requires the courts to enter the thicket of executive discretion." I wouldn't begin to enlarge on that. I think it is well said.

Do you think there is any validity in his characterization of S. 270 to that extent?

Mr. SPANIOL. Certainly if the legislation were written to require the agencies themselves to determine the amount of attorneys' fee, as a result of judicial review proceedings, we would have no objection to that.

Senator LAXALT. Are you troubled at all by the deficiency within S. 270 as to the standards to be applied in relation to the district courts, as opposed to the court of appeals?

Mr. SPANIOL. No, sir.

Senator LAXALT. That was a problem for your group in February wasn't it?

Mr. SPANIOL. Yes, it was.

Senator LAXALT. What change has there been there? I don't see any changes in S. 270 in that respect.

Mr. SPANIOL. We just reevaluated that position. We don't think we want to adhere to it. We want to adhere to our statement here.

Senator LAXALT. The bill doesn't specify whether the standard of review is substantial evidence or abuse of discretion. Does that trouble you?

Mr. SPANIOL. In the award of attorneys' fees, no, sir.

Senator LAXALT. How about in terms of review generally? The standard to be applied in the review.

Mr. SPANIOL. The standard to be applied in review in speaking of the awards made by the agencies?

Senator LAXALT. The assumption of jurisdiction as to whether or not this is properly a matter within the realm of public interest in accordance with the criteria established.

Mr. SPANIOL. The question of whether or not it is in the public interest to provide for the payment of attorneys' fees, as I indicated, is a matter that we regard as a public policy for the Congress.

If it is determined here that you should make provision for payment of these attorneys' fees, following the simple rules we now have with regard to an award of attorneys' fees under authority of the court we feel that it would not give us any difficult problem.

Senator LAXALT. In other words, if I understand you correctly, do you feel there wouldn't be any undue additional caseload on the courts if the existing rules were applied that you now apply in the existing practices?

Mr. SPANIOL. That's right.

Senator LAXALT. That strikes right at the heart of S. 270 doesn't it?

Mr. SPANIOL. I don't quite see that.

Senator LAXALT. In terms of the provisions of S. 270, this is to be a matter of independent, separate judicial review, applying whatever standards and criteria, which is different from what you apply at the present time.

Mr. SPANIOL. As long as those criteria are considered to be guidelines.

Senator LAXALT. And not binding.

Mr. SPANIOL. Yes. It is still within the discretion of the court. If it is exhortatory to the court, we would have no difficulty.

Senator LAXALT. All things being equal, getting back again to the February position which I interpret to mean, respectfully, we would rather not have this on our backs, do I understand the position of your group to be that insofar as the jurisdiction is concerned, review in the attorneys' fees area with the Federal courts would be far better than having all these matters determined on the executive level—rather than being a matter of judicial review.

Mr. SPANIOL. That would be satisfactory to us.

Senator LAXALT. Would it be preferable?

Mr. SPANIOL. That, sir, I can't say.

Senator LAXALT. That's all that I have at this time, Mr. Spaniol.

Senator ABouREZK?

Senator ABouREZK. I have no questions.

Senator LAXALT. Senator THURMOND?

Senator THURMOND. I have no questions.

Senator LAXALT. Senator HATCH?

Senator HATCH. I have no questions.

Senator LAXALT. Senator Wallop?

Senator WALLOP. I have no questions.

Senator LAXALT. Thank you for your testimony.

Mr. SPANIOL. You are quite welcome.

Senator LAXALT. Our next witness is Mr. Robert W. Lee, vice president of the National Hearing Aid Association.

Senator Thurmond has requested that you testify next, and I have no objection.

TESTIMONY OF ROBERT W. LEE, DIRECTOR OF GOVERNMENTAL RELATIONS, NATIONAL HEARING AID ASSOCIATION, ACCOMPANIED BY TIMOTHY WATERS, LEGAL COUNSEL

Mr. LEE. Thank you, Mr. Chairman.

Senator ABOUREZK. I wonder if I might direct a couple of questions to the witness before he begins his opening statement?

Senator LAXALT. Do you have an opening statement?

Mr. LEE. I do not.

Senator ABOUREZK. You are Mr. Robert Lee?

Mr. LEE. That's right.

Senator ABOUREZK. Do you appear here today voluntarily?

Mr. LEE. I was subpoenaed.

Senator ABOUREZK. Why did you have to be subpoenaed?

Mr. LEE. It is certainly no lack of wish to cooperate with this subcommittee.

Basically, we were not invited by the subcommittee officially. The only request or suggestion we had to appear came from a prior witness.

Senator ABOUREZK. Who was that?

Mr. LEE. Mr. Clinkscales.¹

He suggested that we also, since he had testified about the hearing aid proceeding, that it would be appropriate for us to petition the committee to appear.

It was on that basis our board advised us not to request to appear before the committee.

Senator ABOUREZK. I didn't understand that.

Based on that, you did request to appear?

Mr. LEE. No; we did not request to appear.

We felt that we were in the declining stages of a long, and to us very costly, trade regulation rulemaking proceeding with the FTC. Our board considered this and declined officially to request to appear.

Senator ABOUREZK. Were you ever invited to appear by the committee or any member of the committee?

Mr. LEE. The first communication I had seen from a member of the committee or the staff was the subpoena which I received in Detroit yesterday.

Senator ABOUREZK. So had you received a letter of invitation would you have submitted to that?

Mr. LEE. We would have had to present that to our board for a response.

Senator ABOUREZK. You never got a letter of invitation.

Mr. LEE. We did not receive such, no.

¹ See part 1 of hearings at pp. 167-178 and 295-308.

Senator ABOUREZK. If I might try to restate what you said:
The only invitation you ever had was from somebody who was not
a member of the committee or subcommittee or a member of the staff?
Your invitation to appear was from a person named Clinkscales.

Mr. LEE. Yes, sir.

Senator ABOUREZK. Do you know his first name?

Mr. LEE. Curtis, I believe.

Senator ABOUREZK. Do you know his capacity?

Mr. LEE. I believe he serves as executive director of the National Alliance of Senior Citizens.

Senator ABOUREZK. Do you believe that there is any possibility that your appearance here today may be construed as an attempt to exert political influence on the Federal Trade Commission with respect to the hearing aid rules you discussed?

Mr. LEE. I don't see that it would.

Senator ABOUREZK. You don't see that it is an attempt to influence that?

Mr. LEE. No way.

Senator ABOUREZK. Do you believe there is any possibility your appearance here might be construed as an ex parte contract with the Federal Trade Commission with respect to the hearing aid rules?

Mr. LEE. May I introduce Mr. Timothy Waters who is our legal counsel in the FTC matter, since its beginning several years ago.

Senator ABOUREZK. He can advise you as to how to answer if you want.

Mr. LEE. He advises me that this would not be construed as an ex parte communication.

Senator ABOUREZK. Within the meaning of the *Home Box Office* case would your appearance be construed as an ex parte contract?

Mr. LEE. We cannot say how it will be construed, but we do not believe it will be.

Senator ABOUREZK. Returning to the suggestion of Mr. Clinkscales that you testify, when did he contact you about your testifying before this committee.

Mr. LEE. I believe it was around the 23d or 24th of May, as near as I can remember.

Senator ABOUREZK. Why did he want you to testify?

Mr. LEE. He stated that there had been a challenge to the authenticity or accuracy of some of the prior testimony he had made with regard to his appearance before the FTC at a hearing in San Francisco on the rulemaking proceeding.

Senator ABOUREZK. Who had made the challenge?

Mr. LEE. I am not sure he said.

Senator ABOUREZK. In other words, he was concerned about a challenge to his testimony before the FTC?

Mr. LEE. No; before this committee.

He has testified on S. 270 at a prior hearing.

Senator ABOUREZK. Here in Washington but not in San Francisco?

Mr. LEE. No.

In his testimony before your committee on S. 270, he used as a basis for some of his statements, his appearance as a witness before the FTC in San Francisco.

Senator ABOUREZK. Who made the challenge?

Mr. LEE. I can't say. I don't recall if he mentioned that.

Senator ABOUREZK. Senator Laxalt, are you aware of who made the challenge?

Senator LAXALT. We certainly didn't make any formal challenge to his testimony.

Mr. LEE. I'm not sure whether a challenge was made on the record, or apart from the record.¹

Senator ABOUREZK. At any rate the challenge was made; we don't know exactly who made it.

Did he want you to testify here so you could support his testimony?

Mr. LEE. He felt that any testimony I might present, relative to that proceeding with the FTC, he assumed would support what he had said.

Senator ABOUREZK. What you are saying is that your testimony deals with the FTC hearing.

Senator THURMOND. Would the Senator yield?

This witness doesn't know what he is going to be asked. We understood that he was a reluctant witness, so we had to subpoena him. He is here, and we expect to ask him questions.

Senator ABOUREZK. I understand that, but what I am trying to get at is why he was invited by somebody who is not a member of this committee to testify before this committee. I know he was subpoenaed, because I saw the subpoena.

What I am trying to determine, if I might, Mr. Lee, is whether or not Mr. Clinkscales asked you to testify as to the truth or accuracy of his statements before the FTC. Is that what he wanted you to cover?

Mr. LEE. He didn't ask me to testify. He simply suggested it might be appropriate under the rulemaking proceedings, since we were involved with the FTC in a request for funding; that we should perhaps apply to this committee to be heard.

Senator ABOUREZK. To be heard on what?

Mr. LEE. On the matter of the business before this committee. We declined to do that.

Senator ABOUREZK. I thought you said it related to a challenge that was made to his testimony before the FTC?

Mr. LEE. He told me, when he contacted me to see if we would apply to this committee to appear, that he had testified before you in an earlier session and that there had been raised some questions as to the accuracy of his testimony. And that if we appeared in the same forum, our responses might reinforce what he had said.

Senator ABOUREZK. What you are saying is that he asked you to come and testify as to the veracity of his statements at a San Francisco FTC hearing? Is that right?

Mr. LEE. He didn't ask me to come.

Senator THURMOND. I didn't understand him to say that.

Senator ABOUREZK. I don't yield, Senator Thurmond.

Senator THURMOND. You are putting words in his mouth which he didn't intend to say.

Just ask him a question. Don't put words in his mouth.

¹ See part 1 of hearings at pp. 295-308. See pp. 205-298.

Senator ABOUREZK. I don't yield for any purpose at this point, Senator.

Mr. Lee, would you answer my question?

Mr. LEE. Yes, sir.

What was the question?

Senator ABOUREZK. Would the reporter read back the question, please?

[Pause.]

COURT REPORTER. "What you are saying is that he asked you to come and testify as to the veracity of his statements at a San Francisco FTC hearing? Is that right?"

Mr. LEE. Senator, that is not accurate. He didn't ask me to come; he suggested that we might come and testify as to our experience with the provision of funding, which is the subject of this committee hearing.

Senator ABOUREZK. You stated a little earlier that Mr. Clinkscales had asked you to come here because of a challenge made to his statements based on an FTC hearing in San Francisco. Are you changing your testimony to say that is not the case?

Mr. LEE. I don't think the two statements are necessarily in conflict with each other.

Senator ABOUREZK. You are denying that that is the case now? It seems to me that is a conflict.

Mr. LEE. I merely observed that in the conversation in which he suggested that we come, he mentioned there had been a challenge to his testimony—not in San Francisco but before this committee.

Senator ABOUREZK. So, in effect, you were asked——

Were you ever contacted by any member of the committee staff?

Mr. LEE. No, sir.

Senator ABOUREZK. Or member of the committee?

Mr. LEE. No, sir.

Senator ABOUREZK. You made that clear.

So you have been asked to come, by Mr. Clinkscales, to testify as to the merits of this legislation.

Mr. LEE. My invitation to come was delivered by a process server.

Senator ABOUREZK. I am not talking about the subpoena; I am talking about the conversation with Mr. Clinkscales.

Mr. LEE. He suggested we had had experience that would be useful to this committee.

Senator ABOUREZK. Did he ask you to talk about the rulemaking proceeding that he was involved in with the FTC?

Mr. LEE. He did not.

Senator ABOUREZK. Did he suggest it?

Mr. LEE. No.

Senator ABOUREZK. Did he bring it up in your conversation?

Mr. LEE. Just to mention that it was the basis of his testimony before this committee, and that there had been questions as to his accuracy.

Senator ABOUREZK. You are involved in the rulemaking proceedings.

Mr. LEE. That's right.

Senator ABOUREZK. Has a decision been handed down?

Mr. LEE. No, sir.

Senator ABOUREZK. Do you intend to talk about your particular case?

Mr. LEE. I will answer questions within the limits of our case before the Commission. I have no prepared statement on any subject.

Senator ABOUREZK. I understand that.

Do you believe it strange that on a legislative hearing that merely asks people their opinions on legislation and is not an investigatory proceeding that you would be subpoenaed? Does this seem strange to you?

Mr. LEE. This is the first time it has ever happened to me, so I have no way of judging it by that standard.

Senator ABOUREZK. You have no way to judge whether or not it is strange?

Mr. LEE. Right.

Senator ABOUREZK. Alright.

Senator LAXALT. Senator Thurmond, would you like to proceed?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Lee, as you are aware, you have been subpoenaed to appear before this committee. We understand that you are a reluctant witness to come of your own accord, and so we had a subpoena issued.

The reason for this action was the decision of the National Hearing Aid Society not to appear voluntarily. Can you tell the committee why your board refused to cooperate with our oversight hearing?

Mr. LEE. Senator, I regret that any inference was drawn that we are refusing to cooperate.

It was simply a decision that was reached on the basis of my responses to Senator Abourezk that the invitation was really not issued by the committee and that the board decision was not to not cooperate with the committee but simply not to petition the committee to appear as a witness.

Senator THURMOND. I have a number of questions I intend to ask you, Mr. Lee, for as you are aware, charges were made before this committee by Mr. Curt Clinkscales of the National Alliance of Senior Citizens about the Federal Trade Commission hearings on the proposed rule for the hearing aid industry.

First, when did you initially meet Mr. Clinkscales?

Mr. LEE. As near as I can remember, it was about the late part of May or early June of 1976.

Senator THURMOND. Did you meet him through mutual acquaintances or professionally?

Mr. LEE. Professionally, I would say.

Senator THURMOND. Did you find him knowledgeable about the hearing aid industry?

Mr. LEE. I would have to qualify that. To someone who is completely outside the industry who represents a segment of people who are concerned with our product, he seemed very knowledgeable, yes, sir.

Senator THURMOND. Did he know of the FTC's proposed rule for the hearing aid industry?

Mr. LEE. When I first spoke with him, I don't believe he was aware of the proceeding then going on.

Senator THURMOND. How did Mr. Clinkscales respond when you apprised him of the pending rule?

Mr. LEE. As we discussed it, he seemed to feel that his membership might have an interest in having their views on the hearing record.

Senator THURMOND. Did he offer to help the hearing aid specialists?

Mr. LEE. Insofar as the views of his members would be helpful to the hearing aid specialists, I would assume that, yes, this was true.

Senator THURMOND. Did you then tell him of the next hearing to be conducted?

Mr. LEE. Yes; I had that schedule.

There were three hearings—one in Washington, which was already concluded, or nearly so; one in Chicago in June, which had already closed the date for filing for witnesses, I believe; and the last one, in San Francisco in August.

Senator THURMOND. Did you provide him with the text of his testimony for the San Francisco hearing?

Mr. LEE. No, sir, I did not.

Senator THURMOND. Did you give him materials for preparing the statement he gave?

Mr. LEE. We supplied him with a copy of our interpretation of the proposed trade regulation rule, and how it would affect our membership insofar as that is concerned. Yes, sir.

Senator THURMOND. Did you read the testimony Mr. Clinkscales delivered at the San Francisco hearing?

Mr. LEE. Only after it had been submitted to the FTC and placed on the public record.¹

Senator THURMOND. How would you characterize that testimony?

Mr. LEE. It coincided, in many respects, with the testimony of other senior citizen individuals that we had had comment from during this and a similar rulemaking procedure by the Federal Food and Drug Administration.

Senator THURMOND. Did Mr. Clinkscales receive payment for his trip to San Francisco from the National Hearing Aid Society?

Mr. LEE. No, sir, he did not.

Senator THURMOND. Would you say Mr. Clinkscales represented a valid interest at the hearing?

Mr. LEE. Well, inasmuch as the senior citizens, as such, have a distinct interest in hearing aids—yes. To that extent he did.

Senator THURMOND. Mr. Lee, one of the reasons we have felt it necessary to have you with us here today is to explore the conditions surrounding the financial awards made by the FTC under the Magnuson-Moss Act of 1975.

Do you feel the National Hearing Aid Society was entitled to funds under the provisions of that law?

Mr. LEE. That is a rather lengthy question, Senator. Would you repeat it?

Senator THURMOND. One of the reasons we have felt it necessary to have you with us here today is to explore the conditions surrounding the financial awards made by the FTC under the Magnuson-Moss Act of 1975.

Do you feel the National Hearing Aid Society was entitled to funds under the provisions of that law?²

¹ A copy of Mr. Clinkscales' testimony appears at pp. 227-297.

² See generally pp. 58-65 and 67-72.

Mr. LEE. Basically, I believe the legal interpretation would be that we are—yes, sir.

Senator THURMOND. Would you give us a brief history of the status of your request for such funds?

Mr. LEE. The first knowledge we had that such funds were available was a public announcement by the Federal Trade Commission that an award had been made for this purpose to a group known as the National Council of Senior Citizens.

Therefore, reviewing the provisions of the law, we decided that our group was also eligible, and we entered an application for compensation on April 12, 1976.¹

The reply was received under date of April 26, 1976, laying down additional data which must be supplied before the application might be considered.

This data was supplied on May 4, 1976, and we didn't hear back from them until July 26 [letter of July 20]. They advised us that our application had been approved, conditionally.

Now the conditions imposed had the effect of preempting any funds at all. They also outright denied any funding for a survey. We had suggested an impartial survey by a professional survey organization to establish the economic impact of the proposed TRR for the reason that our members are, by the very definition, the smallest of small businessmen. Most of our members operate what you would classify in terms of a mom and pop operation. Over half of our membership is in that category.

We were interested in having a survey made to determine the impact such a rule would have on them.

This was denied outright in the letter of approval.

On August 4—

Senator LAXALT. Was there a cost estimate based on that survey?

Mr. LEE. We estimated a cost of \$30,000.

We thought of funding it ourselves, and so we had a firm who does this kind of thing give us an off-the-top-of-the-head estimate. It wasn't a detailed estimate, but this was the ballpark figure.

Senator LAXALT. The application for funding was made purely by letter without any other supporting evidence?

Mr. LEE. We supplied some documentary evidence with the letter to the FTC.

Senator LAXALT. Did you meet on it with the FTC people at all?

Mr. LEE. No; there was no face-to-face meeting. There were several telephone conversations.

Senator LAXALT. This resulted in denial then?

Mr. LEE. Yes; denial of the funds for any survey and the approval of some \$38,000 with a stipulation. At that time we were trying to raise the necessary funds to stay solvent. We had assessed our members \$100 per member, and at that time there were some several thousand members that were involved.

But the stipulation with the funding was that for every dollar we collected on this assessment, we must deduct one dollar from the amount approved by the FTC.

On August 4, we protested the conditions imposed on the funding and requested the FTC to reconsider.

¹ See additional statement of Mr. Lee at pp. 350-387.

We received a reply to that letter on November 8 [letter of October 29] and it rejected our position and restated the earlier position by the FTC affirming their original conditional grant.

That's the history, Senator.

Senator LAXALT. Did you or did you not eventually use the \$38,000?

Mr. LEE. No, sir. There was no way we could. We collected more than \$38,000; if we hadn't, we would be insolvent at the moment.

Senator LAXALT. So the formula was such that it——

Mr. LEE. Preempted any use at all.

Senator THURMOND. Does the National Hearing Aid Society intend to request the FTC to give them the money awarded under the conditions imposed?

Mr. LEE. There is no way we can do that, Senator.

Senator THURMOND. Did you find the same conditions were imposed on other groups applying and receiving moneys from the FTC under this program?

Mr. LEE. The only group that we're aware of that applied for and received money would be the National Council of Senior Citizens. We are not aware of any conditions like this that were applied to them.

Senator THURMOND. You are not aware of any conditions imposed on what group?

Mr. LEE. The National Council of Senior Citizens. They are the only other group that applied for funds and received them from the FTC that we are aware of.

Senator THURMOND. Do you feel the FTC considered all the conditions faced by the NHAS when making their determinations of the fund requests?

Mr. LEE. Our letter requesting reconsideration [letter of August 4] laid out the fact that we didn't feel they had given adequate consideration to those factors.

Senator THURMOND. Have you any idea how many members NHAS has lost due to the huge strain on the organization from the additional legal and administrative costs from the FTC hearings?

Mr. LEE. In round figures, during this period of time our membership has dropped some 600 members.

Senator THURMOND. What were NHAS member dues before the investigations, and what are they today?

Mr. LEE. Before that period started, our annual membership renewal was \$50. For the past 2 years now it has been \$150.

Senator THURMOND. Does this include assessments?

Mr. LEE. No; it does not.

Senator THURMOND. Does NHAS owe legal fees today from these proceedings; and, if so, how much?

Mr. LEE. Yes, sir; we do. Our outstanding unpaid balance at the moment is roughly \$50,000. We expect that much or more to be incurred in legal expenses before the FTC rulemaking proceeding is concluded.

Senator THURMOND. Do you have some idea of the total cost of this proceeding to NHAS and its membership?

Mr. LEE. It will exceed a quarter of a million dollars, Senator.

Senator THURMOND. How long will it take for NHAS to pay off this amount of money?

Mr. LEE. Assuming that we don't run into any unanticipated large-scale legal expenses that we don't know about now, it would take us

at least 2 years at the current income we have, which is solely from membership renewals and assessments.

Senator THURMOND. Did NHAS believe the FTC response to their fund request was made in a timely and equally applied manner as opposed to those of the others in this same hearing?

Mr. LEE. That is difficult to say. We have no knowledge of what transpires within the FTC decisionmaking process.

Since a large grant was awarded to one group and ours was so tied with conditions that we could use none of it, it would be our view that there was not an even approach.

Senator THURMOND. Did you happen to discuss this matter with the FTC officials to inquire why they imposed conditions on your group and had not imposed conditions on the other group?

Mr. LEE. I believe the record of correspondence which I have here and which is rather lengthy will bear out that the rationale behind it was that we were businessmen and had the capability of raising the necessary funds if we chose to do so.

Senator THURMOND. Would you care to elaborate on that a little?

Mr. LEE. The other group being the National Council of Senior Citizens—an organization of individuals—as opposed to an association of business people, who presumably had better capability to come up with the funding.

Senator THURMOND. Mr. Lee, a number of serious charges were leveled at the FTC staff in the National Hearing Aid Society's official publication, "Audiodecibel."¹

What did the article mean when it alleged the FTC committed dirty tricks?

Mr. LEE. Basically, that article referred to a program that was conducted and then canceled by the FTC. We would have to refer to it basically as a program of entrapment, as far as our dealers are concerned.

It involved sending shoppers to our members' places of business with a so-called survey of their responses to certain questions that would be used as survey evidence in a finding about their incompetence or perhaps their ethics.²

Senator THURMOND. Did you ever feel the FTC staff was working to discredit hearing aid specialists?³

Mr. LEE. No, Senator. I couldn't make a statement to that effect.

Basically, this would have to be—

The rule itself—the basic proposed trade regulation rule—that was promulgated by the Commission staff was, in essence, a very harsh rule. It was punitive in nature. And, in our view, it assumed a widespread level of both incompetence and unethical practices among our people.

To that extent it would touch on your question.

Senator THURMOND. The article alleged the FTC employed a special consultant who happened to be an audiologist in the period during which it was writing the proposed rule. Was it NHAS' feeling that the audiologists had something to do with the promotion of this rule?

Mr. LEE. I have no evidence, exactly as you have stated it there.

¹ See p. 340 for copy of article.

² See pp. 65-66.

³ See part 1 of hearings at p. 169.

One of my functions of the National Hearing Aid Society was an effort to review the enormous public record that has been accumulated by the FTC—some 50,000 pages.

In this record, I did find a letter by a high official of the Clinical Audiologists Association and American Speech and Hearing Association thanking members of his association for their participation in some of the preparatory matters prior to the proposed rule being issued.

Senator THURMOND. Do you feel that the FTC had adequate substantiation of deceptive and unfair practices by hearing aid specialists to warrant their intervention into the industry with such a rule as the one proposed?

Mr. LEE. Senator, I don't think there is any—

We have been on the public record before. We do not feel that they had.

Another reason for this is that the grant that was given to the National Council of Senior Citizens was not considered inappropriate except for some of the use they made of it in which they went to Miami, Fla., and ran advertisements actively seeking anyone who had recently bought a hearing aid and made statements like: Anyone who has bought a hearing aid recently contact us. You were probably cheated and didn't know it.¹

Those uses of the funding granted by the FTC were those things we considered inappropriate.

Senator THURMOND. From the article, I would conclude that NHAS feels the FTC staff should not engage in deceptive practices to gather supporting data for their viewpoints. Would this be a fair assessment of your views on the attempt by the FTC staff to promote false hearing loss entrapments of unsuspecting hearing aid specialists by various groups?

Mr. LEE. Without making a broad accusation—

Would you repeat that, Senator. That was a lengthy question.

Senator THURMOND. From the article, I would conclude that NHAS feels the FTC staff should not engage in deceptive practices to gather supporting data for their viewpoints. Would this be a fair assessment of your views on the attempt by the FTC staff to promote false hearing loss entrapments of unsuspecting hearing aid specialists by various groups?

Mr. LEE. Yes. In those specific circumstances, we did feel that this was an unfair situation.

Senator THURMOND. Did you feel the FTC staff was openly seeking the truth and all of the relevant facts from all concerned in this matter at these proceedings to promulgate a rule fair to all?

Mr. LEE. That's a pretty broad question, again.

I would say that by and large the Commission tended to encourage the attendance of witnesses who supported the rulemaking as they saw it, and that it was up to us to encourage the attendance with expenses paid of expert witnesses who would support the position that we had taken.

Senator THURMOND. A number of persons have come before us to extoll the virtues of the FTC program to pay fees for witnesses and

¹ See part 1 of hearings at pp. 169, 296, and 308.

attorneys. As one who has faced such a program when the proceedings directly impacted on your industry, do you feel this law was equally and fairly applied in the rule for the hearing aid industry?

Mr. LEE. No, Senator; I'm afraid I do not.

Senator THURMOND. Mr. Lee, a bill is before this committee to extend such authority for funds allocation to virtually all agencies of Government.

First, do you favor adoption of such a measure; and, second, do you feel it would be used by the agencies to fund those who would advance the views of the funding agency?

Mr. LEE. I came on rather short notice. I don't believe I'm in a position to make a recommendation about whether S. 270 should pass or not.

In regard to the second portion of your question, the opportunity exists within the current application of this policy within the FTC for such to happen.

Senator THURMOND. Mr. Lee, I have no further questions.

I want to thank you for your cooperation with this committee, even with the constraints of a subpoena due to the pending rule from the FTC.

Your responses have helped us to get a much better understanding of the feelings of an industry affected by such a law as we are now considering.

Thank you.

Senator LAXALT. Senator Hatch?

Senator HATCH. I would like to ask a couple of questions.

What is the National Council of Senior Citizens doing in this anyway?

Mr. LEE. I was asked about similar funding as the one to which we were given —

Senator HATCH. Why were they given some \$30,000 by the FTC?

Mr. LEE. Again, the FTC should answer that question.

Senator HATCH. I would like you to answer, if you can.

Mr. LEE. In our view, the FTC started a rulemaking proceeding based upon what they said were widespread abuses in the delivery of hearing aids to senior citizens.

It is our view that they came up without sufficient numbers to categorize them as widespread abuses, and that the National Council of Senior Citizens went out on this funded program in Miami and another one in Boston, Mass., to obtain these citizens with complaints about hearing aids after the proceedings were well underway.

Senator HATCH. Do you know what procedures the Senior Citizens Council used to obtain this information?

Mr. LEE. I have some Xerox copies of some of their procedures.

Here is a paid advertisement which appeared in a Miami newspaper. It reads: "Important Announcement. The U.S. Government needs to know of any complaints involving purchase of hearing aids. Call." And then it gives a number.

Senator HATCH. That could mean anybody who is irritated for any reason at all.

Mr. LEE. That's right. And they turned up, I'm sure, in numbers, because older people who are invited to complain often can find good reason to complain.

Senator HATCH. I see.

Your organization represents all kinds of small business people who operate hearing aid shops all over the country.

Mr. LEE. We had a rather unique situation in the FTC proceeding.

Mr. Waters and our organization were designated the official representatives of all hearing aid dealer dispensers, whether they were members of NHAS or not.

Senator HATCH. Were you given any opportunity to talk to any of these people, or was this just something the FTC considered to be definitive for the purposes of making and perpetuating the FTC's own rules?

Mr. LEE. The result of the survey was—

With moneys taken from their grant, they brought witnesses from Miami to testify before the hearing here in Washington at the FTC building and from Boston. They also prepared and submitted additional affidavits from others.

Senator HATCH. Were there any advertisements that indicated the Senior Citizens Council or the FTC would like to have a survey of all of the people who are satisfied with their hearing aids?

Mr. LEE. No. In fact, there was one—It was not in a paid advertisement but in an interview with a representative of the National Council of Senior Citizens in which he advised people who were satisfied with their hearing aids not to contact. They were interested only in ones who had the complaints.

Senator HATCH. You mean the National Council of Senior Citizens really was doing the work for the FTC, the interviewing, surveying and other type of activity, in order to determine the facts which the FTC wanted to have determined?

Mr. LEE. Yes; they appeared to use the money that was given them as a grant for that purpose. Exactly what their directive was from the FTC I have no way of knowing.

Senator HATCH. Do you have any idea how many hearing aids are sold by the business people that you represent throughout this country? How many people do you represent? How many businesses?

Mr. LEE. This is pretty hard to put a definitive tag on.

Senator HATCH. Approximately.

Mr. LEE. Around 3,500. We are down to close to 3,000 now with our—

Senator HATCH. How many were there then?

Mr. LEE. Around 3,600.

Senator HATCH. How many hearing aids would they have issued?

Mr. LEE. The average annual sale of hearing aids is around 600,000 each year.

Senator HATCH. And your people are the major issuers of those hearing aids?

Mr. LEE. While we don't have but about half of the total so-called specialists or people involved in it as members, our members do control, by virtue of the fact that a member will be the owner of the business and employ half a dozen people who are not members; but under the supervision and direction of our member, we probably are involved in the distribution of 80 percent of the aids that are sold.

Senator HATCH. So of the 600,000, you sell almost a half million of them.

Mr. LEE. Right.

Senator HATCH. How many complaints do you get on the average?

Mr. LEE. We have, in an attempt to counter some of the publicity on these other complaint surveys that were made, run a national survey. We checked with every attorney general and the director of consumer affairs in every State that would respond, and we came up with a complaint ratio to sales of two-tenths of 1 percent, I believe.

Senator HATCH. Two-tenths of 1 percent?

Mr. LEE. We call that a record to be envied and not criticized.

Senator HATCH. In other words, you have complaints on two-tenths of 1 percent of a half million sales of hearing aids on an annual basis.

Mr. LEE. From our survey results.

Senator HATCH. Why is the FTC investigating you to begin with—or even conducting rulemaking proceedings?

Mr. LEE. That's a question we have raised.

Senator HATCH. Is there any definitive or reasonable answer for that?

Mr. LEE. They contend that the distribution of hearing aids is subject to widespread consumer abuse.

Senator HATCH. Upon what does the FTC base that? Upon facts that had been obtained before the FTC, in essence, had employed the National Council of Senior Citizens to go and conduct this unfair survey?

Mr. LEE. I'm sure one of the methods they used to attempt to compile this evidence was this aborted—we call it—entrapment survey.

The inquiries and all are on the public record at the FTC. We asked for a stated basis on which they were proceeding and their reply was that they had this evidence and they did not define it.

Senator HATCH. Did the FTC indicate when it obtained this evidence? Was it before or after the FTC started a complaint about you and accused your organization of consumer abuse?

Mr. LEE. It is divided, Senator; and I can't tell you what the ratio was.

Senator HATCH. I see.

Has the FTC's case been made up primarily of this particular type of survey with these types of ads, asking people who have complaints about hearing aids to come in and register their complaints?

Mr. LEE. This is one specific survey that we have taken objection to because it involved the use of funds granted by the FTC to the organization that did the survey. There has been other testimony from individuals, primarily substantiating the FTC's—We call them horror stories.

There are people who have testified of certain specific abuses.

Again, you have to put them in the right perspective.

The percentage of these as compared—

Any industry you want to name—if you went out to find persons within that industry who act improperly—you can find them.

We feel that this is the case in ours.

Senator HATCH. Would you list, as well as you can, what you consider to be the abuses by the FTC in this matter?

Mr. LEE. We call them dirty tricks.

Again, the word "abuses" I wouldn't necessarily subscribe to.

Senator HATCH. I think dirty tricks are worse than abuses.

Mr. LEE. We felt that the survey they took in which persons with normal hearing were coached to go and visit hearing aid dealers and come back and report these findings which were to be compiled——

Again, the methodology leaves much to be desired.

Senator HATCH. They would send people with normal hearing in to try to deceive the hearing aid examiner?

Mr. LEE. Some of them had a hearing loss that had been measured prior to the hearing examination, but others that were sent out in this mixed group were persons with normal hearing.

Senator HATCH. You still have to depend upon the person who is being examined to report accurately to conduct a good audiology test, don't you?

Mr. LEE. Our case exactly, Senator.

Senator HATCH. So how could they prove anything by that other than that the people who came to the hearing examiner either lied or didn't tell the truth as far as the testing.

Mr. LEE. The motives of the person who either did the survey or compiled it would have to be somewhat in question.

It is well-documented in the record of the FTC proceedings.

In all fairness, the FTC did abandon this when it was brought to light.¹

Senator HATCH. Can you list any other abuses or dirty tricks or any other things which you feel are unfair?

Mr. LEE. No.

Senator HATCH. I was reading the article in "Audiodecibel," the official publication of the National Hearing Aid Society, entitled: FTC Dirty Tricks Block Chances for a Fair Hearing.²

I am wondering why the FTC is investigating you people, inasmuch as you are a diffused industry with all types of independent business people who do what they want to do in this area.

Do you think the FTC has good legal reasons for doing so?

Mr. LEE. We can't speak for the FTC.

From our position, our approach to the response to the FTC, we do not feel that they have the documented abuses that they say is the basis for their severe and harsh rulemaking.

The two basic ——

Senator HATCH. You have indicated that the National Council of Senior Citizens received about \$30,000 for fees from the Federal Government. For doing what? Conducting these surveys?

Mr. LEE. No, sir.

Senator HATCH. Or were they an intervenor in the suit?

Mr. LEE. They were one of the interested parties.

Part of that money was spent to supply the attorneys who sat at the counsel table all during these lengthy proceedings in Washington, Chicago, and San Francisco, and produced witnesses and cross-examined.

Senator HATCH. Did the FTC or the Federal Government pay for your attorneys?

Mr. LEE. Not at all.

Senator HATCH. Did they pay for any other participant's attorneys?

Mr. LEE. None of the attorneys we know of.³

¹ See p. 65 following.

² See article on p. 340.

³ See part 1 of hearings at pp. 24-25.

Senator HATCH. Did these attorneys for the National Council of Senior Citizens participate in any way, or did they just sit and observe?

Mr. LEE. They were active participants.

Senator HATCH. For whom and on which side?

Mr. LEE. They were designated by the presiding officer to represent the consumers of hearing aids at these hearings.

Senator HATCH. So did the presiding officer designate anybody to represent the businesses at these hearings?

Mr. LEE. Yes, Mr. Waters represented the dealers—the hearing aid specialists.

Senator HATCH. Did the FTC or the Federal Government pay any of Mr. Waters' fees?

Mr. LEE. None at all, sir.

Senator HATCH. Who appointed these people that represented the consumers?

Mr. LEE. The person designated by the FTC as the presiding officer in these hearings.

Senator HATCH. And he appointed the representatives from the National Council of Senior Citizens?

Mr. LEE. To represent the consumers.

Senator HATCH. After they volunteered to do so?

Mr. LEE. I can't answer that.

Senator HATCH. Do you suspect that?

Mr. LEE. I have no knowledge either for or against.

Senator HATCH. Do you know how that group got into this matter?

Mr. LEE. They have made other statements relative to hearing aids. Their organization of senior citizens use hearing aids, and I think maybe they were involved in hearing aids and the distribution prior to these hearings.

Senator HATCH. Was any notice given to you that the FTC was going to investigate and bring action against your particular organization and your group of businesses?

Mr. LEE. Yes, the first notice we had was a press release of May 1975 announcing this type of industry investigation.

Senator HATCH. In other words, you read it in the newspapers?

Mr. LEE. I think it was a press release.

Senator HATCH. They didn't come to your organization and say: We're going to investigate you, because we think there may be some abuses here, and we would like to look into them, and would you cooperate. They didn't ask for any cooperation before, or even interrogate you about the possibility of abuses?

Mr. LEE. I am going to have to say that this occurred before I was placed in a position with the society to have the answer to that question.

Senator HATCH. That's all I have, Mr. Chairman.

Thank you.

Senator LAXALT. Senator Kennedy?

Senator KENNEDY. I understand you are representatives of the private industry. Is that correct?

Mr. LEE. Yes, sir. We represent the hearing aid dealers and specialists.

Senator KENNEDY. It is my understanding that the FTC was prepared to provide funds to what they considered to be the principal consumer group and they were also prepared to provide some resources to the hearing aid society. Is that right? Under certain restrictions.

Mr. LEE. After we applied for funds.

Senator KENNEDY. Naturally you would have to make application first.

But they were prepared, as I understand it, to at least make a partial grant to the hearing aid society and also to the consumer group.

Mr. LEE. The grant that they offered carried a condition that rendered it unusable.

Senator KENNEDY. At least you felt those were unreasonable conditions for the FTC to impose. As I understand it, their policy was to try to provide resources to the group that was representing industry as well as to the groups that were going to be the most affected, which were the elderly and senior citizen groups.

You made a decision that you would request \$68,000, and they indicated that \$34,000 would be available under certain conditions which would demand additional fees from your members. Do I understand that correctly?

Mr. LEE. The condition was that for every dollar we collected in a special assessment of our membership, we must deduct \$1 from the grant.

Senator KENNEDY. They were prepared to offer some incentive if the society itself or the industry group was prepared to make an effort to raise funds also.

That's rather like the matching funds concept. It is not a very unusual concept, at least as I understand it.

The council itself indicated that \$34,000 would be available, and they ultimately made \$44,000 available to the elderly group. Is that correct?

Mr. LEE. That sounds correct.

Senator LAXALT. I must have misunderstood his testimony. The basis upon which this money was granted wasn't on a matching basis was it?

Mr. LEE. No; not at all.

Senator LAXALT. To the extent you raised a dollar, you lost it.

Mr. LEE. For every dollar we collected from our membership on the special assessment—which was necessary for our purposes also to keep the society from total insolvency, and we have other expenses besides keeping up with the FTC rulemaking—\$1 would be deducted from the grant amount.

Senator KENNEDY. And if no money was raised, were you still to get the \$34,000?

Mr. LEE. Yes; if we raised none at all.

Senator KENNEDY. So even if you hadn't raised it, you would still get the \$34,000.

Mr. LEE. That's right. If we had raised none at all under that special assessment.

Senator KENNEDY. Thank you.

Senator LAXALT. I gather the bottom line is that because of the initial funding given to the opposition, your group has been prejudiced financially and otherwise. Am I correct in that conclusion?

Mr. LEE. It has placed us under a severe financial strain to keep up with the rulemaking proceeding without such funds, yes, sir.

Senator LAXALT. Counsel can perhaps better answer this question. Had this funding not been available to the other side—public funding—to the intervenors or consumers, would your legal costs have been substantially less than they actually were?

Mr. LEE. Yes. The attorney time would have been reduced by the absence of witnesses that were produced under this grant. Yes, sir, to that extent.

Senator LAXALT. The intent of the legislation which has authorized the FTC under S. 270 is that whoever represents the consumer, I would assume, is going to be representative of the consumers.

How representative is the National Council of Senior Citizens of the consuming hearing aid public?

Who are these people? Do they have an office here in town?

Mr. LEE. I understand they do.

Senator LAXALT. And a staff?

Mr. LEE. Yes. I don't know that much about them. There may be another witness who can tell you in detail more about this organization than I can.

Senator LAXALT. You don't know offhand how representative of the consuming public they would be?

Mr. LEE. I can't answer that.

Senator LAXALT. One of the concerns I've had with S. 270 is that there are going to be Washington groups and Washington lawyers. It's going to be a bonanza.

I think perhaps there is a real world outside of this town.¹

Senator KENNEDY. As one of the sponsors, I would hope that in the area of small industry, where matters that are being decided affect their vital interests and where they have important issues to raise which bear on the decision, that they aren't automatically denied funding. I don't want to see a financial burden so placed upon you that you can't get at least a fair hearing within the agency that is going to make a decision which might effectively bankrupt or eliminate the industry.

I am thinking particularly in the smaller businesses—The big boys can take care of themselves.

The purpose, obviously, is to try to insure you to get an adequate hearing. Perhaps the restrictions that are placed on it were unfair or unrealistic, and I won't make a judgment on that because I don't know the facts.

We can save a lot of money for the taxpayers by not providing you, or other groups like yourself, from having your voice heard in those decisions. We can save a lot by not having the particular groups which are going to be affected from being heard.

Whether that really helps us in terms of reaching a decision which is in the public interest is a matter which concerns me.

But I have trespassed on the chairman's time.

I want you to at least understand the purpose.

I couldn't agree more in terms of small business and small industry that are also going to be affected. I would certainly hope that any legislation would have the kind of flexibility to make sure you are going to get a fair hearing.

¹ See p. 57.

Senator LAXALT. I am personally delighted to hear Senator Kennedy make that observation.

One of the great concerns I've had about the whole process here is that the thrust is consumer oriented.

The small business community is going to end up getting the shortest end of the stick.

Senator KENNEDY. I will work with the chairman to see if we can stop that.

[Laughter.]

Senator LAXALT. I think that the act is presently defective in that respect.

I think if we are going to move in this direction—and I hope we don't—there should be adequate legislative safeguards to make certain that small business, particularly, comes in on an even keel, so far as the funding is concerned.

From what we have seen at FTC so far, for whatever reason, that hasn't been the case.

Thank you very kindly.

Senator THURMOND. Thank you very much for appearing.

Mr. LEE. It was a pleasure.

[See supplemental material submitted by Mr. Lee in the appendix at pp. 350 to 387.]

Senator LAXALT. Our next witnesses are Mr. Herlis Tillman and Mr. Larry Williams from the National Funeral Directors & Morticians Association.

For those who are here from the FTC, we are simply running out of time. We wanted you to close the testimony, in response to the observations being made by other witnesses.

I don't see how we can accomplish having your testimony today. We will have to attempt to do this someday next week.

If you want to stay and listen to this testimony for the remainder of the morning, that will be fine. Otherwise, feel free to consider yourselves dismissed.

Please proceed, Mr. Tillman.

TESTIMONY OF HERLIS S. TILLMAN, VICE CHAIRMAN AND LARRY C. WILLIAMS, SR., COUNSEL, NATIONAL FUNERAL DIRECTORS AND MORTICIANS ASSOCIATION

Mr. TILLMAN. First of all, I would like to thank the members of the committee for allowing us the opportunity to appear here today.

I am Herlis S. Tillman, chairman of the board of directors for the National Funeral Directors & Morticians Association.

I am president of the Independent Funeral Directors Association of Washington, D.C., Inc.

We would have provided this information in advance, but due to circumstances beyond our control, we were unable to meet the committee's requirement in this regard.

I appear before this committee today on behalf of all black funeral directors in the United States and some foreign countries to express our opinion about funds that have been allocated to various consumer and other groups to help defray expenditures incurred in giving testimony at various hearings conducted around the country by the Federal

Trade Commission in support of rules to be promulgated for the funeral industry.

We oppose such funding practices when we, as minority small businessmen, are not notified of the availability of such funds.

Senator LAXALT. On that point, are we to understand that during the process of your particular situation, there was no notification whatsoever that the funds were available?

Mr. TILLMAN. We didn't know until last week.

Senator LAXALT. Thank you.

Please proceed.

Mr. TILLMAN. It served a total hardship on our national associations. We had no funds to defray legal expenses in order for us to be heard at these hearings at which we were not allowed to testify until the untiring efforts and pleadings by our executive secretary, Robert H. Miller, of Chicago, Ill. Only then were we allowed to sit in on the hearings in Atlanta with our general counsel, Larry C. Williams of Washington, D.C.

With the efforts of these two individuals we were able to have three people testify for us at the last hearing held here in Washington.

Had we known that funds were available from the Government for such purposes, we would have applied for such funding in order for us to have been represented at each hearing—as we have members in each State where hearings were held and our members would not have had to defray their own expenses in order to testify.

Senator LAXALT. What length of time was involved in connection with the problem of the funeral people and the FTC? How much time was involved from the time of the enactment of the rule—It is still in the process I gather?

Mr. TILLMAN. That's right.

Senator LAXALT. You are still in the course of hearings.

Mr. TILLMAN. The hearings are over.

Senator LAXALT. It is now submitted for a decision by the FTC?

Mr. TILLMAN. That's right.

Senator LAXALT. What was the connection of your particular association with the rulemaking procedure. Were you an active party?

Mr. TILLMAN. No. We were not.

Senator LAXALT. In a representative capacity?

Mr. TILLMAN. Right.

Senator LAXALT. Do you understand the thrust of S. 270 which would provide additional funds in several agencies throughout the Federal Government for the purpose of public-interest activity?

Mr. TILLMAN. We were informed of this last week.

Senator LAXALT. In reference to your own experience with the FTC, I gather that since you weren't notified at all, that this created a rather serious burden on your being able to properly be represented in this particular proceeding.

Mr. TILLMAN. Very much.

Senator LAXALT. How much did it cost you?

Mr. WILLIAMS. In view of the fact that hearings were held in New York City, Chicago, Seattle, Los Angeles, Atlanta, and the District of Columbia, the association was not able to involve itself in any of the hearings, except for those in Atlanta and Washington, D.C.

Senator LAXALT. How many hearings were conducted?

Mr. WILLIAMS. Six.

Senator LAXALT. For the purpose of the record, the man now testifying is Larry C. Williams, general counsel of the National Funeral Directors & Morticians Association. Is that correct?

Mr. WILLIAMS. That's correct.

I was not their general counsel at the time.

Senator KENNEDY. I think it is regrettable that the FTC didn't notify you.

Part of the advantage of S. 270 is that there is a requirement for notification.

We have a number of different agencies that are moving in this area. That is one of the reasons we hope that we would have at least some uniform standards and very clear criteria.

One of them would be in the area of notification. I think it is deplorable that when you are dealing with an issue affecting the National Funeral Directors Association that they were not notified.

First of all, people must be notified about the hearing and then about whatever process would be determined upon participation.

Hopefully, the problem of notification will be remedied by our legislation.¹

Senator LAXALT. S. 270 does cover that provision.

I am more concerned with the fact that we are establishing a system here which is going to be arbitrary and an advocacy decision.

It may not be truly representative of the public interest in its final impact as indicated by the previous testimony or be adverse to small business people.

Would you testify that those particular matters, in terms of your own experience, did the people selected to represent the so-called consumers seem fair and evenhanded in their approach or did they tend to be advocates and on the other side of the aisle in your proceeding?

Mr. WILLIAMS. Not in our proceedings.

I think it is crystal clear and there is abundant evidence in the record that it was a one-sided proceeding. It clearly advocated positions which the staff of the Commission had previously taken—whether it was in the interest of the consumer or not. It seemed to be the private views of the staff members of the Commission.

The record, at least insofar as we were involved in Atlanta and the District of Columbia, went in that direction.

To that extent, I think it was biased and contrived.

Senator LAXALT. Did you ever have any feeling that they were attempting to be the least bit evenhanded in their approach to the problem?

Did they consult with you and ask for your impressions or advice in connection with matters as they arose during the course of the hearings?

Mr. WILLIAMS. As a matter of fact, not only did they not consult with us, but it was through the constant implorations of the national executive secretary, Mr. Miller, that the National Funeral Directors were permitted to participate in the hearings at all.

In other words, we were considered a nonentity and totally inconsequential.

¹ See S. 270, section (g) (7) on p. 102.

Senator LAXALT. Who were these attorneys who were brought in by the FTC? Are they local attorneys?

Mr. WILLIAMS. That I don't know. I know they are staff people.

Senator LAXALT. Do you practice yourself?

Mr. WILLIAMS. Yes; I do.

Senator LAXALT. But you are satisfied that the people brought in did not represent the interests of small business in this proceeding at all?

Mr. WILLIAMS. I think the record will indicate that the people who were brought in represented the interests of the memorial societies.

It is simply a question of the philosophy of how you dispose of dead human remains. It did not go basically to the question of internal practices.

Of course, for cosmetic reasons, they could involve themselves in various aspects of the funeral industry to indicate, at least for the record, that there was not that kind of bias.

If you review the record, as it is in all adversary proceedings, if you're not there to see the demeanor of the witnesses and the interrogators, you lose much of the flavor of what transpired.

I think it is abundantly clear that it was a one-sided hearing.

Senator LAXALT. This is a terribly important point, because the thrust of S. 270, as it has been explained to me by the sponsors—like Senator Kennedy and others—has been that these attorneys who are going to be selected by these agencies will be veritable watchdogs over the agencies—to make sure they conduct their matters properly and in the public interest.

In this particular case, I gather that your experience is just the opposite—that they were in the same bed literally as the agency.

Mr. WILLIAMS. That's correct.

Senator LAXALT. At any time during the course of the conduct of this testimony did they appear to be the least bit disinterested or objective in the questioning of the witnesses or in the conduct of the proceedings?

Mr. WILLIAMS. No. As a matter of fact, had it been a judicial proceeding where we were trying a case, there would have been objections and they would have been sustained time after time for leading questions and putting answers in the witness' mouth.

Senator LAXALT. So the bottom line result of your situation is that as well intentioned as the legislation was to create additional funding for additional lawyers, it simply loaded up the agency against private business?

Mr. WILLIAMS. That's exactly what it did.

Senator LAXALT. That's where it ended up?

Mr. WILLIAMS. Yes.

Senator LAXALT. Senator Kennedy, this is one of the great concerns I have.

These folks have apparently had a very adverse experience when funds we made available to the FTC ended up literally in the agency's side to the detriment of these people and small business.

Wherever S. 270 goes, it seems to me that this testimony leads us inescapably to the provision that we have to provide adequate safeguards to make sure that this type of thing doesn't continue.

I think it applies to what we are trying to do.

Mr. WILLIAMS. I have a short commentary that I would like to read into the record.

Senator KENNEDY. I would like to ask you a few more questions on the point that the chairman mentioned.

How many groups did appear?

Mr. WILLIAMS. I don't know. I know the hearings lasted 5 days. They generally would begin around 8 o'clock and would end around 6:30 or 7 in the evening with about 30 or 40 minutes for lunch.

Senator KENNEDY. My question relates to the number of groups that did appear—the number of consumer groups that appeared.

Mr. WILLIAMS. I don't have a statistical rundown on them.

Senator KENNEDY. Do you know about how many?

Mr. WILLIAMS. I can't really testify as to how many appeared.

Senator KENNEDY. Then what are you objecting to?

Can you tell us which groups testified that you objected to?

Senator LAXALT. Our staff has checked the FTC records and I can read that into the record.

Senator KENNEDY. If I could just finish my line of questioning.

Having listened to the testimony where there have been objections, in terms of evaluating the amount of credibility we should give to the testimony, the witness stated that all of the groups were supposedly parlaying the line of the staff of the FTC.

I was just interested in whether he could name some of the groups that he objected to.

Mr. WILLIAMS. I didn't object to any of the groups.

Senator KENNEDY. Can you name any of the groups that were selected?

Mr. WILLIAMS. Continental Society is one. The Arkansas Consumer group is another.¹

Senator KENNEDY. What was the testimony that they gave?

Mr. WILLIAMS. The testimony revolved around—

Senator KENNEDY. Specifically, on the particular groups, now—you have made strong accusations. Basically, by your testimony, you have indicted the testimony of every one of these groups, whether you realize it or not.

That's the way I interpret it.

I'm asking you specifically with that general broad brush of accusations whether you will tell us which particular group you objected to and what the nature of the testimony was. Otherwise I don't give much value to your testimony. Others may form what opinions they want.

Mr. WILLIAMS. With reference to indictment or objections, I indict no one. I did not object to their testimony.

My indication is that the cumulative effects of the total testimony of those proponents, as a rule, was disproportionate to those who testified in opposition to the rule.

That is strictly what I've said. I did not indict or—

Senator KENNEDY. Well, you did, Mr. Williams.

You have indicated basically that they offered prejudiced testimony against the interests you have. You said that you felt they were completely self-serving in terms of the FTC's position on it.

I want to hear from you what those particular references were. Otherwise, I will just let the statement be left alone, if that's the way you want to leave it.

As far as I am concerned, the general broad brush of accusations you placed before us has very little value.

¹ See pp. 51-54.

Mr. WILLIAMS. The record has hundreds of pounds of testimony. For me to paraphrase the testimony at these hearings is impossible.

Senator LAXALT. You apparently participated at two hearings.

Mr. WILLIAMS. Yes.

Senator LAXALT. And you derived your impressions from these two hearings?

Mr. WILLIAMS. Yes.

Senator LAXALT. Are there transcripts?

Mr. WILLIAMS. Yes.

Senator LAXALT. Would it be within your time limitation or motivation to abstract those transcripts to summarize for us the point that you made here generally?

Mr. WILLIAMS. We couldn't begin to purchase testimony of such magnitude. There are hundreds of pounds of testimony in the record in just those two hearings.

Senator LAXALT. Arising out of those hearings?

Mr. WILLIAMS. Yes, sir.

Senator LAXALT. Is there sufficient information for you to be able to supply the type of documentation Senator Kennedy is interested in?

Mr. WILLIAMS. I would imagine so.

Senator LAXALT. I think he is entitled to that, as are members of the committee. If you would kindly provide us with as much specific information as you can supporting what you have stated here today, we would appreciate it.¹

Mr. WILLIAMS. If someone can provide our association with the wherewithal to buy transcripts. This association has no such money to buy transcripts.

Senator LAXALT. We understand that.

Senator Kennedy, would you please proceed.

Senator KENNEDY. I have no more questions.

I think it is regrettable that your views were not considered.

But quite frankly, I think because of that to basically indict the various groups that commented and who did testify—to give a general indictment without specificity about the nature of the exclusion to which you have testified—I find has very little meaning as far as this Senator is concerned. It may have meaning for others, but I find it has very little meaning for me.

Mr. WILLIAMS. I respect your views.

Senator LAXALT. As a matter of general information, were there any comparable groups funded at all or were you standing by yourself in the course of these proceedings?

Mr. WILLIAMS. Since we had no knowledge of the funding we have no way of giving an answer to that.

Senator LAXALT. Do you have any estimates on what it cost your people for these proceedings?

Mr. WILLIAMS. Not at this time.

[Supplemental statement by Mr. Williams:]

I do wish to make one additional statement for the record.

The committee should also be aware that at the conclusion of the session at which I testified, Mr. Arthur M. Angel of the Federal Trades Commission stated

¹ See supplemental statement submitted by Mr. Williams below declining to provide detailed information to the committee.

to me that "you fellows know how to burn your bridges" or words to that effect leaving the clear implication of a threat or reprisal against the funeral service profession and the black funeral directors in particular. In my humble opinion, this statement alone serves to corroborate my opinion, that the FTC proceedings with respect to the funeral industry were biased, opinionated and to some extent contrived by Commission staff.

With respect to Senator Kennedy's request that I review the transcript of the proceedings, I wish to again announce that my clients the National Funeral Directors and Mortician's Association is impecunious and therefore I am unable to take the time to read the voluminous transcript of those hearings.

I hope that, at least for some members of the panel, our testimony was helpful. In any event, I always appreciate the opportunity to express views on matters of public policy.

Senator LAXALT. For the purpose of the record, I would like to read in the recipients of awards in funeral proceeding, which according to the testimony was pretty much an advocacy situation in support of the FTC position.

Continental Association of Funeral and Memorial Societies, \$18,170; Consumer Affairs Committee, Americans for Democratic Action and the National Council of Senior Citizens, \$18,139; California Citizens Action Group, \$15,558; New York Public Interest Group, \$11,740; Consumer Federation, \$11,328; Arkansas Consumer Research, \$7,694; Central Area Motivation, \$7,410; and Consumer Union, \$3,980.

The staff indicates the Consumer Federation chose not to accept the award after grant.

In view of the time, which precludes us from conducting hearings after the session has started, I think we will have to recess here.

For those witnesses who have not been permitted to testify, we will be in touch with you in an attempt to reschedule the conclusion of these hearings during the course of the coming week.

Thank you very much.

[Whereupon, at 1:05 p.m., the hearing was recessed.]

PUBLIC PARTICIPATION IN FEDERAL AGENCY PROCEEDINGS ACT OF 1977, S. 270

TUESDAY, JUNE 21, 1977

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, in room 324, Russell Senate Office Building, at 10 a.m., Senator James Abourezk (chairman of the Subcommittee on Administrative Practice and Procedure) presiding.

Present: Senators Abourezk, Thurmond, and Laxalt.

Staff present: Charles Ludlam, counsel, of the Subcommittee on Administrative Practice and Procedure; Jay Steptoe, assistant counsel, of the Subcommittee on Antitrust and Monopoly; Robert Lyon, minority counsel; and Dick Moore, minority counsel.

Senator ABOUREZK. The hearing will come to order.

At the meeting last week we were unable to hear from all of the scheduled witnesses. We have scheduled this hearing to complete the committee's hearings on S. 270. As with the hearing last week, this hearing is being held in the main committee, where S. 270 has been pending since it was favorably reported by the Subcommittee on Administrative Practice and Procedure on May 3, 1977. This is the fifth day of hearings on S. 270 this session.

Our first witness will be Mr. Jonathan Sloat of the Grocery Manufacturers of America.

TESTIMONY OF JONATHAN SLOAT, GROCERY MANUFACTURERS OF AMERICA, INC., ACCOMPANIED BY GARY J. KUSHNER, STAFF COUNSEL, SCIENTIFIC AFFAIRS

Mr. SLOAT. Mr. Chairman, the Grocery Manufacturers of America is a trade association for the Nation's leading producers of food and related products sold to consumers and retail outlets.

I am Jonathan Sloat, vice president and legal counsel to the association.

I am accompanied today by Gary Kushner, GMA staff counsel.

GMA has previously filed comments and recommendations regarding S. 270 with the Subcommittee on Administrative Practice and Procedure.¹ Our appearance here today is in response to an invitation of Senators Abourezk and Laxalt to participate in these oversight hearings to review the public participation grants by the Federal Trade Commission under the Magnuson-Moss Act in order to determine the desirability of extending similar authority to other Federal agencies under S. 270.

¹ See part 1 of hearings at pp. 257-262.

GMA has been an active participant in the FTC-proposed trade regulation rule on food advertising under the Magnuson-Moss Act.

On February 3 of this year, the then FTC Chairman testified before this committee's Subcommittee on Administrative Practice and Procedure regarding the Commission's public participation and compensation program, stating that, in his opinion, its benefits to Commission proceedings are substantial. He then proceeded to elaborate on how successful, in his view, the program has been.¹

Our testimony today will address the other side of the coin. Regretfully, the Federal Trade Commission is not complying with clear statutory mandates of the Magnuson-Moss Act regarding public participation grants and is not even following its own published procedures for processing such grants.

The Magnuson-Moss Act states that any person receiving a grant must be one who "has or represents an interest which would not otherwise be adequately represented in such proceeding." This language clearly indicates the statutory intent that grants under the Magnuson-Moss Act are not intended to be given for testimony which duplicates other testimony in the proceeding.

Nevertheless, in connection with one issue alone in the food advertising proceeding, the relationship between food energy and calories, the Commission made grants to 14 individuals or organizations, 7 of which were under the Magnuson-Moss Act. It may not come as a surprise to you that all 14 of the recipients supported certain calorie disclosure requirements proposed by the Commission for advertisements involving food energy.

In his testimony on February 3, the FTC Chairman suggested that the best way to assure objectivity in grants contemplated under S. 270 was to vest program authority in a single disinterested agency. In other words, it should not be the agency which was possibly going to give the grant.

He expressed concern that, otherwise, there would be a temptation on the part of individual agencies to steer funds away from groups that opposed the agency. A more important consideration, apparently, as revealed by experience in the food advertising rule, is the temptation on the part of the agency to steer funds to specific individuals and groups that agree with the agency's proposals.

The Magnuson-Moss Act further provides that any recipient must be a person who "is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding."

In the February 3 hearing, Senator Thurmond brought out the fact that the FTC had given a number of grants under the Magnuson-Moss Act to Consumers Union, an organization with an annual budget of over \$16 million. Responding to the Senator, the FTC Chairman attempted to justify such grants by stating that he does not feel that Magnuson-Moss grants should be limited to applicants who are "indigents" but that they may appropriately be given to anyone who, in the Commission's view, might not otherwise be willing to participate in the proceeding.²

¹ See part 1 of hearings at pp. 4-44.

² See part 1 of hearings at p. 10.

In other words, the Commission, in effect, has changed the test from the statutory test of not being able to afford to participate, to its own test of not otherwise being willing to participate.

Senator LAXALT. May I ask a question in that respect?

Are you speaking in terms of the financial adequacy or inadequacy of the particular firm involved or the group being represented?

Mr. SLOAT. The financial adequacy—not being able to participate—those words. To pay the costs of participation.

This rather astonishing reinterpretation by the Federal Trade Commission of what appears to be a clear congressional mandate should not only be clarified with respect to future Magnuson-Moss grants, but the question of financial eligibility requirements should be spelled out in detail with respect to grants by other agencies under S. 270. In other words, this shows a clear problem.

Surely, there must be some middle ground between giving grants to organizations with multimillion-dollar annual budgets and limiting the program only to applicants who are indigents.

Senator ABOUREZK. May I stop you there for a moment?

Consumers Union, from what I know of it, is a public interest group that tests different products and advises the public on whether or not they believe, to the best of their objectivity, these are good or bad products. If they have a \$16 million budget and if they are indeed a nonprofit organization, which I am led to believe they are, if they spent it all on those kinds of things, then that does not necessarily make them rich.

I am curious to know why you keep bringing up this large budget thing; it does not mean that is profit to them. They may be just as penniless as I am.

Mr. SLOAT. I know that corporations like Lockheed have lost millions of dollars, too. I do not think Lockheed would be considered this kind of "public applicant." Just because an organization decides to budget its multimillion-dollar income for some other purpose and because it may be losing money—I understand Consumers Union said they lost money last year—should be no reason to give them public participation grants of \$7,000. This is especially so when, as I understand from reading their report, they use almost \$5 million for promotional purposes for the magazine.

Senator ABOUREZK. I think Lockheed, perhaps, is a corporation organized for profit, whereas Consumers Union is not organized for profit. I think that would be the distinction.

Senator LAXALT. Isn't the point whether or not the given group has the financial means to be represented?

Mr. SLOAT. I would think so. That is what the statute—

Senator LAXALT. Isn't that what you are contending here?

Mr. SLOAT. Exactly.

Senator LAXALT. Groups like Consumers Union do have the financial wherewithal to come in and make a representation on their own without needing public funds to support that effort. Isn't that the point that you are making?

Mr. SLOAT. That is exactly the point. And it is their decision what they want to use those funds for. If they want to use them for promoting the magazine instead of appearing at an FTC proceeding, I

raise the question, is that an appropriate reason, therefore, to give them additional money.

I think the point also can be made, as the Senator pointed out, they are a nonprofit organization. If that is correct, this is, in effect, giving them a double benefit. They are tax exempt now. Then they also would get an additional public participation fund.

So, they get two benefits, which is beyond what a business participant would get.

On this point of the eligibility requirements under the Magnuson-Moss Act, a further point in the act is that the act specifically limits public participation grants to persons who cannot afford to pay the costs of three types of participation. The act is very clear on this. The three types are: making oral presentations, conducting cross-examination, and making rebuttal submissions. Those are all from the statute.

Other forms of participation, such as merely filing statements with the Commission, are not included. Nevertheless, 2 out of 10—one-fifth, 20 percent—of the recipients of Magnuson-Moss grants in the food advertising rule merely filed statements for the record and thus did not meet the participation requirements for persons receiving grants under the act.

Again, this is an area which we believe should be clearly spelled out in connection with grantmaking authority contemplated under S. 270.

A third point: the FTC is not adhering to its own published procedures for processing applications for grants under the Magnuson-Moss Act. One consideration which has been agreed on by all who have testified on S. 270 is the importance of trying to achieve maximum objectivity in the decisionmaking process on grant applications. This would certainly rule out allowing staff attorneys working on a particular proceeding to participate in the determinations as to which grant applications should be funded.

In his testimony on February 3, the then FTC Chairman suggested assigning this authority to a separate, disinterested agency in order to obtain such objectivity.¹

However, I think it is only fair to point out that there is much the FTC could now do in this regard which it is not doing, including following its own published procedures for processing grants under the Magnuson-Moss Act.

The procedure for handling Magnuson-Moss grant applications is set forth in section 1.17 of these regulations which are found in title 16 of the Code of Federal Regulations.²

Section 1.17 provides that the presiding officer in a given rulemaking proceeding, "shall consider applications for compensation filed under this section and forward initial findings to the Director of the Bureau of Consumer Protection * * *"

The regulations then provide that the Director of the Bureau of Consumer Protection "shall review applications and initial findings of the presiding officer and determine in his discretion to what extent compensation shall be authorized under this section."

There is no mention made in the FTC's published regulations of any participation in the decisionmaking process by staff attorneys directly involved in the rulemaking proceeding.

¹ See part 1 of hearings at p. 6.

² See part 1 of hearings at pp. 372-373.

In response to a recent inquiry by a House Appropriations Subcommittee, the FTC revealed that not only does the presiding officer make recommendations—not findings, but recommendations—in regard to funding grant applications, but that he does so only after consultation with the staff attorneys working on the matter, who are entitled to include their concurrences or dissents—that's in quotes—with the recommendation of the presiding officer.¹

In addition, the matter is then—according to the FTC's answers to the House Appropriations Subcommittee—reviewed by an “ad hoc” review group. This is the first time we heard about that group. It includes a number of additional personnel from the Bureau of Consumer Protection, which is the bureau making the decisions, including, usually, the supervisor of the staff attorneys working on the rule.

So, there we have, in the published procedures, we have the presiding officer and the Bureau Director making the decision—just two people. But, in the answers to the House Appropriations Committee, they point out that everybody involved in the rulemaking proceeding gets in on the act, including the attorneys, their supervisor, and other people from the Bureau of Consumer Protection.

This procedure would seem to encourage the kind of abuses pointed out earlier where the staff gives public participation funds to compensate witnesses who support the agency's proposals.

One well might ask, why is it the Commission has not seen fit to spell out their actual procedures until they received the congressional inquiry, rather than operating behind the abridged version of the procedures published in the Commission's regulations.

My fourth point is this. The Magnuson-Moss Act fails to guard against FTC staff excesses such as writing prepared statements for delivery by ostensible public witnesses. Although the Magnuson-Moss Act authorizes the FTC to make public participation grants to persons wishing to participate in the proceedings, it does not prevent the FTC from bringing in other ostensible public witnesses and compensating them out of regular FTC budget money.

Thus, the FTC has two methods of funding witnesses who support the Commission's rulemaking proposals.

I might just add parenthetically that, if S. 270 were passed in its present form, the FTC would have still a third method for funding public witnesses.

During the February 3 hearings, Senator Thurmond brought out the fact that the FTC had written virtually the entire statements of some witnesses in the food advertising proceeding.² This was proved conclusively by the fact that, in the case of at least three witnesses, there statements were virtually identical.

To participants in that proceeding, however, it was apparent from a number of indications that the FTC staff had been involved in the preparation of the testimony of other witnesses who were compensated by the Commission.

Although the presiding officer allowed cross-examination to prove that the FTC staff had, in fact, written the three statements that were

¹ Reference is to House Appropriations Committee hearings on State, Justice, Commerce, and Judiciary for fiscal year 1978; include pp. 211-214 beginning with “Qualifying for Public Rulemaking Participation.”

² See part 1 of hearings at pp. 13-15.

virtually identical, he did not permit examination into the extent of collaboration by the FTC staff with other witnesses.

This issue, therefore, raises important questions not only with respect to the relationship between compensation received by witnesses under the Magnuson-Moss Act as against compensation received from regular FTC appropriation funds, but also the propriety of staff collaboration with witnesses receiving compensation under both programs.

In any event, it makes a mockery of rulemaking proceedings for agency staff to bring in ostensible public witnesses and independent experts to present testimony which has been written for them by the FTC staff. This is so, regardless of which funding mechanism is being used to compensate such witnesses.

A clear congressional mandate to put a stop to such staff excesses would seem to be in order. In this connection, it is relevant to note that the Consumer Product Safety Commission, in recently establishing its Office of Public Participation, specifically provided that the office "may provide guidance as to the availability of Commission data and expertise, but shall not in any way prepare or assist in preparing the comments or testimony of participants in Commission proceedings."

That language is in quotes.

We would urge that such limitation be made applicable to the FTC staff handling specific trade regulation rules and applicable regardless of the funding mechanism which happens to be used for the witness.

We did, as I mentioned, provide a statement in these proceedings previously, with certain recommendations regarding S. 270. In regard to our testimony today, we have three further recommendations.

One, in order to avoid unnecessary and repetitive duplication of testimony, Federal agencies should not be authorized to give public participation grants to individuals or organizations who represent an interest already represented in the proceeding by the agency staff.

Two, any agency authorized to give public participation grants under S. 270 should be required to set up a separate office of public participation, as the Product Safety Commission has done, and establish procedures which will insulate the decisionmaking process on grant applications from the staff attorneys directly involved in the agency proceeding in respect to which such grants are sought.

Three, Federal agency staff should be prohibited from preparing testimony used or comments for submission by other persons in the agency's proceedings. This requirement is particularly germane to S. 270 since most rulemaking proceedings are so-called notice and comment proceedings and it would be impossible to ascertain in such a proceeding whether a statement submitted in response to a solicitation for public comment had actually been written by an agency staff member soliciting the public comments, and submitted for the record through some other person.

We submit that such ventriloquist advocacy is an improper use of Federal funds.

That concludes my prepared statement, Mr. Chairman.

Senator ABOUREZK. Thank you, Mr. Sloat.

Your experience on which your testimony is based is limited to this one particular rulemaking proceeding? Or have you had more than that?

Mr. SLOAT. No, just this one. The Magnuson-Moss Act is only 2 years old, and this was one of the first.

Senator ABOUREZK. It was a proposed rule by the FTC to require grocery manufacturers to advertise the number of calories on each package or can?

Mr. SLOAT. That is just one issue of many in the proceeding.

Senator ABOUREZK. There were other issues in advertising regulations?

Mr. SLOAT. It is a comprehensive proposal to regulate advertising on nutrition of food products.

Senator ABOUREZK. You objected to the proposed rule, obviously.

Mr. SLOAT. We felt that it would not be effective in terms of consumer education.

Senator ABOUREZK. On what grounds would it not be effective?

Mr. SLOAT. I am not expert on advertising. But when you think of putting in a 30-second ad that makes a claim for food energy that the energy comes from calories, and there are x number of calories in a y size serving of this food, and try to crowd that additional information into a 30-second ad, then you are doing two things. One, you are turning viewers off; they are not involved in a consumer education kind of attitude. Second, when you try to crowd that additional information on top of the message which the advertiser is trying to get over, what happens is that nothing gets across to the consumer. They tune out the whole message; there is too much there.

Senator ABOUREZK. They were requiring what: the calorie count?

Mr. SLOAT. There were two requirements. If a food ad said that this food will give you energy to start off the day right, and had a picture of the food—orange juice or whatever—then on top of that in the ad you have to have a statement that the energy is provided by calories and that x number of calories are contained in a y size serving.

The result of that is that the consumer just tunes the whole thing out.

Senator ABOUREZK. But they were only asking for the amount of calories and nothing else to be put on it?

Mr. SLOAT. Plus the statement, the energy and calorie relationship; two requirements.

Senator ABOUREZK. How would that have appeared? I guess I do not understand the relationship between the two.

Mr. SLOAT. The statement in the ad that the energy comes from calories—No. 1. And then, there are x number of calories in a y ounce serving of this product.

Senator ABOUREZK. And did they ask you to do it by voice, on a TV commercial, or could you put a banner there?

Mr. SLOAT. This is what the hearings are about. They would like to have both. Our feeling is that neither is going to be effective. The whole advertising becomes ineffective, for the product as well as the nutrition message.

Senator ABOUREZK. I just wanted to get an understanding of what it was and why you were opposed to it.

Then your complaint about the Magnuson-Moss Act about public participation was that the FTC staff people, you believe, wrote statements for witnesses who were in the favor.

Mr. SLOAT. This was admitted by the witnesses.

Senator ABOUREZK. They admitted it publicly?

Mr. SLOAT. Yes.¹

Senator ABOUREZK. And you also objected to someone such as Consumers Union getting \$7,000 for submitting testimony or whatever they submitted, in view of the fact that they have a \$16 million budget.

Mr. SLOAT. Yes, sir.

Senator ABOUREZK. If you deprived consumer groups or individual consumers of any kind of public participation funds in rulemaking proceedings, would there be anybody, really, on the other side to represent what is considered by a lot of them as the public interest as opposed to the private interest, which you represent?

Mr. SLOAT. I am glad you asked that question to clarify our position. Our position is not that we are opposed to public participation grants.

What we are objecting to is the failure of the Commission to follow a clear congressional mandate which we believe to be in the statute. I think it is putting up a strawman to say, "Well, if you don't give it to Consumers Union, then you have to limit it to indigents." That is not what the statute says, but that is the strawman that they put up.

Clearly, if somebody does not have \$7,000—if there is a consumer group, say, with a \$50,000 annual budget—which some of the smaller consumer groups have—and they need \$7,000 to participate, if the other participation requirements are met in the statute, then we would say they should have the \$7,000.

Senator ABOUREZK. You do not have any objection to the public participation provisions of the Magnuson-Moss Act, then, if it were followed to the letter? Is that what you are saying?

Mr. SLOAT. That is correct.

Senator ABOUREZK. Are you saying you are opposed to S. 270 on the grounds of the way it is written, or that you are afraid it might be violated once it is passed into law?

Mr. SLOAT. As I understand the purpose of these hearings, it is to focus on Magnuson-Moss as the prototype for possible S. 270 funding for all agencies. The concern we have is that the FTC is not now following Magnuson-Moss, No. 1, and they should. No. 2, S. 270 is broader than Magnuson-Moss and lends itself to more abuses even than Magnuson-Moss, despite the narrower language of Magnuson-Moss.

Senator ABOUREZK. The purpose of these hearings is to consider testimony on S. 270, which might include the Magnuson-Moss experience. So, it is not directed entirely to the Magnuson-Moss Act.

What we are trying to do is find out whether the passage of the bill is justified or not. That is the purpose of the questioning that I am trying to direct toward you.

Do you think S. 270 should be passed, should not be passed, or should be passed with amendments; or what?

¹ See part 1 of hearings at pp. 13-18, and 43. See below at pp. 48-50.

Mr. SLOAT. I think it is up to the Congress to decide whether the bill should be passed. Our feeling is that, if it is passed, it should have in it clear language on these points, which we have shown by experience are not being followed in Magnuson-Moss, which is similar to it.

Senator ABOUREZK. What about the provisions in S. 270 which clearly set out that staff attorneys who are working on the case itself cannot take part in the payback provision, providing attorneys fees and help for groups or individuals who cannot afford them?¹

Mr. SLOAT. I am not clear that that is in the statute right now. Clearly, if it is, I have forgotten that unless it is an amendment to the original bill.

I think that you need to go further than that——

Senator ABOUREZK. What would you do?

Mr. SLOAT. I think, clearly, the FTC staff—for starters—should be prohibited in the statute from writing statements for witnesses. I think they should be excluded as much as possible from the decision-making process. Right now, the FTC, despite their denials, by the way——

Senator ABOUREZK. Who ought to be excluded?

Mr. SLOAT. The staff working on the case.

Senator ABOUREZK. Obviously, the final decision comes from the Commission itself with recommendation by their staff.

How would you do it otherwise?

Mr. SLOAT. I believe that the final decision does not come from the Commission; it comes from the Bureau Director.

Right now——

Senator ABOUREZK. For the rulemaking?

Mr. SLOAT. On the grant applications, the final decision——

Senator ABOUREZK. No, no; I am talking about rulemaking. We are talking about two different things.

On grant applications, you are saying what now?

Mr. SLOAT. That the staff attorneys working on the case should not be involved in decisionmaking process on whether to give those grants or not other than to provide information as to whether this kind of testimony will be provided by somebody else. But to be involved in the whole decisionmaking process and to make concurrences or dissents.

I even question whether the presiding officer, frankly, should be involved in making recommendations. He is supposed to be a neutral, objective, judge-type person.

I would like to say for the record, by the way, that the presiding officer in our case, I think, has been very good in that respect. He has tried very hard to be impartial.

Senator ABOUREZK. Let me read page 18 of the committee print of S. 270, line No. 3:

No determination under this subsection shall be made by any office, bureau, or other division of an agency having responsibility for the presentation of the case or the initial decision or recommendation in any proceeding to which this section applies, except that agency personnel and hearing examiners in any such proceeding may provide relevant information with respect to such determinations.

¹ Section (e) (6) of committee print in the appendix at p. 102.

Mr. SLOAT. That language just goes to the question of—as I understand it—determining whether an application will be granted or not.

It does not go to the question of other participation which the staff might have, such as them writing a statement for that witness.

Senator ABOUREZK. No; this particular section does not.

I wanted to read you the section about whether or not staff attorneys working on a rule determine attorneys fees or witness fees; they don't under this bill.

Mr. SLOAT. I think that would be an improvement.

I might just point out that the FTC has a similar kind of language but they do not follow it, at least according to their own—

Senator ABOUREZK. Well, we have a law against murder. A lot of people don't follow that. But you do not throw out the law on murder.

Mr. SLOAT. No; but it has to be as tight as possible.

Senator ABOUREZK. Well, I agree with that.

I think we ought to find out what our objectives are.

Just to summarize, your position is that, if the language were tightened up and if—in fact, I would suggest that if you think the FTC under the Magnuson-Moss Act is violating the law as written, I think that you and other groups that believe the same way ought to get together and take them to court on it. They are obligated to follow the law just like everybody else is.

Mr. SLOAT. I understood these were oversight hearings sort of on that issue. That is why we are here to testify.

Senator ABOUREZK. No, no; this hearing is a legislative hearing on this specific piece of legislation.

I am just saying that if you think—if you are absolutely convinced that your interests are being damaged by the FTC breaking the law, then I think you ought to take them to court—you and other groups. If you were an average citizen, it would be ridiculous for me to suggest that because you probably would not have the money to do it. But I think business groups who think they are being injured ought to get together and do that kind of thing.

What we are trying to determine here, as I said before, is whether or not S. 270 ought to be passed or ought not to be. That is the specific purpose of these hearings. It is not an oversight hearing on what has happened with Magnuson-Moss.

I do not know where you got that understanding, but I think it was misrepresented.

Mr. SLOAT. That was what was told us when we were asked to testify.

Senator ABOUREZK. It was misrepresented to you somehow then.

I just want to summarize what I believe to be your position.

You would have no objection to passage of S. 270 if, No. 1, the staff could be prevented from writing testimony for witnesses. No. 2—

Senator LAXALT. Just a second, I do not think that—

Senator ABOUREZK. Well, he can correct me.

Senator LAXALT. I want to make certain that the record is right.

Senator ABOUREZK. He can correct the record.

Senator LAXALT. All right.

Senator ABOUREZK. No. 2, you want to make certain that the agencies do follow the law once it is passed.

Mr. SLOAT. I am not sure when you say "we have no objection."

Our position is that, if S. 270 is passed, these requirements should be in it, among the others that I mentioned. We also had, as I recall, four recommendations in the statement we previously filed with the committee.

Our comments were filed March 3 in a letter to Senator Kennedy in which we set forth—actually 10 points which we suggest considering.¹

Senator ABOUREZK. Well, if we took care of your problems, then you would not have any objection to the passage of the bill?

Mr. SLOAT. And it was clear the agencies were following the language—

Senator ABOUREZK. You know, if—

Mr. SLOAT. I think oversight hearings the first couple of years are very important.

Senator ABOUREZK. I think that is a good idea on any legislation; I agree with you there.

Mr. SLOAT. One of the concerns we have is that S. 270 would apply to adjudications and to court proceedings. We have real concerns about both of those, which go beyond the rulemaking powers—

Senator ABOUREZK. Why do you object to them being involved in adjudications?

Mr. SLOAT. Well, it is not clear that, if you had a criminal proceeding—maybe this is farfetched—that the prosecutor could not go out and get a public participant to come in and testify against the defendant.

Senator ABOUREZK. What's wrong with that?

Mr. SLOAT. Well, it is also not clear that the prosecutor could not write that person's testimony for him.

Senator ABOUREZK. Well, I do not think you can do that in a court case.

Mr. SLOAT. I would hope you could not do it.

Senator ABOUREZK. If you are caught doing that in a court case, I would say you are in deep trouble.

Mr. KUSHNER. Senator, if I could add one thing.

First of all, as our comments of March 3 reflect—and I would be glad to provide additional copies if that would be of any assistance—we have several problem areas with S. 270 as drafted. We have no problem with the principle that there should be increased participation by the public. In fact increased participation may well lead to better decisionmaking in rulemaking proceedings.

If I may respond to one of our several points, which is the one that has just been mentioned with respect to adjudications.

There are many adjudications in Federal agency proceedings that are not at all dissimilar to a prosecution in a criminal trial. In fact, many of the agencies' attorneys refer to themselves as prosecutors in adjudication.

Let me use the example of a criminal trial. In a criminal trial, you have a prosecutor and you have a defense attorney. Adding public participants in an adjudication would be very similar to adding two or three more prosecutors who are then prosecuting the case and forcing a defendant to defend himself in the case from more than one flank, more than two flanks, but from several different flanks.

¹ See part 1 of hearings at p. 257.

In a rulemaking proceeding, on the other hand, it is important that the facts come into the record and that the facts are established and that, upon these several different facts, we can make a rule that will be of prospective and general application. That it important, we believe.

In adjudications, we would have three, four, five parties who are intervening in a proceeding of specific applicability to one defendant who is now facing several different prosecutors.

Senator LAXALT. I would like to compliment you on this statement. It is very helpful to me and I think to the other members of the committee.

Mr. SLOAT. Thank you.

Senator LAXALT. While, in theory, it may be well for you to bring a proceeding against the FTC, as a practical matter it presents a bit of a difficulty in suing the judge who is going to be passing on your proceeding; does it not?

Mr. SLOAT. It certainly does.

Senator LAXALT. Wouldn't it be far more practical, if you are thinking in terms of the act not being followed and looking for an objective group, to go out and fund an intervening law firm and have them file a proceeding against the FTC to see whether or not they are complying in the interest of the public with the provisions of Magnuson-Moss?

If you are looking for an independent, objective-type law firm, of the type that is being enlisted in Magnuson-Moss and which is the subject of S. 270, isn't that what it is all about?

Mr. SLOAT. Yes; it is. Actually, Magnuson-Moss provides for that kind of funding. There is such a person now involved in the food proceeding who is doing a pretty good job. In fact, it raises some question as to why they need other consumer organizations in addition to the main one that was contemplated by the act, who is being funded and doing a good job.

Senator LAXALT. Tell me, in terms of numbers, how many people does your group represent in this country?

Mr. SLOAT. Approximately 150 food manufacturing companies.

Senator LAXALT. And in terms of employment? Do you have those numbers?

Mr. SLOAT. We could provide that for you.

Senator LAXALT. It is not that important.

I would like to summarize what my understanding of your testimony is.

First of all, I think, in respect to whether or not we do anything with S. 270, you felt that that was up to the Congress?

Mr. SLOAT. Yes.

Senator LAXALT. You do not take a position per se on that? If we do pass it, you want it cleaned up in the manner which you suggested?

Mr. SLOAT. That is correct.

Mr. KUSHNER. I think we have taken a position, Senator—

Senator LAXALT. Are we on the same side?

Mr. KUSHNER. We are on the same side. I think we have taken a position. Our comments, which are quite detailed, reflect that.

I think, as you have clarified, that if the bill is "cleaned" up, then we could probably support it. The question is whether or not the bill, as presently drafted, could ever be adequately "cleaned" up.

Senator LAXALT. Now, detailing the objections, I gather that we feel that public participation should be limited to those groups who cannot otherwise afford to be represented themselves?

Mr. SLOAT. Yes, which means more than just indigency.

Senator LAXALT. I recognize that, but that is your basic premise; is it not?

Mr. SLOAT. Yes.

Senator LAXALT. Your own experience with FTC has indicated that very often groups come in who have the financial means to properly conduct that representation on their own without public funds.

Mr. SLOAT. That is correct.

Senator LAXALT. Is that the essence of your statement?

Mr. SLOAT. Yes.

Senator LAXALT. Then I gather your statement is the intent of that act, as should be the case in S. 270, is that whoever is brought in should be somewhat objective.

Mr. SLOAT. Yes.

Senator ABOUREZK. Will the Senator yield?

Senator LAXALT. Yes.

Senator ABOUREZK. You mean the—

Senator LAXALT. The intervening law firm. I am speaking principally of the law firm that is going to be hired as a result of grant application. It should be objective.

Senator ABOUREZK. The law firm ought to be objective?

Senator LAXALT. Yes, objective in terms of the FTC and objective in terms of trying to represent the people out there who are not otherwise being represented in the proceeding.

Mr. SLOAT. It is a public participation grant as I understand it.

Senator ABOUREZK. Yes; but they can hardly be objective; they would have to take a position.

Senator LAXALT. They would have to take a position in connection with their constituency, but they—let me rephrase it.

They certainly should be free of the influence of FTC; should they not?

Mr. SLOAT. Yes.

Senator LAXALT. They should be independent of the influence of FTC.

Mr. SLOAT. That is the point; yes.

Senator LAXALT. And they should not be an added arm, an additional muscle for the agency.

Mr. SLOAT. That is correct.

Senator LAXALT. I gather from your statements and what you have indicated here today, your experience is, rather than the intervening program resulting in there being additional representation for people out there in the country who are not otherwise being represented, what has happened, as a practical matter, is that these folks come in on the side of the agency in support of the rule and regulation.

Mr. SLOAT. That is the way it has worked out, certainly.

Senator LAXALT. This has been carried to the point where they have even been active participants in preparing the agency's case.

Mr. SLOAT. That is correct.

Senator LAXALT. Purportedly disinterested witnesses were not.

Mr. SLOAT. That is correct.

Senator LAXALT. Purported public witnesses who, in fact, are not.

Mr. SLOAT. That is correct.

Senator LAXALT. Enlisted by the agency.

Mr. SLOAT. And this is happening under both programs: Under Magnuson-Moss and under their own budget funds. They are the same kinds of witnesses. They all come in and provide testimony supporting the rule.

Senator LAXALT. And you object, I gather also, to the selection process by which the agency goes out and theoretically selects a disinterested group there who is going to watch the whole proceeding, including the agency.

Mr. SLOAT. I do not know whether they go out and select people under the Magnuson-Moss grants as distinguished from their own appropriation funds. They do not make much distinction between the two; so, it may be an academic point. I do not know, for a fact, that they have gone out and gotten public participation witnesses under Magnuson-Moss. They certainly do do it under appropriation funds.¹

The two kinds of witnesses do tend to just duplicate the testimony. You know, when you have three witnesses making the same statement, you could not have much more duplication than that.

We have no objection to their going out and getting witnesses. Congressional committee staff are assigned by the chairman to go out and get viewpoints of people who can provide useful information. The staff goes out and does that. The witnesses come in and give their views.

Staff does not go out and write their testimony or say, "Here's what we want you to say," and write the words for them and then have the person come in and testify and not tell anybody that the staff has written them.

The FTC tried very hard not to let us find this out, by the way, and not to let us cross-examine. We made such an issue out of it that they had to let us. The presiding officer did let us cross-examine with respect to those three witnesses. He would not let us cross-examine with respect to other witnesses where the same thing appeared to have been happening.

Senator LAXALT. I gather you object, too, and have grave reservations about the selection process. It has been suggested in other hearings that the selection process, if we go to intervening attorneys, should be an independent group, independent entirely of the agency.

Do you agree with that as a concept?

Mr. SLOAT. That would be desirable. I think there are certain requirements that you should not duplicate or overlap other testimony. So you have to compare that with what the proposed witness would come in and say.

Senator LAXALT. I mean in terms of the law firm that is eventually selected to participate.

How does it make any sense for the agency over which this law firm is supposed to be watching and overseeing the objectivity of the proceeding, protecting the interests of the people not otherwise represented—how does it make sense for the agency to select its own law firm?

Mr. SLOAT. Well—

¹ See p. 56.

Senator LAXALT. Select its own watchdog?

Mr. SLOAT. I do not know how this happened in the food case. To be candid with you, in this case, the law firm that was selected to do the primary consumer representation has, I would say, not been a tool of the Federal Trade Commission. They have had their own independent views. They have agreed with the Commission and disagreed with us on some issues, and agreed with us and disagreed with the Commission on some issues.

They have attempted to do a very responsible job. They are not the only consumer representatives, though, that either receive grants under Magnuson-Moss or, I believe, under the FTC's appropriation funds. Other consumers groups also are brought in. I question how much contribution they have made; overall, it may be some contribution possibly.

Senator LAXALT. There were some 14 groups represented; were there not?

Mr. SLOAT. Yes, there were 10 under Magnuson-Moss, 7 of whom were on one issue alone.

Senator LAXALT. I see.

In relation to those funded under Magnuson-Moss and the others, was there any difference in the type of representation; would you say?

Mr. SLOAT. Well, there is a lot of duplication.

Senator LAXALT. There is duplication?

Mr. SLOAT. Yes.

Senator LAXALT. But in terms of your position, were they for or against you?

Mr. SLOAT. They are all in favor of the rule in some way or other.¹

Senator LAXALT. That apparently is how this is coming out, not only from your testimony but from other testimony: whoever is selected here eventually comes down in favor of the rule or regulation of the agency.

Mr. SLOAT. That is correct, and that's—

Senator LAXALT. We have not yet found one where they have come in and said, "Listen, we don't think this rule is necessary at all. Or, if so, it should be amended or modified in some respect."

As I say, it eventually comes down as an added arm and added political muscle on the part of the Agency.

Am I misstating your conception as the result of your own experience?

Mr. SLOAT. This is exactly what has happened.

There were some applicants that were not granted. I do not know the reasons why they were not granted; we are not privy to that process.

Senator LAXALT. Were they for or against the rule?

Mr. SLOAT. I do not know.

Mr. Collier submitted a table in his testimony on February 3 which listed all the grants that were funded and those that were rejected.

Senator LAXALT. I have a closing observation.

Considering the difficulties you personally experienced with just the FTC and considering the fact that S. 270 would expand itself across all the agencies, isn't your impression that this is going to create problems that we cannot even conceive of in connection with administration and objectivity?

¹ See pp. 50-51.

Mr. SLOAT. I think it is opening a Pandora's box of problems, particularly when you consider the fact that Magnuson-Moss is rulemaking only, and that is probably the only legitimate place that this has, in our view, and should not be extended to adjudication proceedings or to court proceedings.

At least let's crawl before we walk and try the rulemaking and see what happens before we just open up the whole thing and inundate the courts with proceedings on how to handle this thing. If we go to court, Senator, that is just going to add another burden to the court system if we have to go to court all the time to make sure the Agency follows its congressional mandates.

Senator LAXALT. Thank you very much, Mr. Sloat.

That is all I have, Mr. Chairman.

Senator ABOUREZK. Has the decision been made on that particular rule yet?

Mr. SLOAT. No, it has not.

Senator ABOUREZK. So, you do not know how it will come out, whether it will be adopted or not?

Mr. SLOAT. That is correct; we do not know.

Senator ABOUREZK. Is it your essential point that the FTC is stacking the deck in favor of supporters of the staff's position on particular rules?

Mr. SLOAT. I think that has been very clear from the record; yes, sir.

Senator ABOUREZK. And they only fund favorable testimony?

Mr. SLOAT. That is correct.

Senator ABOUREZK. To your knowledge, have they ever funded unfavorable testimony?

Mr. SLOAT. Saying "favorable" and "unfavorable" is a little oversimplified because some of the witnesses—I would not say all the people they funded have favored all their proposals. But they have all favored some of the proposals—favored the rule in general rather than in all specifics.

Senator ABOUREZK. Well, they are not funding anybody who is unfavorable?

Mr. SLOAT. No.

Senator ABOUREZK. To your knowledge.

Mr. SLOAT. That is correct.

Senator ABOUREZK. It might be happening in other cases, but not in yours that you know about.

Mr. SLOAT. That is correct.¹

Senator ABOUREZK. Do you have any proof that the FTC knows in advance what position on a particular rule an applicant will take?

Mr. SLOAT. I believe that is stated in the application.

Senator ABOUREZK. What is?

Mr. SLOAT. The position the applicant will take.

Senator ABOUREZK. In the attorney's funding application?

Mr. SLOAT. Yes. I think it has to be because the act provides it shall represent interests not otherwise represented. So, you have to know what the interest is and what he is going to say and whether anybody else is saying the same thing. So, that would have to be stated in the application.

¹ See pp. 50-51.

Senator ABOUREZK. You are stating that it is laid out for them by the FTC so they will know well in advance? ¹

Mr. SLOAT. It would have to be in order to get the funds.

Senator ABOUREZK. You said something a minute ago that was interesting to me. You said that the particular law firm that was suggested by the FTC to represent the public interest was one that takes an independent position.

Mr. SLOAT. Yes; in this case it has.

Senator ABOUREZK. They were funded under the Magnuson-Moss Act; is that right?

Mr. SLOAT. Yes, they were.

I do not know whether the FTC selected them or they applied. I think they are supposed to apply, so I assume they applied. And the FTC agreed to make them the main consumer representative to do oral testimony, cross-examination, and rebuttal, the whole thing which the act contemplates.

Senator ABOUREZK. Senator Thurmond, do you have any questions of this witness?

Senator THURMOND. Not at this time, Mr. Chairman.

Senator ABOUREZK. I think that is all we have right now. Thank you both very much.

Mr. Sloat, somebody just walked by and mentioned that there is no place to state on the application the position you are going to take. I just wanted to make sure whether it was or was not on here before you leave.

Ms. SMITH. I do not believe it is on there.

Senator ABOUREZK. Pardon?

Ms. SMITH. I do not believe it is on there.

You do not have to state what position you are going to take.

You state your expertise, your knowledge, and your general area; but you do not have to state which position you are going to take.

Senator ABOUREZK. You are Margery Waxman Smith?

Ms. SMITH. Yes, sir.

FEDERAL TRADE COMMISSION PANEL TESTIMONY BY MARGERY WAXMAN SMITH, EXECUTIVE DIRECTOR, ACCOMPANIED BY JAMES V. DeLONG, ASSISTANT DIRECTOR FOR SPECIAL PROJECTS, BUREAU OF CONSUMER PROTECTION; WILLIAM DIXON, SPECIAL ASSISTANT FOR RULEMAKING, BCP; BONNIE NARADZAY, SPECIAL ASSISTANT FOR PUBLIC PARTICIPATION, BCP; ARTHUR ANGEL, STAFF ATTORNEY, BCP; AND STEVEN D. NEWBURG-RINN, STAFF ATTORNEY, BCP

Ms. SMITH. Mr. Chairman, I am Margery Waxman Smith.

Senator ABOUREZK. Ms. Smith, in your experience, does anybody ever state their position in advance on those applications?

Ms. SMITH. I have never personally seen it on any applications.

Ms. NARADZAY. The reason we ask them to state their interest in the proceeding is that we need to know if that interest is already being represented.

¹ See pp. 54-55.

Ms. SMITH. That is their interest, but not the position they are going to take on the rule.

Ms. NARADZAY. Right.

Sometimes they might state the position they want to take on the rule, but—

Senator LAXALT. Don't they regularly do that?

Ms. NARADZAY. Well—

Senator LAXALT. Statements indicate that they do this almost without exception. They take strong positions philosophically, and they even take some positions on a rule.

Ms. NARADZAY. They take positions, but they change those positions during the course of the proceedings. If they say that they want to conduct a survey in order to represent their interest, they do not say how they expect the survey to turn out.

Senator ABOUREZK. Let me get to the heart of it.

The question really is, does the FTC know in advance what position one of these applicants will take by virtue of either filling out the application or otherwise?

Mr. DeLONG. May I say something?

Senator ABOUREZK. Would you introduce yourself for the record?

Mr. DeLONG. I am James DeLong, Assistant Director for Special Projects in the Bureau of Consumer Protection.

Part of the requirement under the statute is that the interest an applicant represents not be otherwise adequately represented. When someone files an application, we will routinely ask them what type of thing they plan to do and what interest they represent, what types of information they plan to introduce into the hearing and what types of activities they plan to undertake.

In answering these questions people frequently describe what their position is on the rule.

I might add, that in a twist that is somewhat different from Mr. Sloat's point, the basic bias of the FTC has been against funding redundancy. If someone simply says, "I represent a particular consumer group and I want to endorse your rule in every particular," then our inclination is to say, "Fine, send us a letter and that will do it." There is no point in spending money on that.

As a result applicants tend to try to distinguish themselves from the Federal Trade Commission and show ways in which they disagree with us, on either side. They may say, "We think your rule is not stringent enough," or they may say, "We think you are neglecting regulatory costs."

There is a reward in the process for distinguishing oneself from the FTC staff position.

Senator ABOUREZK. Were you here when Mr. Sloat gave his testimony this morning?

Ms. SMITH. Yes.

Senator ABOUREZK. Were you able to hear that testimony?

Ms. SMITH. Yes.

Senator ABOUREZK. In this particular rulemaking procedure that he is referring to, were there three statements in favor of the rule that were identical to each other, as he testified? ¹

Ms. SMITH. I brought with me the presiding officer of that particular rule, Mr. William Dixon, who sat, obviously, at all the hearings.

¹ See part 1 of hearings at pp. 13-18 and 48.

Mr. Dixon, you can answer that question better than I can.

Senator ABOUREZK. In this particular rulemaking proceeding that Mr. Sloat was talking about, were there three statements that were identical to each other in favor of the rule?

Mr. DIXON. Yes, sir.

That was an episode that I have discussed here previously.¹ The sequence of events was that the staff interviewed these three expert witnesses, prepared an interview report—one interview report to cover all three since they said that the witnesses had told them the same thing—and sent the interview report to the three witnesses, who verified that it was an accurate statement of their views.

Then, when it came time for these three witnesses, who were going to testify, to file their notice of the substance of their testimony, which we require in advance, they all three virtually copied that interview report word for word and sent it in as their notice of the substance of their testimony.

I could also add, though, that that was the written notification of their testimony. None of the three actually read the statement at the hearings. They delivered their testimony extemporaneously and then answered questions from all of counsel at some length.

Senator ABOUREZK. Now, were these three witnesses getting Magnuson-Moss money?

Ms. SMITH. No.

Mr. DIXON. No, sir, they were not.

They had their actual expenses to travel to the hearing—travel and per diem paid from the staff's witness fund, not from Magnuson-Moss.

Senator ABOUREZK. So, the representation of Mr. Sloat, then, that the staff went out and essentially wrote three identical statements for these witnesses—would you agree or disagree with that representation by Mr. Sloat?

Mr. DIXON. I would have to agree and disagree in a sense, because it is as I related it. I went to great pains to make certain that all of this was made clear on the record so that there would not be any doubt about it. That is the way it took place.

Senator ABOUREZK. It was all on the record that that is the way it took place.

Mr. DIXON. Yes.

And I departed from my usual rule in permitting counsel to even cross-examine on this particular aspect of their testimony to make certain that everything was clear on the record as to exactly what did transpire.

Senator ABOUREZK. Well, now, from listening to Mr. Sloat's testimony, I was led to believe that the FTC staff went out and found these witnesses and directed them and told them what to say and wrote the statements for them.

That is the impression I got from his testimony.

Mr. DIXON. Well, the slant I would put on it is just as I have said. The staff interviewed these three witnesses on the energy calorie section of the rule, wrote that one interview report, because the staff's position was that all three of them took essentially the same position. They sent the interview report to each of the three witnesses, who verified its authenticity. Then each of the three witnesses used that inter-

¹ See part 1 of hearings at pp. 13-18 and 48.

view report as the substance of their testimony for meeting the pre-filing requirement.

So, what we had in front of us was three identical written statements; although, as I said, the witnesses stated their position extemporaneously at the hearing and answered questions at considerable length as to their positions.

Senator ABOUREZK. So, in essence, then, the representation of Mr. Sloat is not quite accurate, that it was a sort of setup deal. In effect, it was all in the public record; and that is just the way the witnesses wanted to do it. They were not coerced into it or talked into it in any way.

Mr. DeLONG. Yes; his representation is misleading.

I might add that we are in the process now of drafting a response to senatorial inquiry on this, I believe from Senator Weicker. We will be glad to send you a copy of the response.

Senator ABOUREZK. Please send it to the committee. I think we should have it.¹

Mr. DeLONG. Basically, these were three distinguished physicians. They were simply taking a position and the staff summarized it. Then they opened themselves to cross-examination.

I think it might clarify matters if I said something about funding witnesses in rulemaking proceedings. Mr. Sloat said we have two methods of funding witnesses. Actually, there are three. We, like any other Federal agency, have money to hire experts and consultants. In the course of preparing a rule, we, of course, consult with experts. In the course of developing a record in support of a rule, we have an obligation to put their statements and their testimony on that record to support what the agency proposes to do.

In addition, we do have a program where we will pay people simply travel expenses to come testify.

Neither of those is at all involved in the Magnuson-Moss money.

Then, finally, there is this program of compensation for independent public participants. These participants are funded under an entirely different mechanism. It is an entirely different review process.

The first two methods, which involve regular agency-appropriated funds, are pretty much under control of staff conducting the rule-making. The public participation money is not.

Ms. SMITH. I would also add there have been many groups that have received Magnuson-Moss funds which have opposed points of view of the staff.

Mr. Dixon, who presided over the food rule, tells me that there were several groups that came in with surveys opposing the staff, which cross-examined staff witnesses quite severely, which had points of view entirely different than the staff on various parts of the rule.

Senator ABOUREZK. Did they receive Magnuson-Moss funds?

Ms. SMITH. They received Magnuson-Moss funds.

Senator ABOUREZK. Mr. Sloat represented that there were no Magnuson-Moss opponents to the rule in this particular proceeding.

Senator LAXALT. No. He indicated that the law firm was fairly—

Senator ABOUREZK. Except for the law firm. But I mean—

¹ The response had not been received by the time this hearing went to press.

Ms. SMITH. That was the designated consumer representative, I believe.

Mr. DIXON. That was the consumer representative who participated in the hearings with the Magnuson-Moss funds.¹

There were other witnesses funded under the Magnuson-Moss. One that comes to mind readily is one consumer group which filed to conduct a survey of consumer understanding of certain terms that were involved in this rule. At this stage, now, the Commission has no way of knowing how their survey is coming out any more than they do. But it did fund, quite substantially, two groups that conducted surveys and then, as a result of those surveys, the witnesses testified essentially in opposition to those sections of the rule.

Senator LAXALT. Will the Senator yield?

Senator ABOUREZK. Yes.

Senator LAXALT. It is just on this very point.

Who in the panel is familiar with the so-called funeral proceeding?

Mr. DeLONG. I am, Senator.

Senator LAXALT. Our staff has examined applications in connection with independent representation in that proceeding.

Did you have any applications from any group which would take a position contrary to the agency rule? Do you recall?

Mr. DeLONG. I do not recall from the applications themselves. I know from subsequent discussion that there has been some opposition on the parts of some groups.

Senator LAXALT. Were they funded?

Mr. DeLONG. Yes.

Senator LAXALT. There were some in that proceeding, that you funded, in opposition to the rule?

Mr. DeLONG. I have been told that at least one of the public interest firms involved is skeptical about what we have done here.

Senator LAXALT. Off record?

Mr. DeLONG. If you want more detail on it, the staff attorney in charge of that proceeding is here.

Senator LAXALT. Well, no: I do not want to get into it here. But I would like some evidence indicating that there was some firm, in connection with that particular proceeding, which took a position in opposition to the agency. I would like that.

Senator ABOUREZK. Maybe we can just ask him.

Mr. Angel?

Senator LAXALT. Mr. Angel, in connection with the funeral proceeding, of any of the groups funded under the Magnuson-Moss, did any of these groups take a position in opposition to the proposed rule?

Mr. ANGEL. To sections of the proposed rule; yes.

Senator LAXALT. To sections.

Mr. ANGEL. On both sides. Some were saying that we had not gone far enough; some thought we had gone too far in certain respects.

Senator LAXALT. I would like the benefit of those. If you can give me a short summary as to those firms and those positions. Would that be burdensome? I do not want to do that to you.

Mr. ANGEL. I do not think it would be too burdensome to give you a summary.

¹ See pp. 45 and 46.

Senator ABUREZK. Without objection, we will hold the record open.
[The material requested follows:]

One prefatory observation relevant to the subcommittee's inquiry and concerns should be made. During the hearings, there were numerous references to the predominant support for particular TRR proposals by consumer groups as evidence of the reluctance of such groups to bite the hand that doles out the funds supporting their participation. It is important to note that consumer group support for a proposed rule may be inspired simply by the fact that the rule is a good one which will effectively and efficiently serve the public interest.

While the willingness of consumer groups to depart from the proposed rule or FTC staff positions is one indication of whether consumer groups support for a rule is "bought" by Magnuson-Moss funds, another measure is the support or opposition expressed by consumer groups who have not received Magnuson-Moss funding. In the funeral rule proceeding, some 20 to 30 consumer groups who received no Magnuson-Moss funds (ranging from the American Association of Retired Persons with 10,000,000 members to local consumer alliances with less than 100 members) had filed written comments or presented testimony in the oral hearings. Every single one expressed strong support for the rule.

It should also be noted that at least some consumer groups are sophisticated enough to realize (as do FTC staffers) that economic burdens on small businesses imposed by an FTC rule would inevitably be passed through to consumer buyers in the form of higher prices. Consequently, while the interests of small businessmen and those of consumers are not always congruent, neither are they entirely divergent.

The requested summary follows:

1. *Americans for Democratic Action/National Council of Senior Citizens*

The filed statements of the two component groups comprising this funded coalition urged at least three amendments to accommodate funeral industry problems.

1. The requirement of permission to embalm in section 453.2(a) should include a proviso to deal with instances in which permission cannot practically be obtained;
2. A similar proviso should be included in section 453.2(b) when permission to remove a corpse from the place of death cannot practically be obtained in advance;
3. Section 453.2(d) should be amended to allow funeral directors to retain markup on cash advance items, if such markups were disclosed in advance.

2. *Arkansas Consumer Research*

ACR proposed six modifications in the rule, four of which would reduce compliance burdens for small businesses.

1. Allow state official to authorize embalming by an amendment to 453.2(a);
2. Permit disclosed markup on cash advances by an amendment to 453.2(d);
3. Consolidate disclosures and eliminate the separate form required by 453.3(a)(2);
4. Combine the general price list (required by 453.5(e) and the casket price list (required by 453.5(b) into a single document;
5. Amend 453.2(b) to require release of bodies "promptly;"
6. Amend 453.5(a) to require standardized set of information to be disclosed by telephone.

3. *Consumer Federation of America*

CFA was granted Magnuson-Moss funds but refused the grant. The organization's attorney, Kathleen O'Reilly (now CFA's executive director), received some indirect funding as a consultant to Arkansas Consumer Research. CFA's prefiled statement urged that the proposed rule's protections be extended further, in at least 10 respects:

1. Section 453.2(a)(2) should be revised to require that a body must be released "promptly;"
2. The written explanation of law 453.3(2) should be *mandatory*, not "upon request;"
3. All disclosures required should be in both English and Spanish;

4. Casket prices should be displayed on or in an "open" casket; add "open" to the rule;

5. The rule should require that if the funeral director does not have selection room TRR should require display of three least expensive caskets by means of photographs.

6. The rule should preempt prohibitions on casket reuse;

7. The required general price list should be more detailed and include methods of payment, default charges, etc.;

8. The recordkeeping requirements should be expanded to include such things as wholesale prices, time and place of burial, name of clergy participating;

9. The FTC should not preempt State law which is stronger than the FTC's rule;

10. The rule should be amended to prohibit financial resources inquiries.

4. Consumers Union

CU's written comments urged two rule amendments to make the proposed rule more stringent and one to relax it:

1. The same rule-loosening exemption from the embalming authorization requirement urged by ADA/NSCS;

2. The rule should be amended to limit the markups which could be applied by funeral directors to the three least expensive caskets.

3. The rule and the disclosures required by it should be amended to notify consumers to refer any complaints to the FTC.

5. Continental Association of Funeral and Memorial Societies

In its written comments and prefiled statement, CAFMS urged a number of modifications in the proposed rule, most designed to increase the protections provided:

1. Add a category called "grief therapy" to the general price list 453.5(e) to make it clear that consumers can accept or reject this service;

2. The memorandum of service selected (required by 453.5(f)) should require the consumer's acknowledgement of receipt of the general price list;

3. A provision should be added to the rule prohibiting funeral directors from inquiring into the consumer's financial resources before a funeral is selected and a price quoted;

4. The rule should prohibit kickbacks for referral or "steering" of bodies to a funeral home.

5. The rule should require funeral directors to inquire about any possible funeral instructions left by the deceased;

6. The rule should preempt State laws which require embalming;

7. The rule should prohibit funeral directors from refusing to use a casket supplied by family;

8. Section 453.2(b) should include a proviso for pickup authorization when family members cannot be reached;

9. The rule should be expanded to deal with manufacturer's claims regarding caskets and vaults;

10. The rule provisions respecting display of least expensive casket and color disclosure should also be applicable to manufacturer's showrooms;

11. The general price list (453.5(e)) should include service categories such as counseling;

12. The casket and vault manufacturer's name and model number should be displayed;

13. On the "memorandum of funeral service selected" there should be an entry made for social security and VA benefits to be received.

6. New York Public Interest Research Group

In its prefiled statement and written comments, NYPIRG expressed the view that the proposed rule did not provide sufficient consumer protection in at least two respects:

1. The rule should require that the mandated disclosures be provided to consumers at the very first contact between funeral director and consumer;

2. The rule should be amended to preempt existing state laws and regulations prohibiting reuse of caskets.

Another consumer group, California Citizen Action Group, participated in the proceedings with a somewhat different emphasis. The group chose to devote its

efforts primarily to conducting and presenting the results of a consumer survey of consumers who had made funeral arrangements.

This is a summary rather than an exhaustive list. In addition, it also bears noting that all of the consumer groups adopted and pressed positions different from those of the FTC staff on a variety of motions, objections and procedural issues which arose in the course of the proceedings. In some instances the consumer advocates sided with industry counsel in opposition to an FTC staff position.

Senator LAXALT. I would like to read into the record wording from the various applications in connection with the funeral proceeding, to make one point here. From the wording here, it is obvious that each of these applicants was attempting in one form or another to curry the favor of the agency, since the agency was going to pass on the application. I find nothing in any of these statements which would indicate a position which would be in opposition to the proposed rule or the agency position on that rule.

I would like to read it down into the record so we can dispose of this part of it.

For example, Continental Association of Funeral and Memorial Societies, on their application, indicated:

Continental is well aware of abuses in the funeral industry.

They are aware of—

anticompetitive pressures exerted by the licensing boards in the industry and familiar with a wide range of practices that exploit the customer's grief, ignorance, and vulnerability when a funeral purchase is made without advance planning.

To me, that wording is something less than the objective standard we hope to achieve in this legislation.

Consumer Action Committee, Great Washington Chapter, Americans for Democratic Action and National Council of Senior Citizens:

Applicants firsthand experience in the frustrating and, to date, fruitless work of seeking such reforms at the local level should appear in the record to help document the need for reform at the national level.

California Citizens Action Group:

CCAG will present testimony from consumers and professionals who will address the need for regulation of the funeral industry.

New York Public Interest Group:

NYPIG feels confident of its ability to represent the interest of consumers at large in the effective regulation of the funeral industry.

Arkansas Consumer Research:

Interest of consumers at large in the establishment of fair pricing and fair funeral practices will be represented in the proceeding.

Central Area Motivation Program:

The proposed rules affect the industry business by providing more information to consumer who could then make a wiser choice.

Consumers Union:

As the beneficiaries of proposed rule and as the persons who have the experience to which a number of the questions propounded in rulemaking, that is the necessity and adequacy of price information disclose the effect of the circumstance of the funeral transaction on the vulnerability of the consumer are addressed, Consumer and consumer organizations knowledge and views are highly relevant to the commission's inquiries and the proceeding.

Lastly, Consumers Federation of America:
The CFA planned to present witnesses who—

would rebut any industry witness who might characterize the proposed FTC rules as violative of the religious mores and traditions of any particular religious sect.

Another witness would—

describe how the proposed FTC rules are in furtherance of those sound principles of psychology which encourage the bereaved to confront the fact of death.

The only thing that I want to point out here is that, if you have applications which indicate a little bit more objective positions than these obviously do not indicate, then I would appreciate very much receiving them, Mr. DeLong.¹

Mr. DeLONG. We will look for them.

I might add that I think those were applications that came in fairly early in the process. I think that, in fact, the FTC probably has administered a program more objectively than anybody expected.

As I said, as time has gone on I think people have realized that we have, unavoidably, set up a system that tends to reward people who differ with us.

[See pp. 109 to 169 for copies of four applications which were funded in connection with the proposed TRR on advertising of over-the-counter-drugs.]

Senator LAXALT. I want you to understand here—and I think I speak for all the members of the committee—that we do not intend to have this be an inquisition of FTC. The only point that some of us want to make is that, if we experience this kind of difficulty with one agency, what kind of trouble are we buying in this town if we are going to spread this concept across every agency?

Mr. DeLONG. Of course, we are in agreement with one of the basic points here, which is the advisability of having the whole thing administered by an independent agency.

We disagree with the specific characterizations of our process that some other people have been using to make that point. But we certainly agree with the basic point. The potential for abuse exists. It is better done by an independent group.

Senator LAXALT. Based upon your own experience, then, you feel the decisionmaking process in the application granting process should be in an independent central agency?

Mr. DeLONG. Yes.

Ms. SMITH. Yes.

Senator LAXALT. Can you tell us why?

Ms. SMITH. It is important. You have stressed over and over again it looks like the staff is seeking support for its rulemaking. We have tried to avoid that.

It would be better for everyone if that were done by an independent agency.

Senator ABOUREZK. Are you saying that you think the principle of getting more public involvement in these proceedings is more important than whether you pick—

Ms. SMITH. I think that is more important than anything. I think that the hardest job for an agency is to decide what is in the public

¹ See pp. 46-48.

interest. The more groups you can get to participate in that, the better the decisionmaking is.

This provides funds for groups that otherwise would not be represented in rulemaking proceedings.

Senator ABOUREZK. I appreciate hearing that from you.

You have heard testimony over 3 days of hearings. I assume that you have had somebody here or you have been here through most of these proceedings.

As the Grocery Manufacturers said, the bill ought to be cleaned up. But I think you ought to be entitled to clean up everybody's testimony. We have already cleaned up the Grocery Manufacturers' a little bit. You might want to proceed on that and talk about other charges that have been made against the particular Magnuson-Moss activities with the FTC so that we can at least clean the record up and straighten it out.

So, if you would like to proceed then.

Ms. SMITH. I have not prepared a statement of responses to the charges because I expected I would mostly be getting questions.

As far as the Grocery Manufacturers' statement goes, I think, as we have demonstrated, we have used Magnuson-Moss funds to fund groups that have opposed parts of our rules, that have criticized our staff in part, that have cross-examined our staff witnesses. In addition to the food rule, the same thing has been true in the hearing aid rule. We have a staff member from the hearing aid rule as well.

I want to say something about the funding of Consumers Union because that has come up several times. I think that is important for the consideration of S. 270.¹

We understood that Consumers Union was in considerable financial straits. They could not afford to participate in our rulemaking proceeding. Consequently, we took the position that we should not be forcing them into bankruptcy or greater financial straits by refusing to grant them Magnuson-Moss funds when they represented a view that would not otherwise be adequately represented.

Consumers Union, it seems to me, is exactly the kind of organization you want participating in rules involving consumer interests. They have expertise in consumer matters. We have not used a strict indigency standard. Our object in the Magnuson-Moss funding was to get as many views as possible into the rulemaking proceeding.

Senator LAXALT. Was Consumers Union solicited to make an application by your people then on that basis?

Ms. SMITH. No. No one has ever been solicited.

Senator LAXALT. There is no contact whatsoever made?

Ms. SMITH. The contacts are made—

Senator LAXALT. On the part of the staff people? Did any of these—

Ms. SMITH. Contact has been made by the groups to the staff.

Senator LAXALT. And in no instance was there initial contact by FTC staff of these various groups?

Ms. SMITH. I know of no instance—

Senator LAXALT. To your knowledge you know of none?

Ms. SMITH. I know of no instance where staff has gone out and sought support this way. I cannot guarantee that no staff member has ever solicited support, but this would clearly be against our policy.

¹ See part 1 of hearings at pp. 9-10 and 40. See pp. 33-34.

We do not view this as a lawyers' relief act. You keep talking about law firms.

We have stressed, instead, getting evidence into our proceedings. We have stressed conducting surveys, interviews, using whatever information the group has as evidence in the proceeding rather than lawyers.

Senator LAXALT. Hasn't the bulk of the money, though, gone to law firms?

Ms. SMITH. No. The bulk of the money has gone to other than lawyer's fees.

Senator LAXALT. Well, is it not true that some 46 percent of the funded money so far has gone to law firms?

Ms. SMITH. That is right. That is less than half the money.

I think, when we started out on this 2 years ago, we expected that it would be going mostly to lawyers. That has not been the case. We think that it is of greater value to the agency, to get evidence rather than just simply a lawyer—

Senator LAXALT. Has any law firm been engaged in any of these proceedings which is outside of Washington?

Ms. SMITH. In the first place, we do not fund law firms; we fund groups who are represented by lawyers or not represented by lawyers. Some groups are not represented by lawyers; that is good to know.

There have been many groups from outside of Washington as well. I assume that some of them are represented by lawyers from outside Washington.

Senator LAXALT. Has any group been represented by a law firm outside of Washington?

Mr. ANGEL. Yes. In the funeral proceeding, there is one from Oregon, one from Los Angeles, one from Arkansas.

Ms. SMITH. Mr. Sloat also raised a question of the staff participation in the decision on who is to be funded. It is true that staff has looked at the applications. I think staff has to look at the applications to see whether they are duplicating what is already coming in.

As Mr. DeLong said, we have looked for evidence outside of what the staff is producing; evidence pro or con, but evidence outside of what the staff is doing. There is no point in using these funds to duplicate exactly what other tax money is being used to do.

So, the staff has looked at the applications and has made recommendations to the presiding officer based on whether the evidence which may be presented or is proposed to be presented would be duplicative of what is already going to be presented.

The presiding officer's recommendation—the committee review—that was raised by Mr. Sloat as well—the committee is composed of all of our assistant directors, which are Bureau of Consumer Protection senior staff. They have very different points of view. There have been very hotly contested committee meetings. I do not attend them, but Mr. DeLong has been attending them. He tells me that they are probably the most interesting meetings he has attended his 3 or 4 years at the Commission. There are great differences of opinion about who is to be funded.

That is exactly the sort of conflict that I wanted to bring to my decision as to whether a group should be funded or not. I wanted as broad a spectrum of views as I could get within the Bureau.

I have funded groups over the objections of the staff, on occasion, when I thought the group represented an interest which was not being represented by staff or by any of the other groups.

These procedures, including the committee, were set out in our draft guidelines, which were made available to Mr. Sloat last August, made available to Members of Congress, and were commented on by members of this committee. So, this procedure has been known to groups for quite a long time.

I want to make it clear that the staff has never prepared statements for any witnesses receiving Magnuson-Moss funds. Unfortunately, Mr. Sloat did leave that impression. I want to make clear not just in the food rule, but in no other rule has staff ever prepared statements for witnesses receiving Magnuson-Moss funds.

Senator LAXALT. How about other funds?

Ms. SMITH. Staff has worked, as lawyers do work, with expert witnesses in preparing statements. They are funded by appropriated funds for use in employing expert witnesses. I expect that you have had many people testifying here who have had their statements worked on by their lawyers as well.

Mr. DELONG. The committee also has some written material, I believe, that we submitted concerning various proceedings where we received the same types of statements over and over. Obviously, individuals had signed a mimeo put out by a trade association.

I might add that we regard that as perfectly proper. If a person signs it, that is his opinion. If it was written by the trade association, it doesn't matter; it is still his opinion.

Ms. SMITH. A couple of issues were raised—

Senator ABOUREZK. I just want to say that no Member of Congress would ever sign anything written by somebody else. [Laughter.]

Ms. SMITH. There were some statements by the representative of the National Hearing Aid Society. They applied for funds and were granted funds. There were two conditions set in the grant. They felt that they could not meet either of those conditions.¹

If they were willing to meet those conditions, we would have funded them. We clearly had the funds set aside for them.

One of those conditions was that they not pay their attorneys in excess of \$27 per hour. That is the funding level we were using for all attorneys representing groups receiving Magnuson-Moss funds. We worked with our Office of Budget and Finance in setting that hourly rate.

They (NHAS) were paying their attorneys at that time \$75 an hour. We were not willing to pay \$75 an hour for attorney time. Maybe that is because we have a different view of attorney time and we do not believe in only funding high-paid Washington attorneys. But \$27 an hour is what we were reimbursing for all groups receiving Magnuson-Moss funds.

We told them that we would fund their attorneys, reimburse them for \$27 an hour.

At the time they made their application, they were also engaged in a fundraising campaign. The fundraising campaign, it seemed to me from reading their brochure, went to trying to raise funds to participate in our rulemaking proceeding.

¹ See pp. 7-24.

So, when we granted them the money, I asked them how much they had raised to participate in our proceeding. They simply never replied. Eventually, they said that they could not accept the funds because they could not meet the conditions.

I do not know which they could not meet, whether it was the \$27 per hour for their attorneys or whether it was that they had raised so much money that they could participate in our proceedings now without funds.

In any event, they never replied to our letter seeking further information.

Senator ABOUREZK. I wonder if I might break in at that point.

I have here some materials from the FTC. This is from one of the staff attorneys. It is a compilation of identical statements written by industrial interests in opposition to the vocational school rule that the FTC was advocating at the time.

I was just reading over these. Here is one from the Finishing School and Model Agency in Wilmington, Del.:

As a proprietary, vocational school owner and operator, I take strenuous exception to the rules the FTC proposes for our small business industry under 16 CFR part 438.

Here is one from the Millie Lewis Modeling and Finishing School:

As a proprietary, vocational school owner and operator, I take strenuous exception to the Federal Trade Commission rules that the FTC proposes for our small business.

They are exactly identical.

Now, the statement—there are 15 the same way—of the FTC is that they regard this is perfectly proper if the signer is willing to sign the statement. That is what it amounts to. I also have 11 similar industry affidavits in the funeral rule proceeding.

I want to put this in the record, without objection.¹

Senator ABOUREZK. I have to leave now. Senator Laxalt will be chairing the hearings. He has accorded the courtesy to me of allowing my staff counsel, Chuck Ludlam, to ask questions.

Senator LAXALT. Thank you.

May I ask a question in connection with the hearing aid application, which I guess was conditioned on some type of formula on a matching basis.

Ms. SMITH. I do not think that is the point. I think it was not conditioned on a matching basis.

Senator LAXALT. If they demonstrated—according to the testimony now—their financial ability to proceed on their own, I guess that would disqualify them from funding; or am I wrong on that?

Ms. SMITH. That is right.

Senator LAXALT. If that be the standard applied to them, why isn't the same standard applied to some of these consumer groups who obviously have finances of their own and well capable to conduct their own representation?

Ms. SMITH. The same standard is applied to consumer groups. If they had started a campaign to raise funds to participate in our rule-making proceedings, they would also have to demonstrate that they still needed money above and beyond what they raised in order to get any funds from us.

¹ See statements referred to on pp. 170–187 and 188–204, respectively.

Senator LAXALT. But, aside from the fundraising capability, they do not have to go to a fundraising device to raise their funds. They are independently self-sufficient financially; why is it different—

Ms. SMITH. It is not any different. The National Hearing Aid Society did not have to go to a special campaign to collect funds for our rulemaking proceeding. They decided to do that on their own. They decided to do that before they ever submitted an application to us.

Senator LAXALT. I guess I just am not making myself clear. But it appears to me the Hearing Aid Society, when they reach the point where they are financially capable of conducting their own representation, are precluded from receiving funds. Is that true?

Ms. SMITH. The statute says, "unable effectively to participate without funds."

Senator LAXALT. OK, now, you take some of these groups, which I gather are extremely well-funded on their own. How do they meet that criteria?

Ms. SMITH. The only group that is at all well-funded is the Consumers Union. They, as we have said, are in very bad financial straits; they are \$2 million in debt. We made the determination that we would not force them to go further into debt in order to participate in our hearings; that they had a viewpoint which was not adequately represented in the hearings without them; and that they needed funds to participate. They simply could not participate without our funds.

The National Hearing Aid Society never came back to me to answer the question of how much they raised. If they had come back and could show other needs—that they had raised that money for other needs—and they still did not have money to participate in our rulemaking proceedings, they most likely would have gotten the funds.

Senator LAXALT. I understand that. But, again, in terms of the so-called consumer groups, they are made to demonstrate that they do not have adequate funding of their own before they are funded by you?

Ms. SMITH. They are made to demonstrate that they could not effectively participate in the hearing without funds from us. They do not have the funds to effectively participate in our hearings.

Senator LAXALT. Mr. Ludlam?

Mr. LUDLAM. Part of the application by the Hearing Aid Society was for its survey.

Ms. SMITH. Yes.

Mr. LUDLAM. It was an economic analysis.

I think they asked for something like \$64,000. The Commission agreed to fund them for \$34,000 and did not give them the money to do the survey.

Why did the Commission not think the survey was—

Ms. SMITH. It was not the Commission.

Mr. LUDLAM. Excuse me, the Bureau.

Ms. SMITH. The Bureau did not fund it.

That is because the survey could not be completed and the results could not be obtained before the entire rulemaking proceedings finished. Given that fact, we said we would not fund it. We could not have the results in time.

Mr. LUDLAM. On the question of contributions, do the FTC regulations have a standard procedure that says that groups who are able to contribute some of their own money, either as matching or some other relationship to the FTC money, should be encouraged to make their own contribution?

Ms. SMITH. Yes; we do encourage people to make their own contributions.¹ We use that as one—if you look in the guidelines—of the tests for whether you have demonstrated an interest.

It is not essential, but it is an indication of an applicant's interest in the area.

Senator LAXALT. Do they submit financial statements to you?

Ms. SMITH. Yes, all the groups.

Senator LAXALT. As part of the application? Do they submit financial statements which eventually would support a need on their part for public funding to make an effective representation?

Ms. NARADZAY. Yes.

Senator LAXALT. Are those verified?

Ms. NARADZAY. The application as a whole, including financial information, has to be certified by the signer. We really have no funds to send auditors out to groups and audit their whole accounting system in order to verify.

Senator LAXALT. I understand that. That would be an unreasonable burden.

Getting back to funerals again—

Mr. LUDLAM. Was the answer to the question "Yes"?

Senator LAXALT. I am not certain.

Ms. SMITH. The answer to the question is that we do a verification which essentially is informal. We do not have the funds for an audit.

I think we made the point in supporting S. 270 that we think that is one thing you should be looking at: setting up funds for auditing procedures.

Senator LAXALT. I understand.

But, again, getting back to the funeral people, assuming that this standard was applied, then Continental Association of Funeral and Memorial Societies, Consumer Affairs Committee, California Citizens Action Group, New York Public Interest Group, and others demonstrated to the satisfaction of your agency they are financially incapable of conducting an effective representation without funding from you?

Ms. SMITH. Right.

Mr. DeLONG. Senator, I might add one word on the NHAS situation.

That was a very aberrational situation. They had already sent out to their membership a solicitation for funds specifically for the purpose of participating in the FTC hearing. The decision in the Bureau was that to meet the statutory standard, since they had the solicitation outstanding, and since, as I recall, in their application they said they did not expect to collect much money from it, we would have to say that the failure of the solicitation demonstrated financial inability.

¹ See part 1 of hearings at p. 397.

So the grant was made conditional on that. But, I must say, internally we rather expected that we would be paying the money because we did not think they would be able to raise the money. As it turned out, they got a much better response in the solicitation than they anticipated. So it turned out that condition was not met.

I think, realistically, the tougher condition was the lawyers' fees issue.

Ms. SMITH. Yes; that is right.

Mr. DeLONG. As the proceeding went on, I believe Mr. Lee said the other day, it was costing them a quarter of a million dollars. They had asked us for \$30,000 of that.

There certainly would have been no bar to their coming back to us later and saying, "Well, we did conduct that successful solicitation, but now it's costing even more. You know, you've really run us into the ground."

As I say, I think the lawyers' fees issue was the crucial one.

Senator LAXALT. In that respect, you made reference to my saying that it was a lawyers' relief bill. I made no reference to FTC. But if you apply 46 percent to \$10 million, that is \$4.6 million. If that isn't a lawyers' relief bill, I never heard of one.

Ms. SMITH. I think it depends on—

Senator LAXALT. That is not with respect to your particular shop because you are not dealing with that kind of number. But I would like to be part of a public interest firm in this town if S. 270 is passed.

Ms. SMITH. I do not know what rate of hourly pay you are going to pay, but at \$27 per hour, that was not any great relief act.

Senator LAXALT. I recognize that \$27 per hour is pretty reasonable attorneys' fees, if they didn't do it to you on the hours.

Mr. LUDLAM. There is a statement by a staff attorney, Mr. Newburg-Rinn, on the hearing aid rule which contains a very detailed account of what happened during that proceeding.¹

Senator LAXALT. Without objection, that will be in the record.

Senator THURMOND. Ms. Smith, you refer to \$27 an hour as pay for attorneys' fees. I note in the FTC's approval letter dated March 1, 1976, to the National Council of Senior Citizens, that the FTC approved attorneys fees at the rate of \$30 per hour for collection of affidavits in Boston and Miami, contingent upon—and this is quoting—"adequate substantiation that such a rate is necessary to retain attorneys for that purpose."

Do you recall it?

Ms. SMITH. I am going to have Ms. Naradzay answer the question.

Ms. NARADZAY. I do not think I was in charge of that program when that was given out. But my feeling is that when we were first attempting to set attorneys' rates, we used the Criminal Justice Act standards. As I recall, the first few applications that were granted were granted at those attorneys' rates.

If I could look at this more closely and then send in an answer later, then I could confirm that. It was after—

Senator THURMOND. Well, here's the letter of the Federal Trade Commission dated March 1, 1976.²

¹ See statement referred to on pp. 205-225; attachments appear at pp. 226-298.

² See letter on p. 299.

Ms. NARADZAY. It was after those first few——

Senator THURMOND. It was addressed to Mr. William R. Hutton, signed by Joan Z. Bernstein, Acting Director.

Ms. NARADZAY. Right.

Senator THURMOND. So, there is no question about that?

Ms. NARADZAY. No question about it.

Senator THURMOND. That is all I am asking.

Now, normally, as I understand it, the maximum rate is \$27 an hour.

Ms. SMITH. That was the rate up until very recently. We have recently revised it.¹

Senator THURMOND. What is it now?

Ms. SMITH. It is now——

Ms. NARADZAY. Well, you see, the \$27 an hour is really a maximum. That was for attorneys with over 10 years experience before the bar. People have told us that \$27 an hour, even though we base it on a Government attorney's salary, is not realistic. So, we recalculated the rates and came up with another scale, the top of which is now \$42 an hour.

Senator THURMOND. I believe I also noticed in the FTC's conditional approval to the National Hearing Aid Society dated July 20, 1976,² that the National Hearing Aid Society's requested rate of \$75 an hour was flatly refused and the recognized maximum of \$27 an hour was adopted.

I realize it would be unreasonable to expect \$75 to be accepted but would it be unreasonable to give the National Hearing Aid Society the same condition as NCSC at \$30 an hour? It would have made a difference of \$2,400. Was adequate substantiation ever received from the NCSC on its request?

Ms. SMITH. On its request for \$30 an hour? Is that what you are asking?

Senator THURMOND. Yes.

Ms. SMITH. I was not at the Bureau then either, and I have not seen that but I would be glad to look at it. It may very well be, as Ms. Naradzay said, that at that point we had not decided whether \$30 or \$27 was going to be the maximum for experienced attorneys.

[Supplementary statement supplied for the record:]

The NCSC attorneys were held to a maximum of \$27 per hour. The \$30 per hour mentioned in the March 1, 1976, letter applied only to a limited part of the project which required NCSC to retain outside attorneys in Boston and Miami for short term work. The approval of the \$30 rate for this purpose was contingent on substantiation that the higher rate was necessary if the work was to be completed in time for the hearings because attorneys willing to take on a limited project for \$27 per hour were unavailable.

Senator THURMOND. I notice that the National Council of Senior Citizens, who favored the proposed rules of January 30, 1976, applied for funding under the Magnuson-Moss Act and received approval of the request on March 1, 1976—30 days later.

The National Council of Senior Citizens applied for a supplemental on March 15, 1976, and received approval on April 23, 1976—39 days later.³

¹ See part 1 of hearings at p. 415.

² See letter on p. 302. See also pp. 331 and 370.

³ See letter on pp. 306 and 313, respectively.

Yet, the National Hearing Aid Society applied on April 12, 1976, and did not receive its approval—which was conditional—until July 20, 1976—99 days later.¹

The National Hearing Aid Society's letter of protest to the condition was not answered until October 29, 1976—86 days later.²

Why is there so much difference in the time of response for these two groups?

Why could you answer the National Council of Senior Citizens in 30 days or 39 days, and you took 99 days to answer the National Hearing Aid Society?

Ms. SMITH. I will let Ms. Naradzay answer.

Ms. NARADZAY. First, we have a standard approval letter. That letter, when granting an approval, says that you cannot be reimbursed for any expenses incurred before the filing of the application. That is also in our rules of practice. However, any expenses incurred after we receive an application, no matter when it is resolved, can be reimbursed. So, any group granted approval for reimbursement need not wait until the official approval, since the reimbursement would apply to any expenses incurred after the application has been filed.

Now, in the case of the National Hearing Aid Society there was considerable delay because we felt that we needed to meet the statutory criteria in any determination. Since they had said that they wanted to pay their attorney \$75 an hour, and had been doing so for quite a time, we needed to make sure that we could apply the same standard to them that we were applying to other groups.

So, it took quite a lot of back and forth communication, both internally and with the National Hearing Aid Society. I talked with them on the phone quite a few times.

So, I was continually talking with them about the application.

The second delay that you mention, Senator, was an unfortunate one. That is because I was having trouble just controlling the filing system. I had no help. It was up to me. I—

Senator LAXALT. Were you doing this all by yourself?

Ms. NARADZAY. Well, I had been for quite a while. I understand that we asked for help, but we were turned down.

Ms. SMITH. Right.

Ms. NARADZAY. So, there is no recourse. We were mandated to give out funds, but we had insufficient help in administering the program.

In the second case, that letter of protest came to the director's office and then was inadvertently filed before I saw it. When I was simply looking through the files one day for another purpose, I found it.

That was reflected in the answer to that protest. I believe your staff probably picked that up.

Senator THURMOND. As a matter of fact, the record shows you answered one in 30 days and 39, and you took 99 days to answer the other.

Was any favoritism shown to this National Council of Senior Citizens?

Ms. NARADZAY. I am not sure I understand your question.

Senator THURMOND. Was any favoritism shown by answering them quickly and delaying the other organization as you did for 3 months?

¹ See letter on p. 317-330 and 331-334.

² See letter on p. 335. See also p. 377.

Ms. SMITH. As Ms. Naradzay said, the application of the National Hearing Aid Society was a little more complicated. They were using a \$75 per hour attorneys' fee rate.

Senator THURMOND. I understood that. You said that. If you did not approve that one, you could have said so and go and answer them and not take 3 months then.

Ms. SMITH. She did communicate with them by telephone.

Ms. NARADZAY. It might have been easy to say "no" to them within a few days, but we would not have felt that we were complying with the statute if we did not make full determination of the application. So, we were continually asking for additional information so that we would not have to say, "No, you don't meet the criteria."

Senator THURMOND. I want to ask you this. Is it correct that the FTC staff, Steven D. Newburg-Rinn in particular, engaged in surreptitious, immoral, and deceitful conduct in gathering supportive information for the proposed regulations?

Ms. SMITH. No; I do not believe that is true.

I think what you are referring to is what was raised at the hearings last week, which was a survey that was begun by our staff, having nothing to do with Magnuson-Moss funds.

A survey to see whether hearing aid dealers were prescribing hearing aids to people with normal hearing. That survey was never completed. All the documents were put on the public record by the staff.

The survey was stopped. There are not any results of the survey.

Senator THURMOND. Did the FTC staff solicit volunteers and coach them to deceive hearing aid dealers that they had hearing problems when actually they did not?

Ms. SMITH. I looked at the protocol questions that the staff proposed for volunteers to ask. The people who were supposed to seek the information were people with normal hearing. They were told to answer all of the test examination questions as accurately as possible. They were just told to go in and tell a hearing aid dealer that they believed themselves to have normal hearing but that someone else had told them they might not.

I do not know whether I agree with those procedures. I did not authorize them. I am certainly glad that they were stopped.

This survey, as I said before, did not involve Magnuson-Moss funds; and the survey was never completed.

Senator THURMOND. Have you seen this article I show you? ¹

Ms. SMITH. Yes.

Senator THURMOND. Is it true that they were reportedly told that these volunteers were told by the FTC staff, quote,

As far as you and the dealer are concerned, you are there for your own benefit, not as a participant in a survey. When asked about your hearing, you might say it isn't as you feel it should be, or "Others have been complaining that you don't hear them," or you play the TV too loudly, or you don't hear the phone ring or a knock at the door, and you are concerned about this?

Ms. SMITH. All of those questions were put on the public record. The survey was never conducted. ²

Senator THURMOND. Were there not enough actual complaints, without fabricating complaints in this manner?

¹ See article referred to on p. 340.

² See pp. 15-16.

Ms. SMITH. A member of the staff has just told me that the questions that you read were proposed by a group other than the Federal Trade Commission staff and were not approved by the Federal Trade Commission staff.

I believe that the record, which is 60,000 pages long and which is now being gone through by the staff, has evidence both pro and con, on the side of the hearing aid dealers, on the side of the staff proposal. I do not know what the results of that evidence are going to be.

Senator THURMOND. Did the National Council of Senior Citizens participate in the survey during the summer, fall, and winter of 1975?

Ms. SMITH. The National Council of Senior Citizens conducted a survey of its own, having nothing to do with the staff.

Senator THURMOND. If so, did you ask them to participate?

Ms. SMITH. The National Council of Senior Citizens was granted Magnuson-Moss funds. As part of their participation in the hearings, they used the results from a survey conducted before the proceedings began.

Senator THURMOND. That is not the question I asked you.

Did you or the FTC or anybody in the FTC ask them to participate?

Ms. SMITH. Not that I know of.

Senator THURMOND. Did the NCSC participation in these surveys have any influence in their receiving funds to participate in the rule-making proceedings in 1976?

Ms. SMITH. I understand the National Council of Senior Citizens survey was conducted by the council on its own without the staff approval or disapproval.

Senator THURMOND. Well, did their participation have an influence in their receiving funds to participate in the rulemaking proceedings?

Ms. SMITH. Their application for Magnuson-Moss funds was granted because they had an interest which would not otherwise be represented.

How that interest was going to be represented during the hearings was up to the National Council of Senior Citizens.

Senator THURMOND. I note that in the letter of approval from Joan Bernstein, dated March 1, 1976, to the National Council of Senior Citizens, \$1,080 more was awarded for attorneys' fees that were asked for because the application, "inadvertently underestimated the length of time to be required for the Washington hearing."

Shouldn't the NCSC know better how much time its attorney will need than the FTC? And is this a normal practice by the FTC?

Ms. SMITH. When we started these rulemaking proceedings, nobody knew how long they would take. Both the staff and outside groups, industry, and consumer groups, all underestimated how long these rulemaking proceedings would take.

In the case of a consumer representative, they are likely to have even less knowledge of the overall picture of the rule and the evidence to be presented. So, they are likely to know even less about how long a hearing is going to take.

Senator THURMOND. Did they request the additional funds?

Ms. SMITH. Yes, we have had requests for supplemental funds.

Senator THURMOND. Or did the FTC feel that they should just award the additional funds?

Ms. SMITH. No. We have had several requests for supplemental funds when the hearings have run much longer than expected.

Senator THURMOND. Did you receive a supplemental request on that particular occasion?

Ms. SMITH. I do not know that one, but I will be happy to look for you.

[Supplementary statement supplied for the record:]

The application showed on its face that the applicant was assuming that the Washington hearing would take 120 hours, whereas the presiding officer was certain it would take at least 160. Thus the BCP approval included funds for an additional 40 hours.

This is in accord with our standard practice. If an applicant has clearly made a mistake concerning an important fact, we will correct it *sue sponte* without requiring a resubmission. This saves both time and administrative resources.

Senator THURMOND. Would you—

Senator LAXALT. Are these characteristically from lawyers?

Ms. SMITH. The supplemental requests?

Senator LAXALT. Yes.

Ms. SMITH. Well, they are from the groups. Now, sometimes they are for lawyers' fees and sometimes they are for other things that they have not expected.

Senator THURMOND. Would you check the record and answer that for the record?

Ms. SMITH. Yes, I will be glad to do that.

Senator LAXALT. Without objection, we will hold the record open.

[Supplementary statement supplied for the record:]

We have found that 46% of the requests are to cover attorney fees and attorney-related costs such as travel, per diem, and secretarial and para-legal help. Of this amount, 35% goes directly to attorneys' fees and 11% to attorney-related expenses. In looking over the supplemental requests we have received, we have found approximately the same mix. That is, about one-third of the supplemental requests are for additional hours of legal time (sometimes necessitated by hearings which last longer than originally anticipated) and close to two-thirds are for other expenses. Of course, we encourage applicants to apply for one phase of participation at a time. Therefore, supplemental requests often are to cover later stages of participation, such as rebuttal statements and post-hearing comments.

Senator THURMOND. In a letter from the presiding officer, Mr. Shepard, dated April 26, 1976,¹ to the National Hearing Aid Society, concerning its request for funding, he states:

"It is requested that we advise in detail of the association's complete financial status including, but not limited to, all details relating to all reserves, assets, income, potential income and actual and scheduled outlays for the last"—that is 1975—"and current years."

He goes on to say, "Please give particular attention to the feasibility of contributions to the cost of participation by individual representatives of the interests. In this regard, advise in detail of any efforts made to solicit contributions from any and all members and non-members, including dealers and others who share your interests, namely manufacturers, and the results thereof."

¹ See letter on p. 338. See also p. 366.

"Please document, also, what others means of financing might be available."

Now, was all of this information requested from the National Council of Senior Citizens? If not, why not?

Ms. SMITH. We do ask for a great deal of information from all of the organizations who apply for funds as to their financial status.

In this particular case, because this group was seeking funds on its own, was soliciting funds on its own, we particularly asked, the presiding officer particularly asked, about contributions and what other sources of funds that they had. That was based on his conversations with them.

Senator THURMOND. So, you wanted all of this detailed information from the National Hearing Aid Society, but you did not request it from the National Council of Senior Citizens?

Ms. SMITH. The National Hearing Aid Society was conducting a special campaign to raise funds to participate in the rulemaking proceeding, which was known to the presiding officer. The National Council of Senior Citizens was not conducting such a poll. If they had been, we would have requested the same information from them.

Senator THURMOND. Don't you think it would be fairer and wiser to require all applicants to supply information containing all sources of income?

Mr. DELONG. There is a distinction between groups which have a direct economic stake in the outcome of a rule and groups whose interest is more diffused and amorphous. I think the general presumption is that when groups are very directly involved and are fairly limited in number, the chances that they can support their own representation are much greater than when there is a very large group, each of whom has a very tiny stake or no economic stake.

We have tended to inquire harder when a group has a direct economic interest than when it is more diffuse. I think this is an appropriate way to go at it.

Senator THURMOND. Why was the total allowable amount awarded to the National Hearing Aid Society reduced by the amount of member contributions received between the filing date and the reimbursement date?

Ms. SMITH. The statute requires us to examine whether the group could participate without our funds. If the group had raised money specifically for participation in the rulemaking proceedings, then that must be taken into account in determining whether they could effectively participate without our funds.

We asked them for further information as to how much money they raised to participate in our rulemaking proceedings. They never responded.

Senator THURMOND. Isn't it possible that portions of those contributions could go to some cause other than these proceedings?

Ms. SMITH. That is perfectly possible, but that is not what their solicitation said. I specifically wrote a letter to them asking how the funds that they raised were distributed, whether they went to the rulemaking proceeding or whether they went to other needs of the organization.

Senator THURMOND. After all, the National Hearing Aid Society had a deficit of over \$76,000 for 1975. No such stipulation was put

on the National Council of Senior Citizens, and their organization realizes a modest excess of cash receipts over current expenditures.

Ms. SMITH. We would welcome a response by the National Hearing Aid Society to my letter or another application from them.

As they stated at the hearing last week, they expended a considerable amount of money on these rulemaking proceedings. If they can demonstrate that they do not have the funds for these rulemaking proceedings, that the money that they raised does not cover the rule-making proceedings, we would consider their application again.

I think the major hurdle in their application is not this poll or funds that they solicited, but rather the fact that they pay their attorneys \$75 an hour and are not willing to pay their attorneys—well, at the then rate of \$27 an hour.

Senator THURMOND. Of course, you could have given the information and proceeded from there; couldn't you?

Doesn't it seem reasonable that, if the National Council of Senior Citizens members truly had a compelling interest in these proceedings, that they would be willing to make contributions to at least partially fund the council's participation?

Why was this not suggested by the FTC?

Ms. SMITH. We do not require groups to go out and solicit funds in order to demonstrate that they do not have the funds to participate.

In the case of the National Hearing Aid Society, they were doing the solicitation for our rulemaking proceedings before they applied for the funds.

Senator THURMOND. I have no interest in any of these groups. But, from hearing this testimony, it seems that the National Hearing Aid Society was not accorded the same consideration the National Council of Senior Citizens was.

It seems that you are raising a lot of questions and causing people to become suspect of the method of operation down there if you continue in the future with other groups like you have handled these two groups.

Ms. SMITH. I think we made it clear, Senator Thurmond, to the National Hearing Aid Society that we had set aside the funds for their use. If they would respond to the question of how much money they had raised—for our hearings, not for other uses—and whether they were willing to pay their attorneys \$27 an hour, we would have funded them.

I think the real problem is that they were paying their attorneys \$75 an hour and were not willing, and their attorneys would not accept \$27.

Senator THURMOND. Did you tell them that you would fund them if they paid their attorneys \$27 an hour?

Ms. SMITH. Yes.

Senator THURMOND. Of course, you paid \$30 in another case.

Ms. SMITH. I will look into the other case.

Yes, we did tell them that. We would fund them if they would pay their attorneys \$27 an hour.

Senator THURMOND. And they refused to do that?

Ms. SMITH. They never answered the letter.

Senator THURMOND. Well, what action did you take? Or what action did they take after that?

Ms. SMITH. I think our correspondence since then has been limited to an exchange about an inaccurate report in a newspaper article that said we were funding them. They wrote us a letter asking us to make it clear that they were not receiving funds from us.¹ After they had solicited funds from their members, they did not want their members to think that we were funding them.

Senator THURMOND. I just think that any Government agency—it does not matter which one—ought to treat the public in the same fair and equitable manner and show no partiality. You have got no friends to reward; you have got no enemies to punish. Your duty is to go right down the middle, as I see it, and treat all alike.

Ms. SMITH. I agree with you.

Senator THURMOND. And not fund one group and not another. And not put off one group for 90 days and answer another one in 30 days.

That is all I have, Mr. Chairman.

Senator LAXALT. Mr. Ludlam?

Mr. LUDLAM. I have a couple of questions on the hearing aid rule, on specific points in Mr. Clinkscales' testimony.

Perhaps Mr. Newburg-Rinn can answer.

We have a copy of your statement which takes the points made in the testimony of Mr. Clinkscales one by one.² I have a couple of quick questions.

Is there any evidence in the record or elsewhere to your knowledge that the motive of the National Council of Senior Citizens in participating in the hearing aid rule was to destroy the reputation of hearing and specialists?³

Mr. NEWBURG-RINN. I do not think so. It is clear that they believed that there were malpractices in the hearing aid delivery system. They had been active in trying to get State legislation relating to the hearing aid delivery system for some time, prior even to the announcement of the Federal Trade Commission's proposed rule.

I do not think that they just were setting out to destroy the reputation of hearing aid sellers.

Mr. LUDLAM. Is there any basis in Mr. Clinkscales' charge that, "Without collusion with the FTC staff and the NCSC, there was no way the NCSC could have been aware in advance of Mr. Clinkscales' prepared remarks"?⁴

Mr. NEWBURG-RINN. I think it may have seemed to Mr. Clinkscales that there was collusion because of his lack of knowledge about how the proceedings are run. In fact, the National Council of Senior Citizens was one of the designated group representatives along with the National Hearing Aid Society, the Hearing Aid Industry Conference, and several other groups. All the groups that were designated group representatives were furnished copies of the advanced written statements approximately 15 days in advance of the San Francisco hearings.

Mr. Marlin therefore found out about it in the same way as Mr. Waters of the National Hearing Aid Society. It is the standard operating procedure.

¹ See pp. 380-381.

² See pp. 205-226 with attachments at 226-298.

³ See part 1 of hearings at p. 169.

⁴ See part 1 of hearings at p. 170.

Mr. LUDLAM. Mr. Clinkscales made a number of statements about your questioning of him during that statement. He said it was "filled with excuses of time restraints and little substance."¹ There was attached to your statement a copy of the complete transcript of his appearance.²

Could you describe the points you were trying to establish on cross-examination of Mr. Clinkscales?

Mr. NEWBURG-RINN. Well, my examination of Mr. Clinkscales—obviously, I have a different view of the import of my examination than he has of it. I think we did reach matters of substance, mainly the fact that he had, prior to deciding to get involved in these proceedings, no personal knowledge of whether hearing aid buyers in general, or the elderly hearing aid buyers in specific, had had difficulties with the hearing aid delivery system.

The second point that we established on the examination was that he had obtained his background knowledge from the ex-executive director of the Hearing Aid Industry Conference, which represents manufacturers, and from the nonprofit foundation that is funded by the Hearing Aid Industry Conference and the National Hearing Aid Society.

There is a third point. He had not studied the record of our proceedings even though he was located in Washington and it was located in Washington. Therefore, he did not know whether the consumers complaints were legitimate or illegitimate.

In addition, he had testified about State licensing programs; but he had not been in contact with any State or studied the licensing program of any State in order to determine whether or not they were adequate.

He also talked about product quality. Again, he had no personal knowledge on the product quality issue relating to the hearing aids and their manufacture.

He had, in addition, talked about the economic effects of the proposed remedy, which is the buyer's right to cancel; but he had not made any attempt, to the best of our knowledge or in his testimony, to ascertain the affect that the sellers who were currently giving an absolute free buyer's right to cancel had had under this sort of a remedy.

I guess the last point that came out in this examination—there really was not time to get into this because he had refused to answer any questions from the National Council of Senior Citizens. It did come out in the examination that one of the purposes for which his organization had been established was to be in opposition to the National Council of Senior Citizens.

Mr. LUDLAM. I have one last question. Perhaps Ms. Smith can answer this.

Did the National Council of Senior Citizens make a competent and responsible and valuable contribution to the hearing aid record in that rulemaking? In other words, did they fulfill the purpose of the funding that was given to the council in that rulemaking?

¹ See part 1 of hearings at p. 170.

² See pp. 227-297.

Ms. SMITH. I have not reviewed the hearing aid record yet. It is 60,000 pages long of transcript and documents. The staff report is being worked on. So, I could not tell you at this point whether, in fact, they had. We probably would have to talk to the presiding officer to get a better view of that.

Mr. LUDLAM. Thank you, Mr. Chairman.

Senator LAXALT. I am afraid we are running out of time. I do not want to preclude anybody from an opportunity to complete the record.

So, Ms. Smith, if you and your people would like to prepare an abstract of what you would testify to in addition, I will make certain it is made part of the complete record.

Ms. SMITH. That would be fine. Thank you very much.

Senator LAXALT. I want to thank all of you for coming in here.

As I indicated, we have not intended at all that this be any form of inquisition. I think you are in the unfortunate position of having been the guinea pigs.

Ms. SMITH. Guinea pigs without any legislative history to help us in this area.

Senator LAXALT. True.

One thing strikes me in closing this up here. We did have some House hearings in connection with the funeral problem. If I understand the bottom line over there, it is to the effect that we did not need a regulation at all. Yet, the record before you is wholly devoid of any effective voice coming in on the basis of questioning, do we need the regulation at all.

Mr. DELONG. We have the House proceedings.

Senator LAXALT. You now do, but it is a bit after the fact.

By way of suggestion—and I think we will attempt to do this with S. 270 in some fashion—I think, that if you are going to have someone come in, you do not come in on the premise that we are going to have regulation.

If we are going to have this effectively done and conducted, we have to have somebody out there say, "Listen, maybe we don't need a regulation; and maybe this type of activity is best done on the local level."

It appears to me that that may be a deficiency in the process which we will attempt to remedy in the course of doing S. 270. It appears from your experience that that really has not been fully met.

Mr. DELONG. I would say that in that proceeding, the National Funeral Directors Association and certain others have been a most effective voice in arguing that there is no need for the regulation at all.

Mr. DIXON. I think we could say in most of them, Senator, there has been a very active voice that we do not need any regulation at all.

Senator LAXALT. I suspect that is the case.

Thank you so much.

Ms. SMITH. Thank you.

Senator LAXALT. The meeting is adjourned.

[Whereupon, at 12:05 p.m., the meeting was adjourned.]

APPENDIX

95TH CONGRESS
1ST SESSION

S. 270

IN THE SENATE OF THE UNITED STATES

JANUARY 14, 1977

Mr. KENNEDY (for himself, Mr. ABOUREZK, Mr. BAYH, Mr. BROOKE, Mr. CHURCH, Mr. DURKIN, Mr. FORD, Mr. HUMPHREY, Mr. JAVITS, Mr. MAGNUSON, Mr. MATHIAS, Mr. METCALF, Mr. PELL, Mr. RIBICOFF, and Mr. WILLIAMS) introduced the following bill; which was read twice and referred to the Committees on Government Operations and the Judiciary jointly by unanimous consent and second committee has thirty days after first report

A BILL

To amend chapter 5 of title 5, United States Code (commonly known as the Administrative Procedure Act), to permit awards of reasonable attorneys' fees and other expenses for public participation in Federal agency proceedings, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled.*

3 That this Act shall be cited as the "Public Participation in
 4 Federal Agency Proceedings Act of 1977".

5 SEC. 2. (a) Subchapter II of chapter 5 of title 5, United
 6 States Code (relating to administrative procedure), is

1 amended by inserting after section 558 of such title the fol-
2 lowing new section:

3 **"§ 558a. Attorneys' fees; fees and costs of experts; par-**
4 **ticipation expenses**

5 "(a) (1) The Congress finds that effective functioning
6 of the administrative process of Government requires Federal
7 agencies to seek the views of all affected citizens. In practice,
8 access to the administrative process is frequently an exclusive
9 function of a person's ability to meet the high costs of partici-
10 pation in Government proceedings.

11 "(2) The purpose of this section is to promote increased
12 public participation in agency proceedings, thereby insuring
13 more effective functioning of the administrative process by
14 enabling all affected persons to secure the representation in
15 agency proceedings to which such persons are entitled. The
16 Congress intends that Federal agencies shall utilize to the
17 fullest extent the authority and funds provided pursuant to
18 this section.

19 "(b) (1) For the purpose of this section the term—

20 "(A) 'person' means any person as defined in sec-
21 tion 551 (2) of this title and includes a group of indi-
22 viduals with similar interests;

23 "(B) 'proceeding' means any agency process in-
24 cluding adjudication, licensing, rulemaking, ratemaking,
25 or any other agency process in which there may be public

1 participation pursuant to statute, regulation, or agency
2 practice, whether or not such process is subject to the
3 provisions of this subchapter.

4 “(2) (A) This section applies to all rulemaking, rate-
5 making, and licensing proceedings, and, in addition, to such
6 other proceedings involving issues which relate directly to
7 health, safety, civil rights, the environment, and the eco-
8 nomic well-being of consumers in the marketplace.

9 “(B) This section does not authorize funds for merely
10 attending, as opposed to participating in, agency proceed-
11 ings, nor for proceedings where the cost of participation is
12 minimal.

13 “(C) This section does not create any new right to par-
14 ticipate in any Federal agency proceeding which is not au-
15 thorized by other provisions of law.

16 “(c) Each agency is authorized, in accordance with the
17 provisions of this section, to award reasonable attorneys’
18 fees, fees and costs of experts, and other costs of participa-
19 tion incurred by eligible persons in any agency proceeding
20 whenever public participation in the proceeding promotes
21 or can reasonably be expected to promote a full and fair
22 determination of the issues involved in the proceeding.

23 “(d) Any person is eligible to receive an award under
24 this section for participation (whether or not as a party)
25 in an agency proceeding if—

1 “(1) the person represents an interest the repre-
2 sentation of which contributes or can reasonably be
3 expected to contribute substantially to a fair determina-
4 tion of the proceeding, taking into account—

5 “(A) whether the person represents an interest
6 which is not adequately represented by a participant
7 other than the agency itself,

8 “(B) the number and complexity of the issues
9 presented,

10 “(C) the importance of public participation, in
11 consideration of the need to encourage participation
12 by segments of the public who, as individuals, may
13 have little economic incentive to participate, and

14 “(D) the need for representation of a fair
15 balance of interests; and

16 “(2) (A) the economic interest of the person in the
17 outcome of the proceeding is small in comparison to the
18 costs of effective participation in the proceeding by that
19 person, or whenever the person is a group or organiza-
20 tion, the economic interest of a substantial majority of
21 the individual members of such group or organization is
22 small in comparison to the costs of effective participa-
23 tion in the proceeding, or

24 “(B) the person demonstrates to the satisfaction of
25 the agency that such person does not have sufficient

1 resources available to participate effectively in the pro-
2 ceeding in the absence of an award under this section.

3 “(e) In any agency proceeding, the agency may
4 require any participant to pay part or all of an award under
5 this section if the agency determines that the participant has
6 acted toward any other participant in an obdurate, dilatory,
7 mendacious, or oppressive manner.

8 “(f) (1) Upon application for an award under this
9 section, each agency shall make a written determination,
10 giving reasons therefore, of the eligibility of a person for
11 such award, and the amount and computation of such award.
12 The determination required by this paragraph shall be
13 made prior to the commencement of any proceeding in
14 which application for an award is made (or as soon as
15 practicable after such application is filed, if the application
16 is filed after the commencement of the proceeding), unless
17 the agency makes an express written findings that all or
18 any part of such determination relating solely to the amount
19 or computation of such award cannot practicably be made
20 at the time the initial determination is made. The agency
21 shall make such determination after consideration of the
22 maximum amount payable for awards under this section for
23 the proceeding and the requests or possible requests for
24 awards under this section by other eligible participants in the
25 proceeding.

1 “(2) Whenever multiple applications are submitted,
2 the agency may require consolidation of duplicative pres-
3 entations, select one or more effective representatives to
4 participate, offer compensation only for certain categories
5 of expenses, or jointly compensate persons representing
6 identical or closely related viewpoints.

7 “(3) Payment of fees and costs under this section shall
8 be made within ninety days after the date on which a final
9 decision or order disposing of the matters involved in the
10 proceeding is made by the agency, or, if the agency has not
11 made a determination with respect to the amount and com-
12 putation of an award under subsection (f) (1) of this
13 section by the date of such final decision, within ninety
14 days after the eligible person submits to the agency a state-
15 ment of fees and costs which it has incurred.

16 “(4) If an eligible person establishes that the ability of
17 such person to participate in the proceeding will be im-
18 paired by failure to receive funds prior to the conclusion
19 of such proceeding, then the agency shall make advance
20 payments to permit the person to participate or to continue
21 to participate in the proceeding.

22 “(5) A person who receives advance payments pur-
23 suant to this section or who the agency determines to be
24 eligible to receive a specified award pursuant to this section
25 shall be liable for repayment of part or all of such pay-

1 ments actually received, or for forfeiture of part or all of
2 the specified award for which such person is determined
3 to be eligible, whenever the agency determines that—

4 “(A) the person clearly has not provided the rep-
5 resentation for which the payments or specified award
6 was made, or

7 “(B) the person has acted toward any other par-
8 ticipant in an obdurate, dilatory, mendacious, or oppres-
9 sive manner.

10 “(6) The amount of reasonable attorneys’ fees, fees,
11 and costs of experts, and other costs of participation awarded
12 under this section shall be based upon prevailing market
13 rates for the kind and quality of the services furnished, ex-
14 cept that (A) no expert or consultant shall be compensated
15 at a rate in excess of the highest rate of compensation for
16 experts and consultants paid by the agency involved; and
17 (B) attorneys’ fees shall not be awarded in excess of \$75
18 per hour for any such participation unless the agency de-
19 termines that special factors, such as an increase in the cost
20 of living or limited availability of qualified attorneys for
21 the proceedings involved justify a higher fee.

22 “(g) A person may bring an action in accordance with
23 chapter 7 of this title for review of a final agency action
24 under this section—

1 “(1) denying an award or failing to pay an award
2 of fees or costs or both, or

3 “(2) granting an amount of fees or costs, or both,
4 which is insufficient to enable such person to participate
5 effectively in a proceeding, or

6 “(3) reimbursing an amount of fees or costs, or
7 both, which is insufficient to compensate adequately such
8 participation

9 in the appropriate court of the United States having juris-
10 diction of an appeal from the proceeding in which such person
11 participated or sought to participate, except that no order to
12 stay the proceeding in which application for payment of
13 fees and costs under this section was made shall be entered
14 by that court in such an action.

15 “(h) (1) Each agency shall, within ninety days after
16 the date of enactment of this section, propose regulations to
17 carry out the provisions of this section. Such regulations
18 shall be adopted by the agency and take effect no later than
19 one hundred and eighty days after the date of enactment of
20 this section.

21 “(2) The head of each agency to which this section
22 applies shall prepare and transmit to Congress on the date
23 of submission of the President's budget an annual report with
24 respect to the nature and disposition of all proceedings in
25 which grants of fees and costs pursuant to this section were

1 sought, and which report shall include the amounts sought
2 and awarded in each such proceeding, the computation of
3 such amounts, and the identity of each applicant and
4 recipient.”.

5 (b) The analysis of chapter 5 of title 5, United States
6 Code, is amended by inserting immediately after the item
7 relating to section 558 of such title the following new item:

“588a. Attorneys’ fees; fees and costs of experts; participation expenses.”.

8 SEC. 3. (a) Chapter 7 of title 5, United States Code,
9 is amended by adding at the end thereof the following new
10 section:

11 **“§ 707. Attorneys’ fees; fees and costs of experts; liti-**
12 **gation expenses**

13 “(a) For the purpose of this section, the term ‘person’
14 means any person defined by section 551 (2) of this title and
15 includes a class of individuals and any individual member
16 of such class.

17 “(b) Notwithstanding any other provision of law, any
18 party or party intervenor in a civil action or other proceed-
19 ing for judicial review of agency action under this chapter
20 shall be entitled to recover reasonable attorneys’ fees, fees
21 and costs of experts, and other reasonable costs of litigation,
22 including taxable costs, from the United States if—

23 “(1) the court affords such person the relief sought
24 . in substantial measure or, after the filing of such action,

1 the agency affords such person the relief sought in sub-
2 stantial measure;

3 “(2) the court determines that such action served
4 an important public purpose; and

5 “(3) (A) the economic interest of the person is
6 small in comparison to the costs of effective participation
7 in the action by that person, or whenever the person
8 is a group or organization, the economic interest of a sub-
9 stantial majority of the individual members of such group
10 or organization is small in comparison to the costs of
11 effective participation in the action, or

12 “(B) the person demonstrates to the satisfaction of
13 the court that such person does not have sufficient re-
14 sources available to participate effectively in the action
15 in the absence of an award under this section.

16 “(c) Reasonable attorneys’ fees, fees and costs of ex-
17 perts, and other costs of litigation awarded under this section
18 shall be based upon prevailing market rates for the kind and
19 quality of the services furnished.”.

20 (b) The analysis of chapter 7 of title 5, United States
21 Code, is amended by adding immediately after the item re-
22 lating to section 706 of such title the following new item:

“707. Attorneys’ fees; fees and costs of experts; litigation expenses.”.

23 SEC. 4. The Administrative Office of the United States
24 Courts shall, in accordance with such rules as the Judicial

1 Conference of the United States may prescribe, prepare, and
2 transmit to Congress an annual report on awards of attor-
3 neys' fees and litigation expenses against the United States
4 under section 707 of title 5, United States Code. Such report
5 shall contain a list of all civil actions in which such awards
6 were sought, and shall include the amounts awarded in each
7 such action and the identity of each recipient.

8 SEC. 5. (a) In addition to the sums authorized under
9 subsection (b), and in addition to any funds otherwise avail-
10 able for supporting public participation in agency proceed-
11 ings, there are authorized to be appropriated for the purposes
12 of carrying out the provisions of the amendment made by
13 section 2 of this Act the sums of \$10,000,000 for the fiscal
14 year 1978, \$10,000,000 for the fiscal year 1979, and \$10,-
15 000,000 for the fiscal year 1980. All funds for any fiscal
16 year which are not expended during such year shall remain
17 available for expenditure in succeeding fiscal years for awards
18 of fees and costs in proceedings commenced during such fiscal
19 year.

20 (b) There are authorized to be appropriated such sums
21 as may be necessary to carry out the provisions of the
22 amendments made by section 3 of this Act for each fiscal
23 year prior to October 1, 1980, and there are authorized to
24 be appropriated, for the fiscal year 1981 and succeeding
25 fiscal years, such sums as may be necessary to satisfy court

1 awards of fees pursuant to the amendments made by section
2 3 where the action was brought prior to the end of fiscal
3 year 1980.

4 SEC. 6. The provisions of this Act shall take effect on
5 the date of its enactment, except that—

6 (1) the amendment made by section 2 shall take
7 effect one hundred and eighty days after such date, but
8 the provisions of the amendment made by such section
9 shall apply to the proceedings in which regulations
10 are required to be issued under section 558a(h) (1) ;
11 and

12 (2) the amendments made by section 3 shall apply
13 to any civil action brought after such date of enactment.

Bill as Reported on May 4, 1977 from the Subcommittee on Administrative Practice and Procedure

[COMMITTEE PRINT]

MAY 4, 1977

Calendar No.

95TH CONGRESS
1ST SESSION

S. 270

[Report No. 95-]

IN THE SENATE OF THE UNITED STATES

JANUARY 14, 1977

Mr. KENNEDY (for himself, Mr. ABOUREZK, Mr. BAYH, Mr. BROOKE, Mr. CHURCH, Mr. DURKIN, Mr. FORD, Mr. GRAVEL, Mr. HUMPHREY, Mr. JAVITS, Mr. MAGNUSON, Mr. MATHIAS, Mr. MATSUNAGA, Mr. METCALF, Mr. METZENBAUM, Mr. PELL, Mr. RIBICOFF, Mr. RIEGLE, Mr. STAFFORD, and Mr. WILLIAMS) introduced the following bill; which was read twice and referred to the Committees on Government Operations and the Judiciary jointly by unanimous consent and second committee has thirty days after first report

MAY , 1977

Reported by Mr. -----, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend chapter 5 of title 5, United States Code (commonly known as the Administrative Procedure Act), to permit awards of reasonable attorneys' fees and other expenses for public participation in Federal agency proceedings, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 ~~That this Act shall be cited as the "Public Participation in~~
- 4 ~~Federal Agency Proceedings Act of 1977".~~

- 5 ~~SEC. 2. (a) Subchapter II of chapter 5 of title 5, United~~
- 6 ~~States Code (relating to administrative procedure), is~~

1 amended by inserting after section 558 of such title the fol-
2 lowing new section:-

3 ~~"§ 558a. Attorneys' fees; fees and costs of experts; par-~~
4 ~~ticipation expenses-~~

5 ~~"(a) (1) The Congress finds that effective functioning~~
6 ~~of the administrative process of Government requires Federal~~
7 ~~agencies to seek the views of all affected citizens. In practice,~~
8 ~~access to the administrative process is frequently an exclusive~~
9 ~~function of a person's ability to meet the high costs of partici-~~
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11 ~~"(2) The purpose of this section is to promote increased~~
12 ~~public participation in agency proceedings, thereby insuring~~
13 ~~more effective functioning of the administrative process by~~
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15 ~~agency proceedings to which such persons are entitled. The~~
16 ~~Congress intends that Federal agencies shall utilize to the~~
17 ~~fullest extent the authority and funds provided pursuant to~~
18 ~~this section.~~

19 ~~"(b) (1) For the purpose of this section the term-~~

20 ~~"(A) 'person' means any person as defined in sec-~~
21 ~~tion 551 (2) of this title and includes a group of indi-~~
22 ~~viduals with similar interests;~~

23 ~~"(B) 'proceeding' means any agency process in-~~
24 ~~cluding adjudication, licensing, rulemaking, ratemaking,~~
25 ~~or any other agency process in which there may be public~~

1 ~~participation pursuant to statute, regulation, or agency~~
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3 ~~provisions of this subchapter.~~

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10 ~~attending, as opposed to participating in, agency proceed-~~
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14 ~~ticipate in any Federal agency proceeding which is not au-~~
15 ~~thorized by other provisions of law.~~

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17 ~~provisions of this section, to award reasonable attorneys'~~
18 ~~fees, fees and costs of experts, and other costs of participa-~~
19 ~~tion incurred by eligible persons in any agency proceeding~~
20 ~~whenever public participation in the proceeding promotes~~
21 ~~or can reasonably be expected to promote a full and fair~~
22 ~~determination of the issues involved in the proceeding.~~

23 ~~"(d) Any person is eligible to receive an award under~~
24 ~~this section for participation (whether or not as a party)~~
25 ~~in an agency proceeding if—~~

1 ~~"(1) the person represents an interest the repre-~~
2 ~~sentation of which contributes or can reasonably be~~
3 ~~expected to contribute substantially to a fair determina-~~
4 ~~tion of the proceeding, taking into account—~~

5 ~~"(A) whether the person represents an interest~~
6 ~~which is not adequately represented by a participant~~
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8 ~~"(B) the number and complexity of the issues~~
9 ~~presented,—~~

10 ~~"(C) the importance of public participation, in~~
11 ~~consideration of the need to encourage participation~~
12 ~~by segments of the public who, as individuals, may~~
13 ~~have little economic incentive to participate, and~~

14 ~~"(D) the need for representation of a fair~~
15 ~~balance of interests; and—~~

16 ~~"(2) (A) the economic interest of the person in the~~
17 ~~outcome of the proceeding is small in comparison to the~~
18 ~~costs of effective participation in the proceeding by that~~
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20 ~~tion, the economic interest of a substantial majority of~~
21 ~~the individual members of such group or organization is~~
22 ~~small in comparison to the costs of effective participa-~~
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24 ~~"(B) the person demonstrates to the satisfaction of~~
25 ~~the agency that such person does not have sufficient~~

1 ~~resources available to participate effectively in the pro-~~
2 ~~ceeding in the absence of an award under this section.~~

3 ~~“(e) In any agency proceeding, the agency may-~~
4 ~~require any participant to pay part or all of an award under~~
5 ~~this section if the agency determines that the participant has~~
6 ~~acted toward any other participant in an obdurate, dilatory,~~
7 ~~mendacious, or oppressive manner.~~

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9 ~~section, each agency shall make a written determination,~~
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12 ~~The determination required by this paragraph shall be~~
13 ~~made prior to the commencement of any proceeding in~~
14 ~~which application for an award is made (or as soon as~~
15 ~~practicable after such application is filed, if the application~~
16 ~~is filed after the commencement of the proceeding), unless~~
17 ~~the agency makes an express written findings that all or~~
18 ~~any part of such determination relating solely to the amount~~
19 ~~or computation of such award cannot practicably be made~~
20 ~~at the time the initial determination is made. The agency~~
21 ~~shall make such determination after consideration of the~~
22 ~~maximum amount payable for awards under this section for~~
23 ~~the proceeding and the requests or possible requests for~~
24 ~~awards under this section by other eligible participants in the~~
25 ~~proceeding.~~

1 ~~“(2) Whenever multiple applications are submitted,~~
2 ~~the agency may require consolidation of duplicative pres-~~
3 ~~entations, select one or more effective representatives to~~
4 ~~participate, offer compensation only for certain categories~~
5 ~~of expenses, or jointly compensate persons representing~~
6 ~~identical or closely related viewpoints.~~

7 ~~“(3) Payment of fees and costs under this section shall~~
8 ~~be made within ninety days after the date on which a final~~
9 ~~decision or order disposing of the matters involved in the~~
10 ~~proceeding is made by the agency, or, if the agency has not~~
11 ~~made a determination with respect to the amount and com-~~
12 ~~putation of an award under subsection (f) (1) of this~~
13 ~~section by the date of such final decision, within ninety~~
14 ~~days after the eligible person submits to the agency a state-~~
15 ~~ment of fees and costs which it has incurred.~~

16 ~~“(4) If an eligible person establishes that the ability of~~
17 ~~such person to participate in the proceeding will be im-~~
18 ~~paired by failure to receive funds prior to the conclusion~~
19 ~~of such proceeding, then the agency shall make advance~~
20 ~~payments to permit the person to participate or to continue~~
21 ~~to participate in the proceeding.~~

22 ~~“(5) A person who receives advance payments pur-~~
23 ~~suant to this section or who the agency determines to be~~
24 ~~eligible to receive a specified award pursuant to this section~~
25 ~~shall be liable for repayment of part or all of such pay-~~

1 ~~ments actually received, or for forfeiture of part or all of~~
2 ~~the specified award for which such person is determined~~
3 ~~to be eligible, whenever the agency determines that—~~

4 ~~“(A) the person clearly has not provided the rep-~~
5 ~~resentation for which the payments or specified award~~
6 ~~was made, or—~~

7 ~~“(B) the person has acted toward any other par-~~
8 ~~ticipant in an obdurate, dilatory, mendacious, or oppres-~~
9 ~~sive manner.—~~

10 ~~“(G) The amount of reasonable attorneys’ fees, fees,~~
11 ~~and costs of experts, and other costs of participation awarded~~
12 ~~under this section shall be based upon prevailing market~~
13 ~~rates for the kind and quality of the services furnished, ex-~~
14 ~~cept that (A) no expert or consultant shall be compensated~~
15 ~~at a rate in excess of the highest rate of compensation for~~
16 ~~experts and consultants paid by the agency involved; and~~
17 ~~(B) attorneys’ fees shall not be awarded in excess of \$75-~~
18 ~~per hour for any such participation unless the agency de-~~
19 ~~termines that special factors, such as an increase in the cost~~
20 ~~of living or limited availability of qualified attorneys for~~
21 ~~the proceedings involved justify a higher fee.—~~

22 ~~“(g) A person may bring an action in accordance with~~
23 ~~chapter 7 of this title for review of a final agency action~~
24 ~~under this section—~~

1 ~~“(1) denying an award or failing to pay an award~~
2 ~~of fees or costs or both, or~~

3 ~~“(2) granting an amount of fees or costs, or both,~~
4 ~~which is insufficient to enable such person to participate~~
5 ~~effectively in a proceeding, or~~

6 ~~“(3) reimbursing an amount of fees or costs, or~~
7 ~~both, which is insufficient to compensate adequately such~~
8 ~~participation—~~

9 ~~in the appropriate court of the United States having juris-~~
10 ~~diction of an appeal from the proceeding in which such person~~
11 ~~participated or sought to participate, except that no order to~~
12 ~~stay the proceeding in which application for payment of~~
13 ~~fees and costs under this section was made shall be entered~~
14 ~~by that court in such an action.—~~

15 ~~“(h) (1) Each agency shall, within ninety days after~~
16 ~~the date of enactment of this section, propose regulations to~~
17 ~~carry out the provisions of this section. Such regulations~~
18 ~~shall be adopted by the agency and take effect no later than~~
19 ~~one hundred and eighty days after the date of enactment of~~
20 ~~this section.—~~

21 ~~“(2) The head of each agency to which this section~~
22 ~~applies shall prepare and transmit to Congress on the date~~
23 ~~of submission of the President's budget an annual report with~~
24 ~~respect to the nature and disposition of all proceedings in~~
25 ~~which grants of fees and costs pursuant to this section were~~

~~1 sought, and which report shall include the amounts sought~~
~~2 and awarded in each such proceeding, the computation of~~
~~3 such amounts, and the identity of each applicant and~~
~~4 recipient."~~

~~5 (b) The analysis of chapter 5 of title 5, United States~~
~~6 Code, is amended by inserting immediately after the item~~
~~7 relating to section 558 of such title the following new item:~~

~~8 "558a. Attorneys' fees; fees and costs of experts; participation expenses."~~

~~9 Sec. 3. (a) Chapter 7 of title 5, United States Code,~~
~~10 is amended by adding at the end thereof the following new~~
~~11 section:~~

~~12 "§ 707. Attorneys' fees; fees and costs of experts; liti-~~
~~13 gation expenses—~~

~~14 "(a) For the purpose of this section, the term 'person'~~
~~15 means any person defined by section 551 (2) of this title and~~
~~16 includes a class of individuals and any individual member~~
~~17 of such class.~~

~~18 "(b) Notwithstanding any other provision of law, any~~
~~19 party or party intervenor in a civil action or other proceed-~~
~~20 ing for judicial review of agency action under this chapter~~
~~21 shall be entitled to recover reasonable attorneys' fees, fees~~
~~22 and costs of experts, and other reasonable costs of litigation,~~
~~23 including taxable costs, from the United States if~~

~~24 "(1) the court affords such person the relief sought~~
~~in substantial measure or, after the filing of such action,~~

1 ~~the agency affords such person the relief sought in sub-~~
2 ~~stantial measure;~~

3 ~~"(2) the court determines that such action served~~
4 ~~an important public purpose; and~~

5 ~~"(3) (A) the economic interest of the person is~~
6 ~~small in comparison to the costs of effective participation~~
7 ~~in the action by that person, or whenever the person~~
8 ~~is a group or organization, the economic interest of a sub-~~
9 ~~stantial majority of the individual members of such group~~
10 ~~or organization is small in comparison to the costs of~~
11 ~~effective participation in the action, or~~

12 ~~"(B) the person demonstrates to the satisfaction of~~
13 ~~the court that such person does not have sufficient re-~~
14 ~~sources available to participate effectively in the action~~
15 ~~in the absence of an award under this section.~~

16 ~~"(c) Reasonable attorneys' fees, fees and costs of ex-~~
17 ~~perts, and other costs of litigation awarded under this section~~
18 ~~shall be based upon prevailing market rates for the kind and~~
19 ~~quality of the services furnished."~~

20 ~~-(b) The analysis of chapter 7 of title 5, United States~~
21 ~~Code, is amended by adding immediately after the item re-~~
22 ~~lating to section 706 of such title the following new item:~~

~~"707. Attorneys' fees; fees and costs of experts; litigation expenses."~~

23 ~~SEC. 4. The Administrative Office of the United States~~
24 ~~Courts shall, in accordance with such rules as the Judicial~~

1 ~~Conference of the United States may prescribe, prepare, and~~
2 ~~transmit to Congress an annual report on awards of attor-~~
3 ~~neys' fees and litigation expenses against the United States~~
4 ~~under section 707 of title 5, United States Code. Such report~~
5 ~~shall contain a list of all civil actions in which such awards~~
6 ~~were sought, and shall include the amounts awarded in each~~
7 ~~such action and the identity of each recipient.~~

8 ~~SEC. 5. (a) In addition to the sums authorized under~~
9 ~~subsection (b), and in addition to any funds otherwise avail-~~
10 ~~able for supporting public participation in agency proceed-~~
11 ~~ings, there are authorized to be appropriated for the purposes~~
12 ~~of carrying out the provisions of the amendment made by~~
13 ~~section 2 of this Act the sums of \$10,000,000 for the fiscal~~
14 ~~year 1978, \$10,000,000 for the fiscal year 1979, and \$10,-~~
15 ~~000,000 for the fiscal year 1980. All funds for any fiscal~~
16 ~~year which are not expended during such year shall remain~~
17 ~~available for expenditure in succeeding fiscal years for awards~~
18 ~~of fees and costs in proceedings commenced during such fiscal~~
19 ~~year.~~

20 ~~(b) There are authorized to be appropriated such sums~~
21 ~~as may be necessary to carry out the provisions of the~~
22 ~~amendments made by section 3 of this Act for each fiscal~~
23 ~~year prior to October 1, 1980, and there are authorized to~~
24 ~~be appropriated, for the fiscal year 1981 and succeeding~~
25 ~~fiscal years, such sums as may be necessary to satisfy court~~

12.

1 ~~awards of fees pursuant to the amendments made by section~~
 2 ~~3, where the action was brought prior to the end of fiscal~~
 3 ~~year 1980.~~

4 ~~SEC. 6. The provisions of this Act shall take effect on~~
 5 ~~the date of its enactment, except that—~~

6 ~~(1) the amendment made by section 2 shall take~~
 7 ~~effect one hundred and eighty days after such date, but~~
 8 ~~the provisions of the amendment made by such section~~
 9 ~~shall apply to the proceedings in which regulations~~
 10 ~~are required to be issued under section 558a (h) (1);~~
 11 ~~and~~

12 ~~(2) the amendments made by section 3 shall apply~~
 13 ~~to any civil action brought after such date of enactment.~~

14 *That this Act shall be cited as the "Public Participation in*
 15 *Federal Agency Proceedings Act of 1977".*

16 *SEC. 2. (a) Subchapter II of chapter 5 of title 5, United*
 17 *States Code (relating to administrative procedure), is*
 18 *amended by inserting after section 558 of such title the fol-*
 19 *lowing new section:*

20 *"§ 558a. Attorney's fees; fees and costs of experts; par-*
 21 *ticipation expenses*

22 *"(a)(1) The Congress finds that effective functioning*
 23 *of the administrative process of Government requires Federal*
 24 *agencies to seek the views of all affected citizens. In practice,*
 25 *access to the administrative process is frequently an exclusive*

1 *function of a person's ability to meet the high costs of partici-*
2 *pation in Government proceedings.*

3 “(2) The purpose of this section is to promote increased
4 *public participation in agency proceedings, thereby insuring*
5 *more effective functioning of the administrative process by*
6 *enabling all affected persons to secure the representation in*
7 *agency proceedings to which such persons are entitled. The*
8 *Congress intends that each Federal agency shall utilize to the*
9 *fullest extent the authority and funds provided pursuant to*
10 *this section.*

11 “(b) For the purpose of this section the term—

12 “(1) ‘person’ means any person as defined in sec-
13 *tion 551(2) of this title and includes a group of indi-*
14 *viduals with similar interests;*

15 “(2) ‘proceeding’ means any agency process in-
16 *cluding rulemaking, ratemaking, licensing, adjudica-*
17 *tion, or any other agency process in which there may be*
18 *public participation pursuant to statute, regulation, or*
19 *agency practice, whether or not such process is subject*
20 *to the provisions of this subchapter.*

21 “(c)(1) Each agency is authorized, in accordance with
22 *the provisions of this section, to award reasonable attorneys’*
23 *fees, fees and costs of experts, and other costs of participation*
24 *incurred by eligible persons in all rulemaking, ratemaking,*
25 *and licensing proceedings, and, in addition, to such other*

14

1 *proceedings involving issues which relate directly to health,*
2 *safety, civil rights, the environment, or the economic well-*
3 *being of consumers in the marketplace.*

4 “(2)(A) *This section does not authorize funds for*
5 *merely attending, as opposed to participating in, agency*
6 *proceedings, nor for proceedings where the cost of participa-*
7 *tion is minimal.*

8 “(B) *This section does not create any new right to*
9 *participate in any Federal agency proceeding.*

10 “(d) *Any person is eligible to receive an award under*
11 *this section for participation (whether or not as a party) in*
12 *an agency proceeding if—*

13 “(1) *the person is an effective representative of an*
14 *interest the representation of which contributes or can*
15 *reasonably be expected to contribute substantially to a*
16 *fair determination of the proceeding, taking into*
17 *account—*

18 “(A) *whether the interest is adequately repre-*
19 *sented by a participant other than the agency itself,*

20 “(B) *the number and complexity of the issues*
21 *presented,*

22 “(C) *the importance of public participation, in*
23 *consideration of the need to encourage participation*
24 *by representatives of segments of the public who, as*

15

1 *individuals, may have little economic incentive to*
2 *participate, and*

3 “(D) *the need for representation of a fair*
4 *balance of interests; and*

5 “(2)(A) *the economic interest of the person in the*
6 *outcome of the proceeding is small in comparison to the*
7 *costs of effective participation in the proceeding by that*
8 *person, or whenever the person is a group or organiza-*
9 *tion, the economic interest of a substantial majority of*
10 *the individual members of such group or organization is*
11 *small in comparison to the costs of effective participa-*
12 *tion in the proceeding, or*

13 “(B) *the person does not have sufficient resources*
14 *available to participate effectively in the proceeding in*
15 *the absence of an award under this section.*

16 “(e)(1) *Any person seeking an award under this sec-*
17 *tion shall submit to the appropriate agency an application*
18 *which states the basis of such person's eligibility for the*
19 *award and the amount sought. Upon receipt of such applica-*
20 *tion, the agency shall make a written determination of the*
21 *eligibility of the person for an award and the amount and*
22 *computation of such award, if any, and shall state the rea-*
23 *sons therefor. Such determination shall be made promptly,*
24 *and prior to timely participation in the proceeding by that*

1 person unless the agency finds that prior determination can-
2 not practicably be made, and states in writing its reasons
3 for a temporary deferral. The agency shall make determina-
4 tions required by this paragraph after consideration of the
5 funds available for awards under this section for the pro-
6 ceeding and the requests or possible requests for such awards
7 by other eligible participants in the proceeding. For the pur-
8 pose of this section a determination under this paragraph is
9 a final agency action in accordance with chapter 7 of this
10 title.

11 “(2) Whenever multiple applications are submitted for
12 participation in a proceeding, the agency may—

13 “(A) require consolidation of duplicative presenta-
14 tions;

15 “(B) select one or more effective representatives to
16 participate;

17 “(C) offer compensation only for certain categories
18 of expenses, or

19 “(D) jointly compensate persons representing
20 identical or closely related viewpoints.

21 “(3) Payment of fees and costs under this section shall
22 be made—

23 “(A) within ninety days after the date on which a
24 final decision or order disposing of the matters involved

1 in the proceeding or phase of the proceeding is made
2 by the agency; or,

3 “(B) within ninety days after an eligible person
4 submits to the agency a statement of its fees and costs
5 if the agency has deferred making a determination under
6 subsection (e)(1) of this section by the date of such
7 final decision.

8 “(4) Notwithstanding any other provision of law, an
9 agency shall make advance payments to permit any eligible
10 person to participate or to continue to participate in a pro-
11 ceeding if the person establishes that the ability of such per-
12 son to participate in the proceeding will be impaired by
13 failure to receive funds prior to the conclusion of such pro-
14 ceeding.

15 “(5) The amount of reasonable attorneys’ fees, fees,
16 and costs of experts, and other costs of participation awarded
17 under this section shall be based upon prevailing market
18 rates for the kind and quality of the services furnished or to
19 be furnished, except that (A) no expert or consultant shall be
20 compensated at a rate in excess of the highest rate of com-
21 pensation for experts and consultants paid by the agency
22 involved; and (B) attorneys’ fees shall not be awarded in
23 excess of \$50 per hour for any such participation unless the
24 agency determines that special factors, such as an increase in

1 the cost of living or limited availability of qualified attorneys
2 for the proceedings involved justify a higher fee.

3 “(6) No determination under this subsection shall be
4 made by any office, bureau, or other division of an agency
5 having responsibility for the presentation of the case or the
6 initial decision or recommendation in any proceeding to
7 which this section applies, except that agency personnel and
8 hearing examiners in any such proceeding may provide
9 relevant information with respect to such determinations.

10 “(7) Each agency shall take appropriate action to assure
11 that information concerning the availability of compensation
12 for public participation pursuant to this section is contained
13 in the notices of proceedings to which this section applies and
14 to otherwise publicize the availability of such funds to the
15 general public.

16 “(f)(1) A person who receives advance payments pur-
17 suant to this section or who the agency determines to be
18 eligible to receive a specified award pursuant to this section
19 shall be liable for repayment of part or all of such payments
20 actually received, or for forfeiture of part or all of the
21 specified award for which such person is determined to be
22 eligible, whenever the agency determines that the person clear-
23 ly has not provided the representation for which the payments
24 or specified award was made.

25 “(2) In any agency proceeding—

1 “(A) in which an eligible person acts in a manner
2 demonstrating bad faith toward any other participant,
3 and upon application by such other participant, the
4 agency may rescind part or all of an award under this
5 section to such eligible person, or

6 “(B) in which any participant (other than an eligi-
7 ble person) acts in a manner demonstrating bad faith
8 toward an eligible person, and upon application by
9 such eligible person, the agency may require such partic-
10 ipant to pay to the agency an amount equal to part or
11 all of an award made to such eligible person under this
12 section.

13 “(g) A person who has applied for an award under
14 this section may bring an action in accordance with chapter 7
15 of this title for review of a final agency action under this
16 section—

17 “(1) denying an award, failing to make a deter-
18 mination, or failing to pay an award of fees or costs or
19 both to such person, or

20 “(2) granting an amount of fees or costs, or both,
21 which is insufficient to enable such person to participate
22 or to continue to participate effectively in a proceeding, or

23 “(3) reimbursing an amount of fees or costs, or
24 both, which is insufficient to compensate such person for
25 its participation in such proceeding

1 in the appropriate court of the United States having juris-
2 diction of an appeal from the proceeding in which such person
3 participated or sought to participate, except that such appeal
4 shall not be the basis for the court to enter an order to stay
5 such proceeding. No person shall be entitled to intervene in
6 any action brought under this section involving an applica-
7 tion for an award by another person.

8 “(h)(1) Each agency shall, within ninety days after
9 the date of enactment of this section, propose regulations to
10 carry out the provisions of this section. Such regulations
11 shall be adopted by the agency and take effect no later than
12 one hundred and eighty days after the date of enactment of
13 this section.

14 “(2)(A) The head of each agency to which this section
15 applies shall prepare and transmit to the Congress and to
16 the Office of Management and Budget by such date as the
17 Director of the Office of Management and Budget designates
18 an annual report with respect to the nature and disposition
19 of all proceedings in which awards of fees and costs pursuant
20 to this section were sought. Each report shall include the
21 amounts sought and awarded in each such proceeding, the
22 computation of such amounts, and the identity of each appli-
23 cant and recipient.

24 “(B) The Director of the Office of Management and
25 Budget shall allocate the funds appropriated pursuant to

1 section 5(a) of the Public Participation in Federal Agency
2 Proceedings Act of 1977 among agencies to which this sec-
3 tion applies. In making such allocations, the Director shall
4 be guided by the indicia of need for funds to promote public
5 participation in each agency's proceedings based on a survey
6 of agency estimates for the initial year and thereafter based
7 upon the report of each agency submitted pursuant to para-
8 graph (A) of this subsection. The Director shall insure that
9 the funds appropriated pursuant to such section 5(a) for each
10 fiscal year are utilized to the fullest extent.

11 “(C) The Director of the Office of Management and
12 Budget shall submit to Congress on the date of submission
13 of the President's budget a report showing the funds allocated
14 to each agency pursuant to this subsection.”.

15 (b) The analysis of chapter 5 of title 5, United States
16 Code, is amended by inserting immediately after the item
17 relating to section 558 of such title the following new item:
“588a. Attorneys' fees; fees and costs of experts; participation expenses.”.

18 SEC. 3. (a) Chapter 7 of title 5, United States Code,
19 is amended by adding at the end thereof the following new
20 section:

21 “§ 707. Attorneys' fees; fees and costs of experts; litiga-
22 tion expenses

23 “(a) For the purpose of this section, the term ‘person’
24 means any person defined by section 551(2) of this title and

1 includes a class of individuals and any individual member
2 of such class.

3 “(b) Notwithstanding any other provision of law, any
4 party or party intervenor in a civil action or other proceed-
5 ing for judicial review of agency action under this chapter
6 shall be entitled to recover reasonable attorneys’ fees, fees
7 and costs of experts, and other reasonable costs of litigation,
8 including taxable costs, from the United States if—

9 “(1) the court affords such person the relief sought
10 in substantial measure or, after the filing of such action,
11 the agency affords such person the relief sought in sub-
12 stantial measure;

13 “(2) such action served an important public policy;
14 and

15 “(3)(A) the economic interest of the person in
16 the outcome of the action is small in comparison to the
17 costs of effective participation in the action by that per-
18 son, or whenever the person is a group or organization,
19 the economic interest of a substantial majority of the
20 individual members of such group or organization is
21 small in comparison to the costs of effective participation
22 in the action, or

23 “(B) the person does not have sufficient resources
24 available to participate effectively in the action in the
25 absence of an award under this section.

1 “(c) Reasonable attorneys’ fees, fees and costs of ex-
2 perts, and other costs of litigation awarded under this section
3 shall be based upon prevailing market rates for the kind and
4 quality of the services furnished.”.

5 (b) The analysis of chapter 7 of title 5, United States
6 Code, is amended by adding immediately after the item re-
7 lating to section 706 of such title the following new item:
 “707. Attorneys’ fees; fees and costs of experts; litigation expenses.”.

8 SEC. 4. The Administrative Office of the United States
9 Courts shall, in accordance with such rules as the Judicial
10 Conference of the United States may prescribe, prepare, and
11 transmit to Congress an annual report on awards of attor-
12 ney’s fees and litigation expenses against the United States
13 under section 707 of title 5, United States Code. Such report
14 shall contain a list of all civil actions in which such awards
15 were sought, and shall include the amounts awarded in each
16 such action and the identity of each recipient.

17 SEC. 5. (a) In addition to the sums authorized under
18 subsection (b), and in addition to any funds otherwise avail-
19 able for supporting public participation in agency proceed-
20 ings, there are authorized to be appropriated for the purposes
21 of carrying out the provisions of the amendment made by
22 section 2 of this Act the sums of \$10,000,000 for the fiscal
23 year 1978, \$10,000,000 for the fiscal year 1979, and \$10,-
24 000,000 for the fiscal year 1980. All funds for any fiscal

1 year which are not expended during such year shall remain
2 available for expenditure in succeeding fiscal years for
3 awards of fees and costs in proceedings commenced during
4 such fiscal year.

5 (b) There are authorized to be appropriated such sums
6 as may be necessary to carry out the provisions of the
7 amendments made by section 3 of this Act for each fiscal
8 year prior to October 1, 1980, and there are authorized to
9 be appropriated, for the fiscal year 1981 and succeeding
10 fiscal years, such sums as may be necessary to satisfy court
11 awards of fees pursuant to the amendments made by section
12 3 where the action was brought prior to the end of fiscal
13 year 1980.

14 SEC. 6. The provisions of this Act shall take effect on
15 the date of its enactment, except that—

16 (1) the amendment made by section 2 shall take
17 effect one hundred and eighty days after such date, but
18 the provisions of the amendment made by such section
19 shall apply to the proceedings in which regulations
20 are required to be issued under section 558a(h)(1);
21 and

22 (2) the amendments made by section 3 shall apply
23 to any civil action brought after such date of enactment.

Additional Material Submitted for the Record

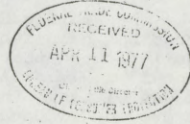
(Material referred to on p. 55.)



americans for democratic action greater washington chapter

1411 K Street, N.W., Washington, D.C. 20005 202-638-6447

April 8, 1977



HARRIETT R. TAYLOR
president

JAMES W. DYKE, JR.
1st vice president

GERALDINE BOYKIN
ANN BROWN
RICHARD RAUSCH
vice presidents

GEORGE KOCH
secretary

R. LEONARD TILLMAN
treasurer

Ms. Margery Waxman Smith
Special Assistant for Compensation
Office of the Director
Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C. 20580

Re: Application For Compensation to Submit
Rebuttal Comments in Proceedings
Concerning the Advertising of
Over-The-Counter Drugs

Dear Ms. Smith:

This is an Application for Compensation to prepare and submit rebuttal comments in the Trade Regulation Rule Concerning the Advertising of Over-The-Counter Drugs filed on behalf of the Consumer Affairs Committee of the Greater Washington, D.C. Chapter, Americans for Democratic Action.

In an Order issued on December 15, 1976, the Presiding Officer for the Proceeding Concerning the Advertising of Over-The-Counter Drugs appointed the Committee to be an official representative of consumer groups in that proceeding. On December 28, 1976, the FTC Office of Compensation approved the Committee's request for compensation for the expense of preparing for and participating in a three-week hearing, and the Commission authorized the Committee to spend no more than \$7,545 for these purposes. At that time, the Office of Compensation indicated that a determination on the Committee's request for compensation to prepare post hearing comments would be deferred until the hearing had terminated.

* angel almedina
richard bayliss
goody braun
dawn calabria
bob carr
anne chase
rick clark
frizzi cohen
linda cook
ed devaughn
bruce gregory
diana harvey
john hazel
diana josthman
mary ann keefe
paul kuntzler
ruth lederer
maureen lingers
david marlin
richard maulsby
rita mcbrayer
kay mcgrath
kevin murray
rickie orchin
gina pragan
harry robinson
terry robinson
ernest rosenburg
jacob schmitt
sheldon shalit
earlyn thomas
debbie wager
josh williams
john wilson
doris woods

On January 21, 1977, the Office of Compensation approved the Committee's request for supplemental compensation to present witnesses at the hearing and authorized an additional budget of \$1411 for this purpose. On February 11, 1977, the Presiding Officer stated at a pre-hearing conference that the hearings would take five to six weeks to complete. As a result, on February 17, 1977, the Committee filed an additional request for supplemental compensation to enable it to participate in the full hearing. The Committee has been assured by Ms. Bonnie J. Naradzay, a member of the Office of Compensation Staff, that this request for supplemental compensation has been approved in full, but has not yet received written authorization to spend the additional funds sought. Nevertheless, the Committee's attorneys have participated as representatives of the consumer interest in the entire hearing from February 28, 1977, until April 1, 1977.

The hearing Concerning the Advertising of Over The Counter Drugs has been substantially concluded and the Presiding Officer has indicated that rebuttal comments must be submitted by Friday, June 17, 1977. The Presiding Officer has delayed the testimony of one witness, Lawrence Light, until April 19, 1977, in order to provide FTC staff sufficient time to analyze data relevant to Mr. Light's testimony. The Presiding Officer has also invited several other witnesses who were unable to appear during the scheduled hearing to appear during the period between April 18 and 20, 1977. It is not yet known whether any of these witnesses will actually testify during this period. Nevertheless, the Presiding Officer clearly indicated in statements on March 31, 1977, and April 1, 1977, that group representatives should commence preparing rebuttal comments immediately and that the belated appearance of Mr. Light and a few other witnesses is not cause for delaying preparation of rebuttal comments. The Committee therefore believes it is appropriate to file its request for compensation concerning rebuttal statements at this time.

The Committee believes that in order to prepare rebuttal comments and identify the need for further comments effectively it must fully review the transcript of the record in this proceeding. The FTC staff which participated in the OTC hearing is providing a courtesy copy of the transcript to the Committee and it is therefore unnecessary to request compensation for purchase of the transcript. */ The Committee intends to use

*/ The Committee will only seek compensation to purchase portions of the transcript from the reporting company if the FTC staff encounters substantial delays in reproducing copies of the transcript, and these delays unduly prejudice the Committee's opportunity to present its position in this proceeding.

paralegal assistants to review and categorize the testimony and identify the location of specific statements which will be rebutted. The Committee believes that this project will require the following time and budget to review the transcript.

Attorney Edward H. Comer	16 hrs. at \$19 per hour ^{*/}	\$ 304
Paralegal	80 hrs. at \$15 per hour	<u>1,200</u>
Total		\$ 1,504

During the course of the hearings, the Committee identified several issues which it believes should appropriately be addressed in rebuttal. The submission of rebuttal statements from expert witnesses requires several stages of preparation. First, the Committee must locate suitable experts who have time to file rebuttal statements within the deadline specified by the Presiding Officer. A paralegal assistant will obtain the names of possible experts for use by the Committee's attorneys in choosing a particular one. The Committee's attorneys, who participated in the hearing and are most familiar with the issues, must then explain to the experts the purpose of the FTC Trade Regulation Rule and identify the statement or statements which we seek to rebut. This is necessary to ensure that the expert understands the relevancy of his rebuttal comment. A paralegal assistant will do research to obtain information to be used by the expert. Finally, any comments prepared by an expert must be reviewed by the Committee's attorneys to insure that they address the proper issues in a clear and relevant manner.

Many industry witnesses testified that the rule was anti-competitive and would ultimately increase consumer costs, but no alternative economic testimony was presented by staff for consumer witnesses. The Committee intends to rebut the industry point of view with an appropriate expert. The Committee proposes the following budget for this work.

^{*/} The Committee's attorney's charge at a rate of \$30 per hour for Edward H. Comer and \$45 per hour for Bruce J. Terris are very reasonable. In comparison, the Department of Transportation is paying \$48 an hour to attorneys with more than 10 years experience, such as Mr. Terris, who represent public interest groups before DOT. However, for the convenience of the FTC, the Committee is citing the rates which the FTC currently authorizes for payment to attorneys. Nevertheless, the Committee understands that if the FTC increases its reimbursement schedule the Committee and its attorneys will be reimbursed at then-current FTC rate.

Attorney Edward H. Comer	16 hrs. at \$19 per hour	\$ 304
Paralegal	40 hrs. at \$15 per hour	600
Secretarial	6 hrs. at \$6 per hour	36
Telephone expenses		<u>50</u>
(to contact experts)		
Total		\$ 990

Other industry witnesses, particularly those associated with the advertising industry, made contradictory statements regarding the ability of advertising to inform consumers about the proper indications for use of OTC drugs and the methods which contribute to effective dissemination of information in advertising. The Committee intends to closely analyze these statements, prepare a comment which briefly points out the inconsistencies between statements which several industry witnesses made about the informative capabilities of advertising and submit rebuttal comments from an educator, psychologist, advertiser or other expert familiar with the educational capability of the media, particularly television. The Committee proposes the following budget for this work:

Attorney Edward H. Comer	28 hrs. at \$19 per hour	\$ 532
Attorney Bruce J. Terris	2 hrs. at \$27 per hour	54
Paralegal	10 hrs. at \$15 per hour	150
Secretarial	6 hrs. at \$6 per hour	36
Telephone expenses		<u>50</u>
(to contact experts)		
Total		\$ 822

Shortly before the commencement of the hearings, the Food and Drug Administration clarified its position regarding the right of panel members to testify about their activities on the panels. As a result, several additional panel members are now authorized to submit comments to the FTC about their panels' activities. The Committee will seek to obtain rebuttal comments from at least two additional panel members to submit statements in rebuttal to testimony by other panel members. The Committee proposes the following budget for this work:

Attorney Edward H. Comer	16 hrs. at \$19 per hour	\$ 304
Attorney Bruce J. Terris	2 hrs. at \$27 per hour	54
Secretarial	10 hrs. at \$6 per hour	60
Telephone expenses		<u>50</u>
Total		\$ 468

The Committee believes that its cross-examination demonstrated that many industry witnesses, particularly FDA panel members and other physicians, prepared their direct testimony on the basis of an inaccurate conception of the requirements of the rule and that many of these witnesses endorsed the adoption of the rule if certain policies are followed by the FDA. According to the testimony of the Acting Commissioner, the FDA will follow these policies. The Committee intends to prepare a statement analyzing the positions of these industry witnesses in the light of the policies of the FDA. The Committee proposes the following budget for this work:

Attorney Edward H. Comer	16 hrs. at \$19 per hour	\$ 304
Attorney Bruce J. Terris	2 hrs. at \$27 per hour	54
Paralegal	8 hrs. at \$15 per hour	120
Secretarial	3 hrs. at \$6 per hour	<u>18</u>
Total		\$ 496

During the course of the hearing, the Committee's attorneys asked several witnesses to submit additional information to clarify or explain the basis for their testimony. The Committee intends to analyze this information and submit rebuttal comments where appropriate. The Committee proposes the following budget for this work:

Attorney Edward H. Comer	12 hrs. at \$19 per hour	\$ 228
Secretarial	3 hrs. at \$6 per hour	<u>18</u>
Total		\$ 246

In addition, during the course of the hearing representatives of several consumer groups who testified, particularly the representative of the Health Research Group, indicated to the Committee's attorneys that they might submit rebuttal comments to clarify points which were addressed during their cross-examination. The Committee recognizes that as a representative of the consumer interest in this proceeding, it has an obligation to present the views of other consumer groups as well. The Committee therefore intends to contact such other groups and submit rebuttal comments on their behalf, where such comments are relevant and appropriate. The Committee proposes the following budget for this work.

Attorney Edward H. Comer	10 hrs. at \$19 per hour	\$ 190
Secretarial	6 hrs. at \$6 per hour	<u>36</u>
Total		\$ 226

Several industry witnesses asserted that OTC drugs, and Category III drugs in particular, are completely safe and do not involve any health risks to consumers. These claims are relevant to many issues, including the validity of the proposed rule under the First Amendment, the propriety of advertising Category III drugs, and the need for warning and cautionary statements in advertisements. The Committee intends to submit additional information from two or three medical and pharmacological experts to rebut these claims. The Committee proposes for this work the following budget.

Attorney Edward H. Comer	30 hrs. at \$19 per hour	\$ 570
Attorney Bruce J. Terris	3 hrs. at \$27 per hour	81
Paralegal	10 hrs. at \$15 per hour	150
Secretarial	10 hrs. at \$6 per hour	60
Phone and xerox expenses		<u>100</u>
Total		\$ 961

The Committee believes that the advertising of claims about Category III drugs is illegal and contrary to established FTC policy in that claims about the therapeutic benefits of such drugs have not yet been substantiated by sufficient scientific evidence. This issue was reviewed by the Committee in its comment submitted on October 3, 1976, and was the subject of considerable cross-examination during the hearings. Since this is primarily a legal issue, the Committee intends to prepare a memorandum of law in support of its position. The Committee anticipates that this memorandum will require the following time and budget.

Attorney Edward H. Comer	20 hrs. at \$19 per hour	\$ 380
Attorney Bruce J. Terris	4 hrs. at \$27 per hour	108
Secretarial	6 hrs. at \$6 per hour	<u>36</u>
Total		\$ 524

Further, industry asserted that the proposed rule would violate the First Amendment guarantee of freedom of speech. The Committee, on the other hand, believes that the regulation of advertising of OTC drugs is subject to no greater constitutional restrictions than the regulations of labeling and that the proposed rule is entirely consistent with the First Amendment.

The Committee desires funds to prepare a legal memorandum supporting its position that the proposed rule would not violate the First Amendment and to rebut contrary claims made in this proceeding. The Committee estimates that this work will require the following time and budget.

Attorney Edward H. Comer	60 hrs. at \$19 per hour	\$ 1,140
Attorney Bruce J. Terris	6 hrs. at \$27 per hour	162
Secretarial	8 hrs. at \$6 per hour	48

Total		\$ 1,350
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Based upon the information set forth above, the Committee proposes the following total budget:

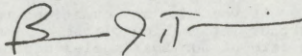
Attorney Edward H. Comer	224 hrs. at \$19 per hour	\$ 4,256
Attorney Bruce J. Terris	19 hrs. at \$27 per hour	513
Paralegal	148 hrs. at \$15 per hour	2,220
Secretarial	58 hrs. at \$6 per hour	348
Bookkeeping expenses	5 hrs. at \$10 per hour	50
Other		50 */
TOTAL		\$ 7,637

Each of the experts which the Committee asks to submit rebuttal comments may request compensation for the time necessary to prepare such comments. Since the Committee cannot identify the experts or the time they will spend in preparing their comments, the Committee may request at a later date reasonable compensation for such experts.

As previously indicated, the Presiding Officer directed rebuttal statements must be submitted by June 17, 1977. In view of this brief period of time which the Presiding Officer has set aside for the preparation of rebuttal comments, it is imperative that this Application for Compensation be considered expeditiously. The Committee must immediately commence contacting suitable experts in order to assure that they have the maximum possible period of time to consider and analyze the statements it seeks to rebut.

We therefore request that you consider this Application for Compensation as soon as possible. If you have any questions regarding this application, please do not hesitate to call us.

Respectfully submitted,



Bruce J. Terris
Edward H. Comer

Attorneys for Consumer Affairs
Committee, Greater Washington,
D.C. Chapter, Americans for
Democratic Action

*/ In view of the amount of money involved, the Committee believes it appropriate to use a bookkeeper to audit the expenditure of these funds.



CALIFORNIA CITIZEN ACTION GROUP

July 20, 1976

Mr. Roger Fitzpatrick
Presiding Officer
Advertising For Over-The-Counter Drugs
Trade Rule Regulation Proceeding
Office of Special Assistant Director
For Rulemaking
Bureau of Consumer Protection
Federal Trade Commission
Washington, D. C. 20580

SPECIAL ASSISTANT
DIRECTOR
FOR RULE MAKING

JUL 23 1976

RECEIVED
FEDERAL TRADE
COMMISSION
WASHINGTON
D.C.

Re: Proposal For Funding
to Participate And
Intervene

Dear Mr. Fitzpatrick:

Enclosed is a proposal by the California Citizen Action Group for \$32,350 to permit its intervention in the pending Commission rulemaking proceeding on Advertising For Over-The Counter Drugs and to permit the undertaking of specified studies to refine the evidentiary base in said proceeding. The proposal is submitted pursuant to the Rules and Procedures of the Federal Trade Commission, 16 C.F.R. §1.17.

We expect the survey to take between six to eight weeks, consequently we appreciate your earliest possible consideration of this proposal.

It is our pleasure to offer this proposal for your consideration and hope that you and the Commission will find our ideas useful.

If you have any questions regarding this proposal or need further information please call me at (415) 771-2735 or write me care of our Los Angeles office.

Sincerely,

Michael Schulman

MS:G

2315 Westwood Blvd.
Los Angeles, CA 90064
(213) 475-0417

909 12th Street
Sacramento, CA 95814
(916) 446-4931

491 65th Street
Oakland, CA 94629
(415) 654-1797

PROPOSAL FOR FUNDING TO PARTICIPATE AND INTERVENE IN
RULEMAKING HEARING REGARDING PROPOSED TRADE REGULATION
RULE PROHIBITING ADVERTISING CLAIMS FOR OVER-THE-
COUNTER DRUGS EXCLUDED FROM LABELING BY THE FOOD AND
DRUG ADMINISTRATION

Submitted by:

California Citizen Action
Group

July 20, 1976

INTRODUCTION

California Citizen Action Group ("Citizen Action") submits this proposal to participate and intervene on behalf of the consumers' interest in the forthcoming F.T.C. hearings on the proposed trade regulation rule regarding advertising of over-the-counter (OTC) drugs.

As will be more fully described in the following paragraphs, Citizen Action's participation in the hearing would be as follows:

1. Conduct a survey of consumers to ascertain the need for federal regulation of advertising of OTC drugs. This survey would meet or exceed common statistical standards; i.e., it would be acceptable as evidence in the courts of most jurisdictions.

2. As an affiliate of three national consumer organizations, solicit and present testimony by and on behalf of these organizations and their affiliated members.

3. Develop expert testimony regarding the question of whether synonymous language should be permitted in OTC drug advertising.

Citizen Action's role as an intervenor would be as follows:

1. conduct legal and background research,
2. examine and cross-examine witnesses, and
3. present rebuttal submissions.

A Description of Citizen Action

California Citizen Action Group has the singular purpose of promoting effective citizen involvement in the economic and political decision-making processes affecting the consumer in the marketplace.

It is the only statewide consumer organization in California. By combining a professional staff with citizen volunteers, Citizen Action has been able, on a modest budget, to undertake and complete over 30 projects in the last 3 years.^{1/}

Recently, Citizen Action participated in two F.T.C. rule-making hearings.^{2/}

Citizen Action as Participant and Intervenor in OTC Drug Advertising Hearing

Citizen Action believes it is in a unique position to successfully participate and intervene in the OTC drug advertising hearing.

The Project Director is a consumer representative on a Federal Food and Drug Administration panel which is reviewing the safety and effectiveness and labeling requirements of OTC

^{1/} See Citizen Action 1975, the annual report of California Citizen Action Group on file with the Bureau of Consumer Protection as attachment "1" to Citizen Action's proposal to participate in the proposed TRR regarding price advertising of ophthalmic goods and services. In order to minimize duplicating costs for both Citizen Action and the F.T.C., incorporation by reference will be made where possible.

^{2/} The Los Angeles, California, hearing on the proposed TRR relating to the Funeral Industry and the San Francisco, California, hearing on the proposed TRR relating to advertising of ophthalmic goods and services.

drugs. In addition, he has participated in two other F.T.C. hearings.^{3/}

The Project Attorney has, inter alia, handled litigation which raised questions regarding misleading and deceptive advertising of prescription drugs. He has acted as intervenor on behalf of consumers in the F.T.C. hearing on the proposed TRR regarding the Funeral Industry.^{4/}

The Associate Attorney for this project developed and conducted an in-store counter advertising program for OTC pain-killers which produced a 15 percent shift in purchasing patterns from brand names to generics at a medium size food chain. He is a former vice-president of a national consumer organization.^{5/}

The proposed survey (see descriptions infra) will be designed and conducted by University of California at Berkeley Professor Peter W. Sperlich. Professor Sperlich has been accepted as an expert in survey research by various state and federal courts. He recently conducted a survey^{6/} under an F.T.C. grant to Citizen Action on the funeral industry and was certified as an expert by the hearing officer.

^{3/} See footnote 2 and attached vitae of Michael Schulman.

^{4/} See attached vitae of Philip Neumark.

^{5/} See attached vitae of Roy Alper.

^{6/} See "Survey of Consumer Experiences With, and Attitudes Toward Practices of the Funeral Industry," by Peter W. Sperlich which is on file with the F.T.C. as part of the record of the hearings on the proposed TRR relating to the funeral industry. Professor Sperlich's vitae is also on record in that proceeding.

Citizen Action believes that it is in a unique position to develop testimony from consumer groups. Citizen Action is associated with three national consumer organizations -- the Consumer Federation of America, Public Interest Research Group and The National Consumer Congress. Citizen Action believes that its association with those groups and their affiliated members can be utilized to assist in developing broadly based national testimony regarding the proposed TRR.

The Need For Financial Assistance

The 1976 annual budget for the California Citizen Action Group and its affiliate, the CalCAG Charitable Trust, was approximately \$60,000. A like budget is anticipated for 1976-77, depending on the success of various proposals for foundation funding and of other fund-raising activities. All foundation funds are specifically targeted and other monies are needed to meet basic overhead requirements, including staff salaries.

The proposed F.T.C. intervention project is budgeted at \$32,350. While the organization has the flexibility to absorb additional projects which may cost several hundred to a thousand dollars, there is no conceivable way that a project of this magnitude could be absorbed.

In regard to the question of financial assistance it should be noted that on two previous occasions, the F.T.C. determined that Citizen Action could not effectively participate without financial assistance.^{2/}

^{2/} See footnote 2.

PARTICIPATION AT THE HEARING PART I - THE SURVEY

In order to ascertain the need for federal regulation of OTC drug advertising, Citizen Action proposes to undertake a survey of consumer experiences and attitudes.

The survey would elicit at least the following types of information:

1. What assumptions as to safety and effectiveness does a consumer make when purchasing OTC drugs.
2. What assumptions as to safety and effectiveness does a consumer make from OTC drug advertising.
3. What assumptions does a consumer make from the failure of an OTC drug advertisement to state that the drug is unsafe or ineffective for certain groups of users or under certain conditions.
4. What is the consumer's understanding of present governmental regulation of OTC drug advertising.
5. What is the consumer's attitude toward governmental regulation of OTC drug advertising.
6. Would consumers alter their purchasing practices in the event that they were misinformed as to present governmental regulation of OTC drug advertising.
7. Demographics.

The survey will be conducted by telephone. The methodology, briefly stated, will be as follows:

1. Sampling: The objective of the survey will be to select a representative sample of persons who purchase OTC

drugs and who are residents of California.^{8/} This will be accomplished by randomly selecting phone numbers.^{9/}

It is estimated that a sample size of 800 will be necessary to meet or exceed common statistical standards; i.e., to achieve a confidence level of 95 percent and confidence limits of ± 5 percent.

2. Questionnaire construction: The survey questionnaire will be designed to meet the requirements of survey research -- clearly worded, single focused, non-leading questions. After initial design, pretests of the survey will be conducted for technical and substantive adequacy.^{10/}

3. Data analysis: The data analysis will be performed with the assistance of a computer and will consist of univariate and multivariate frequency distributions and percentages plus tests of significance where appropriate.

The personnel requirements for the survey are as follows:

^{8/} It would, of course, be possible to conduct a nationwide survey. This would triple or quadruple the cost and in Citizen Action's opinion would not be as cost effective in that it is anticipated that a survey of California consumers would be sufficiently representative of the universe of consumers nationwide.

^{9/} It is possible that the use of a telephone survey may exclude some, but probably an insignificant number, of low-income persons who are not able to afford a telephone. A telephone survey, however, is the most cost effective method for achieving a sample that represents a universe as large as the population of persons who purchase OTC drugs and who are residents of California.

^{10/} An example of how the proposed questionnaire would be constituted can be found in the Funeral Survey, see footnote 6.

A Survey Director (Professor Sperlich), a Research Assistant, a Computer Analyst, an Interview Supervisor, and Interviewers.

The following overhead costs will be incurred: telephones, rent for space to conduct the interviews and typing. The cost of the survey is projected as follows:

Survey Director	\$ 3,000
Research Assistant	1,500
Computer Analyst	1,000
Interview Supervisor	1,000
Interviewers	3,000
Phones	3,000
Secretarial	200
Rent	200
Key Punch, Coding	<u>500</u>
	\$ 13,400

PARTICIPATION AT THE HEARING PART II:
COORDINATION WITH OTHER CONSUMER GROUPS -
WITNESS PRESENTATION

As noted earlier Citizen Action is associated with three national consumer organizations -- Consumer Federation of America, Public Interest Research Group and The National Consumer Congress. Citizen Action believes that each of these organizations and their affiliated member groups have an interest in the proposed TRR on OTC drug advertising.

Citizen Action intends, if funding is granted, to assist these groups in developing testimony on the proposed TRR. Responsibility for this phase of the participation would be vested in the Associate Attorney, Mr. Roy Alper. Mr. Alper was formerly a vice-president of The National Consumer Congress and works regularly with PIRG and CFA affiliates.

The projected costs for this phase of the participation would be as follows:

Compensation for Associate Attorney (90 hrs. x \$21)	\$ 1,890
Witness Fees	2,000
Travel	1,000
Overhead (phones, rent, secretarial)	500
Per diem (6 days x \$40)	240
	\$ 5,630

Consultants - Expert Witnesses

Citizen Action has been informed that the OTC drug industry will argue that the proposed TRR should be amended to permit the use of synonymous language in OTC drug advertising.

Citizen action anticipates that the OTC drug industry and the F.T.C. staff will be presenting expert testimony on this issue.

In order to insure meaningful consumer participation on this issue, Citizen Action proposes to enter into agreements with experts who will assist Citizen Action in preparing for this issue and who will offer testimony on behalf of Citizen Action.

The projected budget for this phase of the participation is:

Compensation for Expert Consultants and Witnesses	\$ 2,500
Travel	<u>700</u>
	\$ 3,200

The Intervention

The intervention encompasses three phases: preparation, the actual intervention, rebuttal submissions.

Preparation: It is envisioned that preparation for the intervention would consist of the following: Assisting the Survey Director in the design of the questionnaire, research on the legal and factual issues raised by the proposed TRR,^{11/}

^{11/} For example, Citizen Action anticipates that one of the issues raised at the hearing will be whether the F.D.A. gave reasonable consideration to the use of synonyms in OTC drug labeling. In regard to this, Citizen Action will solicit information from F.D.A. panel members on the procedure used in developing labeling requirements of OTC drugs.

and perusal of written submissions on the proposed TRR.

The projected costs for preparation are as follows:

Compensation for Project Attorney (90 hours x \$21)	\$ 1,890
Compensation for Project Director (90 hours x \$15)	1,350
Travel to attend pre-hearing conference	700
Overhead (phones, secretarial, rent)	<u>1,000</u>
	\$ 4,940

Intervention

The actual intervention would be handled by the Project Attorney and Project Director.

The projected cost^{12/} of the intervention is as follows:

Compensation for Project Attorney (80 hours x \$21)	\$ 1,680
Compensation for Project Director (80 hours x \$15)	1,200
Travel	700
Per diem (2 people x 10 days x \$40)	<u>800</u>
	\$ 4,380

Rebuttal

The rebuttal submission would be handled by the Project Attorney and Project Director. The projected cost is as

^{12/} The projected cost for this phase is based on the assumption that the hearing will last 10 days.

follows:

Compensation for Project Attorney (20 hours x \$21)	\$	420
Compensation for Project Director (20 hours x \$15)		300
Secretarial		<u>80</u>
	\$	800

B U D G E T

Participation Phase I - Survey		
See detailed explanation at page 7		\$ 13,400
Participation Phase II - Witness Presentation		
See detailed explanation at page 8		5,630
Consultants, Expert Witnesses		
See detailed explanation at page 9		3,200
Intervention		
1) Preparation		
See detailed explanation at page 10		4,940
2) Actual Intervention		
See detailed explanation at page 10		4,380
3) Rebuttal		
See detailed explanation at page 11		<u>800</u>
TOTAL		\$ 32,350

ISIDORE MICHAEL SCHULMAN

1825 Pine St., Apt. 5
 San Francisco, Calif., 94109
 (415) 771-2735

Born July 6, 1951
 Single
 5'10" 165 lbs.

ACADEMIC TRAINING:

College of Law, University of Santa Clara, J.D. (expected)
 December 1976. Emphasis on consumer and
 administrative law.

University of Leeds, one year program (1973-74) in
 Developmental Economics under the direction of Professor
 Wynn Davies. Final paper on the central banking
 system of Zambia.

University of California, Berkeley, B.A. December 1974.
 Graduated with distinction in Economics. Member
 of University LaCrosse Team.

EMPLOYMENT:

September 1975 - Present
 Legislative Advocate for California Citizen Action
 Group.
 Immediate Supervisor: Roy Alper, Director.

April 1975 - September 1975
 Director of San Francisco Consumer Advocates, the
 lobbying arm of San Francisco Consumer Action.
 Immediate Supervisor: Neil Gendel, Board Chairman.

September 1973 - April 1975
 Research Director for San Francisco Consumer Action.
 Concentrated on coordination of the Consumer Agency
 Reorganization Task Force.
 Immediate Supervisor: Kay Pachtner, Director.

COMMITTEE MEMBERSHIP

August 1975 - Present
 Food And Drug Administration Over-the-Counter Miscellaneous
 Internal Drug Review Panel consumer liason.

September 1975 - Present
 Consumer Committee of California's Democratic Party
 Commission on National Platform and Policy member.

May 1975 - Present
 Department of Consumer Affairs Ad Hoc Committee
 on Consumer Affairs member.

PUBLICATIONS:

Authored "Creation of An Independent Consumer Agency".
 Presented to Assembly Finance, Insurance, and
 Commerce Committee October 9, 1975. Reprinted
 in Committee's Report to the Legislature, December, 1975.

Co-authored Deceptive Packaging, A Close Look At The
California Department of Consumer Affairs, published
 September 30, 1974. Described by Consumer Federation
 of America as "quite likely the most devastating
 indictment of a state agency ever to appear."

Co-authored "A Preliminary Report, Department of Consumer
 Affairs: Protector of Business or Consumers?" Presented
 to Assembly Ways and Means Committee March 27, 1974.

RESEARCH AND WRITING:

Drafted for past senator, George Moscone, six bills which
 comprised the Consumer Protection Act of 1975.
 Senate Bill 853, which considerably strengthens the
 consumer advocacy functions of the Department of
 Consumer Affairs, passed both houses and was
 signed into law by the Governor in September 1975.

Representing various consumer groups in California, researched
 and drafted recommended changes to the Governor's
 proposed consumer protection budget. The staffing
 augmentation was adopted by the Legislature and signed
 into law by the Governor.

At the request of the Legislature worked with Legislative
 Analyst, A. Alan Post, to develop an alternative
 staffing augmentation to the Division of Consumer
 Services. Delivered to the Assembly Ways and
 Means Committee on May 7, 1974.

MILITARY:

Member of the United States Coast Guard Reserves, specializing
 in communications at the Pacific Area Rescue
 Coordination Center.

REFERENCES: Will be supplied upon request.

RESUME OF PHILIP NEUMARK

Professional Address: 2327 Cedar Street
Berkeley, California 94708
(415) 843-7511

Birthdate: May 15, 1943.

EDUCATION:

Law School

J.D. Columbia University School of Law, 1968;
Research Assistant to Professor Herbert
Wechsler; Law Clerk with NAACP Legal
Defense Fund; Finalist, Jerome Michael Jury
Competition; Editor, Columbia Survey of
Human Rights; Moot Court Judge; top 1/4
of graduating class.

Member of California Bar with admission
January 1969.

College

B.A. Columbia College, New York, New
York, 1965

Secondary School

Phillips Academy, Andover, 1961

PREVIOUS PROFESSIONAL EXPERIENCE:

Attorney

California Rural Legal Assistance,
1968-1971, 1972-February, 1976.

Attorney

San Francisco Neighborhood Legal Assistance
Foundation, 1971

Special Attorney

To Then Secretary of State of the State of
California, Edmund G. Brown, Jr.,
1971 - 1972.

SELECTED LITIGATION

Maxson v. Born, U.S. District Court, N.D. Cal., was a class action which
resulted in the restoration of welfare benefits to 9,000 aged, blind
and disabled persons in San Francisco County. Permanent injunction
issued April 1, 1974.

SELECTED LITIGATION:

Leach v. Brian, U.S. District Court, E.D. Cal., was a class action to compel officials of the State of California to restore welfare benefits to 50,000 aged, blind and disabled citizens in California. State mooted action in December, 1973 by agreeing to increase welfare allocation by \$17 million per year.

California League of Senior Citizens v. Brian, Cal. Court of Appeal, 3rd Appellate District, November 19, 1973, was a class action on behalf of 400,000 aged, blind and disabled welfare recipients which resulted in an order compelling state welfare officials to increase welfare grants by \$140 million.

Terry v. State Board of Pharmacy, U.S. District Court, Northern District of California, was a successful challenge to a state law which made it unlawful to advertise prescription drug prices. A unanimous three-judge court held that the statute in question violated plaintiffs' First Amendment rights and unnecessarily led to inflated costs for prescription drugs. Permanent injunction entered May 13, 1975.

Kusick v. San Francisco Council of Nursing Homes, U.S. District Court, Northern District of California, involved an anti-trust action against nursing homes in San Francisco, California, who threatened to evict 500 medically indigent patients unless reimbursement rates from the State for said patients were increased. Within a week of the filing of the complaint, the defendants agreed to a stipulated order in the form of injunctive relief and damages. Stipulated order entered June 27, 1975.

Dils v. Guduldig, Los Angeles County Superior Court, was a successful class action against the State of California which resulted in the restoration of \$10 million in State health care benefits to 10,000 aged, blind and disabled low-income Californians. A preceptory writ of mandate issued from the Superior Court on January 19, 1973, and the State decided not to appeal.

California Medical Association, et al. (Plaintiffs), O'Reilly, et al. (Plaintiffs in intervention) v. Brian, California Court of Appeals, 3rd Appellate District, was a successful appeal of a decision by the Superior Court that the State of California had unlawfully reduced the scope of services in the State Medi-Cal program by \$140 million.

Self-Help For the Elderly v. Richardson, U.S. District Court, District of Columbia, challenged the constitutionality of two sections of the Medicare Act of 1965 which delegated unfettered discretion to a private corporation (the Joint Commission on Accreditation of Hospitals) to set standards for patient care and to determine the disbursement of over \$4 billion per year in federal monies. As a result of this lawsuit, Congress on October 29, 1972, amended the Medicare Act to require the Secretary of Health, Education and Welfare to set standards for patient care in hospitals and to assume responsibility for the disbursement of federal funds.

SELECTED LITIGATION:

Shaw v. Modesto School Board, U.S. District Court, E.D. Cal., 1971, was the first successful suit in the nation to enjoin violations of the National School Lunch Act. This action which was brought on behalf of low-income school children resulted in a permanent injunction ordering the school board to increase the number of free lunches served to needy children by 500 percent (from 400 per day to over 2,000 per day).

May v. Hardin, U.S. District Court, N.D. Cal., was a class action suit in which the District Court issued a temporary restraining order which resulted in the release of over 20,000 pounds of surplus food on Christmas Eve, 1970, to hungry persons in rural California.

Olguin v. Arredondo, U.S. District Court for the Eastern District of California, is a class action on behalf of migrant farmworkers against a labor contractor who refuses to comply with the requirements of a new federal law. Temporary Restraining Order issued August 1, 1975.

Wong v. Mihaly, U.S. District Court, N.D. Cal., 1971, resulted in permanent injunction against registrar of voters who had refused to allow indigent candidates to run for public office because they could not pay filing fees.

Brown v. Standard Oil, L.A. Superior Court, was an action to compel three major oil companies to file financial disclosure of their secret financial participation in ballot measure campaigns. In 1972 the Court issued an interim finding supporting the plaintiff's major contentions and all defendants but one have settled the case.

SELECTED LEGISLATIVE ACTIVITY:

United States Senate: At the request of Senator McGovern, presented testimony on the problems of malnutrition among the nation's school children and assisted Senator McGovern's staff in drafting remedial legislation which was eventually signed into law.

Secretary of State in California: As special counsel to the Secretary of State of California, assisted in the drafting of statutes and regulations.

PUBLICATIONS:

Prison Work Release Programs - A Rehabilitative Approach to Sentencing, 1 Columbia Survey of Human Rights Law 99 (1968); Curing Your Sick Hospital: A Lawyers' Guide, available through Clearinghouse Review, Chicago, Illinois.

RESUME

Name: Roy Alper
Date of Birth: 11/19/43

Education: B.A. (Political Science) 1965; Purdue University
J.D. 1968; University of California, Berkeley (Boalt Hall)

Positions:

June 1968 - Nov. 1968	Assistant Counsel, Oakland Redevelopment Agency
Nov. 1968 - Jan. 1970	Operations Manager for a family business in Indiana
Jan. 1970 - Jan. 1974	Private practice of law in Berkeley; specializing in consumer law, domestic relations, and bankruptcy
Jan. 1974 - Present	Legislative Advocate, California Citizen Action Group

Activities:

1971 Assisted in initial organizing of San Francisco Consumer Action and Alameda County Consumer Action

1972-1974 Co-chair, Consumer Protection Committee, Consumers Cooperative of Berkeley.
Responsible for stimulating and channeling volunteer involvement on consumer issues in a 65,000 member organization.

Projects included development of consumer oriented food merchandising policies; in-store counter-advertising program for non-prescription pain killers; development of standards and merchandising program for organic foods; Food Action Campaign; Meat Boycott; several public forums bringing experts and public officials involved in consumer protection, energy policy, food policy, and advertising face-to-face with consumers; laying groundwork for Co-op Health Maintenance Organization; organizing volunteer lobbying efforts on food policy and no-fault insurance; and testimony before numerous state, local and federal bodies.

1972-1974

Member of Policy Board and Executive Committee,
Consumer Federation of California

Involved since the inception of this effort
to create a statewide coalition of consumer,
labor, and farmer interests on consumer issues.

Chaired numerous committees and lobbied on
no-fault insurance, credit policy, local
consumer affairs bureaus, and food labeling
issues.

1973-Present

Vice President, National Consumers Congress

Among the initial organizers of this national,
grassroots based organization which grew out
of the meat boycott in 1973. In one year, NCC
accomplished outreach to local organizations
in thirty states, developed a regular newsletter
which is the only grassroots oriented consumer
paper in the country, developed funding for
a newly hired staff of five that will do research
for and help organize local group actions on food
and energy issues

1974

Member of Board, National Consumer Resource Center

Assisting to obtain research grants for this
newly formed 501(c)3 sister organization to the
National Consumers Congress

COUNCIL ON CHILDREN, MEDIA AND MERCHANDISING

1346 Connecticut Avenue, Washington, D. C. 20036
Telephone: 202/466-2584

December 23, 1976

Ms. Margery Waxman Smith
Acting Director
Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C. 20580

Dear Ms. Smith:

Having received your rejection to our OTC application because the rule "covers only affirmative claims", and since time is running out for those who seek compensation to participate in the OTC Drug Advertising Rule, I amend my previous application, without prejudice to all the goals and arguments presented therein. I think your rejection on the grounds that it primarily focuses on warnings and contraindications is erroneous, inasmuch as the communications from this office, starting with our formal application of November 4, 1976, have studiously avoided that subject except insofar as they influenced the label as a whole. I wonder if the earlier formal application was understood.

We now reapply for compensation in a much simpler vein.

We will testify at the OTC Drug Advertising Hearings, and will supply questions to other witnesses through the appropriate channels and parties. To properly prepare ourselves for this activity, we seek compensation to the Council on Children, Media and Merchandising to permit me to join forces with attorney Robert Pinco upon his termination of government service, and consult with major behavioral science figures in the United States who will be asked to analyze, from the perspective of several vulnerable segments of the public, the fairness of communication of OTC drug information when affirmative claims are made in advertising based on the probable outcome of the OTC monographs drafted for the FDA. We will seek advice from many including some of those scientists previously listed on page 8 of our earlier formal application. Attorney Pinco, who will have just rejoined private practice, is the man who directed the entire FDA OTC drug monograph panel review over the last several years. He feels, as I do, that there is a great need to examine whether the monographs' recommendations are transferable as written to FTC OTC rulemaking. For instance, he personally knows of several monograph statements which might well be not understood by those we seek to represent, particularly in advertising. We stress here that we support the intent of your rule, but want to make sure that it protects those who are most in need of governmental protections.

FEDERAL TRADE COMMISSION
BUREAU OF CONSUMER PROTECTION

Dec 22 1964

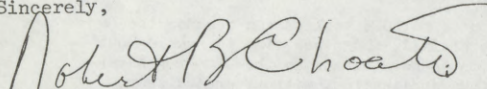
Members:
 Hon. Janice Boyd
 Hon. William C. Coughlin, M.D.
 Hon. Geoffrey C. Swan, J.D.
 Hon. Gregory Pooleman
 Hon. Michael J. Ferro
 Hon. John E. H. Smith
 Hon. Arthur W. Keith
 Hon. Michael Latham, M.D.
 Hon. Enrique Lopez Lopez, J.D.
 Hon. Leo Lunt, M.D., Ph.D.
 Mrs. Grace Gil Olivarez
 Julius Richmond, M.D.
 James S. Turner, J.D.
 Robert B. Choate, Chmn.

The vulnerable groups are illiterates, children, the deaf who watch television, and the blind who listen to radio, and those with minimal schooling.

After discussions with your personnel I am concerned that the FTC's desire to keep these hearings to a "sharp, limited focus" disregards a number of issues about drug advertising that must be raised here and now. They may be raised again in the individual monograph hearings relative to warnings, but they must also be raised in regard to the affirmative claims which are the subject of the immediate proceeding.

This is the holiday season. The hearings start in February. Rather than convene our behavioral consultants, we will now have to travel to meet them, or use the telephone. Our budget reflects this. We ask for your immediate consideration and reply.

Sincerely,

A handwritten signature in cursive script that reads "Robert B. Choate". The signature is written in dark ink and is positioned above the typed name.

Robert B. Choate
Chairman

RBC:th

PART I

APPLICATION FOR FTC COMPENSATION

To Support Participation in FTC
Rulemaking Proceedings - Part I
General Information
Mail Application to:

Federal Trade Commission
Bureau of Consumer Protection

Special Assistant for Compensation
Office of the Director - Code PG

600 Pennsylvania Avenue, N.W.
Washington, D. C. 20580

Application Control No. (FTC USE ONLY)

1. Applicant Name

Consumer Affairs Committee

Organization

Americans for Democratic Action

Street Address - P.O. Box

3005 Audubon Terrace, N.W.

City

Washington

Country

U.S.

State

Zip Code

District of Columbia

20008

Telephone Number

244-4080

Area Code

202

Ext.

2. Name of Rulemaking Proceeding

Advertising Over-the-Counter Drugs

3. Nature of Interest

Business

☒ Consumer

Other

(specify)

4. Total Compensation Requested

\$

5. Type of Applicant

Nonprofit but without IRS

Government Unit

Profit-making

Non-profit

☒ Other (specify)

exemption

6. Type of Application or Request

☒ Initial

Change (specify type)

7. Purposes for which this application is being made:

Preparation of testimony, participation at the hearing
including cross-examination of witnesses, and post-hearing comments

8. Period of Participation

From: Immediately

To: Time of post-hearing comments

9. The applicant certifies that to the best of his knowledge and belief, the data in this application are true and correct, and that he will comply with the attached assurances if he receives the award of compensation.

Name (typed)

Bruce J. Terris

Title

Counsel

Signature of authorized representative

10. Date of Application

11/3/76

FTC USE ONLY - Control Number

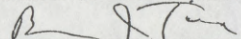
Authorization Code (FTC USE ONLY)		
1141	J14	2515

CASH and REIMBURSEMENT SUMMARY
9. Amount of this Cash Request
10. Total Actual Expenditures
11. Total Cash Received to Date
12. Claimed Reimbursement
13. Amount to be Refunded to FTC

14. Certification for Financial Report and
Cash Advance Requests

I hereby certify that this report is true and correct to the best of my knowledge and belief and that all funds requested and/or all expenditures represented herein have been made in accordance with appropriate legislation, regulations and policies set forth in the application and award documents.

Further, that all accounting records and related original and supporting documents which support costs, charges or claims made herein will be maintained for a period of three years following completion of approved participation. These records will be made available to FTC staff auditors or authorized FTC contract auditors at their request.


Signature

11/3/74
Date

Bruce J. Terris

Counsel

Typed name and Title

FTC USE ONLY	
☒ -Approved	☐ -Amended & Approved
☐ -Disapproved	
_____ Date	_____ Date
_____ Signature-Bur. Dir.	_____ Bureau Director

PART II - A

1. TYPE OF ACTION (check one)

- ☒ Initial Application
☐ FTC Budget Approval (FTC use only)
☐ Report of Actual Expenditures
☐ Request for Budget Change
☐ Request for Cash Advance
☐ Reimbursement Request
☐ Transmittal of Refund

Compensation for Participation
 In FTC Rulemaking Proceedings
 Part II - Budget & Financial Data

2. Compensation Award No.

3. Stage of Participation (check one)

- ☒ Total ☐ Preparation of Testimony ☐ Development of Evidence
☐ Hearing Participation ☐ Rebuttal ☐ Other _____
 (Specify)

4. Budget Categories	5. Proposed Budget	6. Approved Budget	7. Revised Budget	8. Amount of Actual Expenditures	FTC USE ONLY
A. Personnel					
Overhead *					
B. (30 % of Personnel)					
C. Consultants					
Name Rates					
1. Bruce J. Terris \$9900					
2. Lonnie C. Von Renner 8100					
3. Paralegal 720					
Other Direct Costs					
Stenographic & D. Transcription Services					
E. Contractual Services					
F. Travel					
1. Per Diem \$ # days					
2. Transportation					
3. Other Travel \$ 45					
Other-specify					
G. Other-specify					
H.					
I. TOTAL	\$ 18,765				
Comments					

1/ Based on the Commission's new attorneys rates. If the old rates are used, there will be an additional item for secretarial services -- 100 hours at \$6 an hour, a total of \$600.

2/ Bruce J. Terris' rates are \$45 an hour.
 Lonnie C. Von Renner's rates are \$30 an hour.
 Paralegal rates are \$9 an hour.

* If the overhead can be justified at over 30%, fill out and attach Part III and enter that adjusted overhead rate in column B above.

1. TYPE OF ACTION (check one)

- ☒ Initial Application
☐ FTC Budget Approval (FTC use only)
☐ Report of Actual Expenditures
☐ Request for Budget Change
☐ Request for Cash Advance
☐ Reimbursement Request
☐ Transmittal of Refund

Compensation for Participation
 In FTC Rulemaking Proceedings
 Part II - Budget & Financial Data

2. Compensation Award \$

3. Stage of Participation (check one)

- ☐ Total ☒ Preparation of Testimony ☐ Development of Evidence
☐ Hearing Participation ☐ Rebuttal ☐ Other _____
 (Specify)

4. Budget Categories	5. Proposed Budget	6. Approved Budget	7. Revised Budget	8. Amount of Actual Expenditure	FTC USE ONLY
A. Personnel					
Overhead *					
B. (30 % of Personnel)					
C. Consultants					
Name Rates					
1. Bruce J. Terris \$ 900					
2. Lonnie C. Von Renner \$2400					
3.					
Other Direct Costs					
Stenographic &					
D. Transcription Services					
E. Contractual Services					
F. Travel					
1. Per Diem \$ # days					
2. Transportation # days					
3. Other Travel					
Other-specify					
G.					
Other-specify					
H.					
I. TOTAL	\$ 3300				
Comments					

- 1/ Based on the Commission's new attorneys rates. If the old rates are used, there will be an additional item for secretarial services -- 50 hours at \$6 an hour, a total of \$300.
 2/ Bruce J. Terris' rates are \$45 an hour.
 Lonnie C. Von Renner's rates are \$30 an hour.

* If the overhead can be justified at over 30%, fill out and attach Part III and enter that adjusted overhead rate in column B above.

1. TYPE OF ACTION (check one)

- ☒ Initial Application
☐ FTC Budget Approval (FTC use only)
☐ Report of Actual Expenditures
☐ Request for Budget Change
☐ Request for Cash Advance
☐ Reimbursement Request
☐ Transmittal of Refund

Compensation for participation
 In FTC Rulemaking Proceedings
 Part II - Budget & Financial Data

2. Compensation Award NC

3. Stage of Participation (check one)

- ☐ Total ☐ Preparation of Testimony ☐ Development of Evidence
☒ Hearing Participation ☐ Rebuttal ☐ Other _____
 (Specify)

4. Budget Categories	5. Proposed Budget	6. Approved Budget	7. Revised Budget	8. Amount of Actual Expenditures	FTC USE ONLY
A. Personnel					
Overhead *					
B. (30 % of Personnel)					
C. Consultants					
Name Rates					
1. Bruce J. Terris	\$7200				
2. Lonnie C. Von Renner	\$1200				
3.					
Other Direct Costs					
Stenographic &					
D. Transcription Services					
E. Contractual Services					
F. Travel					
1. Per Diem \$	# days	# days	# days	# days	
2. Transportation					
3. Other Travel	\$ 45				
Other-specify					
G.					
Other-specify					
H.					
I. TOTAL	\$ 8445				
Comments					

1/ Based on the Commission's new attorneys rates. If the old rates are used, there will be an additional item for secretarial services -- 10 hours at \$6 an hour, a total of \$60.

The estimates for attorneys' time is based on a three-week hearing and one week of preparation.

2/ Bruce J. Terris' rates are \$45 an hour.
Lonnie C. Von Renner's rates are \$30 an hour.

* If the overhead can be justified at over 30%, fill out and attach Part III and enter that adjusted overhead rate in column B above.

1. TYPE OF ACTION (check one)

- ☒ Initial Application
☒ FTC Budget Approval (FTC use only)
☒ Report of Actual Expenditures
☒ Request for Budget Change
☒ Request for Cash Advance
☒ Reimbursement Request
☒ Transmittal of Refund

Compensation for Participation
 In FTC Rulemaking Proceedings
 Part II - Budget & Financial Data

2. Compensation Award No.

3. Stage of Participation (check one)

- ☐ Total ☐ Preparation of Testimony ☐ Development of Evidence
☐ Hearing Participation ☐ Rebuttal ☒ Other (Specify) _____

Written comments on
 Presiding Officer's
 Summary of Record and
 on Staff Recommendations
 and Comments

4. Budget Categories	5. Proposed Budget	6. Approved Budget	7. Revised Budget	8. Amount of Actual Expenditures	FTC USE ONLY
A. Personnel					
Overhead *					
B. (30 % of Personnel)					
C. Consultants					
Name Rates					
1. Bruce J. Terris	\$1800				
2. Lonnie C. Von Renner	\$4500				
3. Paralegal	\$ 720				
Other Direct Costs					
Stenographic & D. Transcription Services					
E. Contractual Services					
F. Travel					
1. Per Diem \$ # days		# days	# days	# days	
2. Transportation					
3. Other Travel					
Other-specify					
G. Other-specify					
H.					
I. TOTAL	\$7020				
Comments					

1/ Based on the Commission's new attorneys rates. If the old rates are used, there will be an additional item for secretarial services -- 40 hours at \$6 an hour, a total of \$240.

2/ Bruce J. Terris' rates are \$45 an hour.
 Lonnie C. Von Renner's rates are \$30 an hour.
 Paralegal's rates are \$9 an hour.

* If the overhead can be justified at over 30%, fill out and attach Part III and enter that adjusted overhead rate in column B above.

NARRATIVE^{1/}a. The Representation of Consumers Is Necessary
for a Fair Determination of the Proceeding

As we will set forth more fully below, the Consumer Affairs Committee of Americans for Democratic Action represents consumers in a variety of different fields. The proposed rule is of course directly related to the protection of consumers from unfair and deceptive claims by drug advertisers.

1/ We note that the California Citizen Action Group has been notified that it will receive compensation for participation in this proceeding. While it is only a small part of the overall grant, the grant does include funds for examination and cross-examination of witnesses at the hearing.

We assume, nevertheless, that the Commission has not yet made a decision as to which consumer organization should represent the general consumer interest at the hearings. Indeed, if such a determination has been made, it would plainly be improper. The proposal of California Citizen Action Group was both filed and approved before October 7, 1976, the date of which the final notice in the Federal Register informed groups to file notifications of interest. "Until the Presiding Officer has chosen the group representation for the consumer interest," no grant could have been intended to cover this role. See Letter of Margery Waxman Smith to Automobile Owners' Action Council, July 28, 1976.

The Consumer Affairs Committee of Americans for Democratic Action filed a notification of interest as a general consumer representative in response to the notice of the Federal Register. On October 24, 1976, the Presiding Officer requested the four groups to attempt to agree on a group representative but no such agreement has yet been made.

We submit this application because we believe that the Consumer Affairs Committee, either alone or in conjunction with another group, should be allowed to participate in these proceedings, including full participation at the hearings, and should be granted the funds necessary to do so effectively. As we will set forth below, the Committee has a distinctive point of view concerning these regulations which is substantially different -- not merely as to details but as to the basic substance of the rule -- from the Commission's staff. We believe that this point of view should be represented in these proceedings.

There can be no doubt of the need for consumers to be represented in this proceeding. Drug manufacturers, advertisers and media have notified the Commission that they will be represented. While the Commission staff will of course participate, it has the duty to represent the public generally. In contrast, the Committee's sole interest and responsibility is to represent consumers.

More specifically, the Committee has a substantially different position from the staff concerning the contents of the rule which should be adopted. The staff has set forth its views as to the interpretation of the proposed rule. 41 Fed. Reg. 39768, 39770. The Committee of course does not challenge the staff's intention concerning its own proposal. However, the Committee believes that a rule which is to be effective in order to protect consumers must be significantly stronger than the proposed rule as interpreted by the staff. We will therefore state our disagreement with the proposed rule as interpreted by the staff:

1. Does the rule prohibit the making of every claim in advertising that FDA has not specifically approved for labeling?
No, the rule prohibits only those claims that are not allowed in labeling.

The Committee takes the position that drug manufacturers should be allowed to advertise only the claims which the Food and Drug Administration has approved. While the FDA has also specifically disapproved certain claims, there is no way that this list can be complete. The FDA regulations therefore allow only approved claims to be included in labeling. This same requirement must apply to advertising.

Most consumers first receive information about an OTC drug through advertising rather than labeling. Moreover, it is doubtful that many consumers read the label thoroughly before purchase. Even if they read the label, it is likely that they will continue to consider the information they have received about the asserted benefits of the drug which they obtained through advertising.

Advertisers can easily develop new claims and variations on claims. Any rule which allows drug manufacturers to vary the claims without prior approval will certainly result in efforts to escape the purpose of the FDA regulations. This, in turn, will result in complicated and almost surely inconclusive studies and difficult, lengthy proceedings against manufacturers. If the proposed rule is to be effectively enforced, the FTC must require that only claims approved by the FDA be used. Conversely, if advertisers can use other claims which have not been specifically approved, this rule will become a virtual nullity.

Moreover, there is no reason for a different rule as to advertising than for labeling. Drug manufacturers desiring to make other claims can seek permission from the FDA. The FDA has obviously more expertise than the FTC in determining whether these claims may appropriately be made.

We do wish, however, to distinguish claims for use of, benefits from, and pharmacological action of drugs from mere descriptions of them. Accurate descriptions of drugs which do not explicitly or implicitly claim benefits should be permitted. However, as to the use, benefit and pharmacological action of drugs, only claims which have been specifically approved by the FDA should be permitted in advertising.

2. Does the rule limit advertisers to the use of certain terminology?
In those cases in which FDA has prohibited the use of terminology other than that which has been specifically approved, e.g., indications for use of antacids, the same prohibition applies to advertising. Only in those instances does the rule allow only the use of specifically-approved terminology.

The Committee takes the position that the terminology developed by the Food and Drug Administration for labeling should be used in advertising and should be the only terminology permitted to be employed in advertising. The FDA regulations approve specific wording for claims and disapprove specific wording in other claims. However, the FDA allows the use in labeling only of the specific language which is approved. It is irrelevant whether the language has been disapproved. If other terminology is desired, the manufacturer is required to obtain approval in advance from the FDA by showing that the alternative terminology has the same meaning. There is no reason why the rule should be different in advertising than for labeling.

We have noted that, if advertisers can make claims that have not been approved by the FDA, it will be almost impossible to enforce the FDA monograph or the FTC rule. The same is probably even more true as to variation of terminology. A language can be varied infinitely by advertisers. There is no way that the Commission will be able to police the varied terminology so that variations which exceed the claims permitted by the FDA are promptly and effectively prohibited. Permission to use other terminology will simply result in undermining enforcement of the proposed rule and cause needless confusion among consumers.

4. Does the rule require the disclosure of warnings in advertising?
No, the rule is not addressed to the disclosure of warning information. The disclosure of such information for antacids is the subject of the Antacid Rulemaking, announced on April 6, 1976, at 41 FR 14534.

The Committee urges that the proposed rule should require all warnings prescribed by the FDA. The FDA regulations set forth explicitly worded warnings which are required for labeling. These warnings are implicit limitations on the claims approved by the FDA. Without the warnings, the claims are too broad and are implicitly deceptive and unfair. This is particularly true because most or, at least, many consumers who are persuaded to purchase drugs through advertising do not read the labels.

Our position is supported by those of several FDA medical panels. For example, the Monograph for OTC Cold, Cough, Allergy, Bronchodilator and Antiasthmatic Products urged the FTC "to challenge any advertisement which * * * in any way negates or dilutes the information on the label, especially the contraindications and/or warnings." 41 Fed. Reg. 38312, 38334 (1976). Even more implicitly, the Monograph for OTC Laxative, Anti-diarrheal, Emetic and Antiemetic Products urged that "all forms of advertising will be monitored by those having the appropriate jurisdiction, to insure that adequate warning and cautionary statements as found in product labeling will be carried over and incorporated in all advertising and promotional activities for these products." 40 Fed. Reg. 12902, 12904 (1975).

Alternatively, it may be determined that some of the warnings need not be given or that several warnings can be combined in a simple statement in advertising. However, again this should not be permitted without prior

approval of the FDA or FTC. Effective enforcement requires that drug manufacturers not be allowed to vary or ignore the required terminology for either claims and warnings without prior approval.

It is not a persuasive response that these warnings may be required in proposed rules on specific categories of OTC drugs such as the antacid rule. We strongly support the prompt initiation of such proceedings as soon as FDA regulations become final in order to consider specific advertising problems for a particular category of OTC drugs. However, the Committee assumes that the rule involved here has been proposed because the rules for specific categories of OTC drugs will take substantial time to prepare and adopt and/or because the FTC will not initiate specific rules for all categories of OTC drugs. In either event, as long as no rule has been adopted for the particular category of OTC drugs, the general OTC drug rule will be applicable. We believe that the general rule must require, in addition to allowing only FDA-approved claims, that all FDA-required warnings be given.

7. Will the rule take effect for a drug category if the FDA monograph is under challenge?
The rule will not apply if the FDA monograph is not in effect. If the effective date of a monograph is stayed during the pendency of a legal action, the rule will not operate during the period of the stay as to products governed by that monograph.

The Committee takes the position that the rule should take effect as soon as the FDA regulation is finally issued. Industry challenges to FDA actions carrying out the Food, Drug and Cosmetic Act have often taken years to resolve. These challenges have often had little purpose except to keep drugs on the market until judicial review could be completed. We

see no reason to give drug manufacturers the incentive to litigate by promising them that this will delay enforcement of the proposed rule.

While it may arguably be reasonable to allow drug manufacturers to continue marketing drugs during the period of litigation, they should not be allowed to advertise as well during this period. In balancing the equities between the manufacturer and the public, the equities on the side of the public should clearly prevail. A neutral federal agency, assisted by an eminent scientific panel, has made its decision. While the decision is under challenge, it must be assumed that the agency is likely to prevail. The harm to the public from continued advertising of the drug or claim is often severe. In these circumstances, no automatic stay of the rule should be granted. If a stay is appropriate in an individual situation, a procedure could be instituted for seeking relief from the FDA, FTC, or a combination of the two.

8. Does the rule require claims to be made by way of words rather than visually or pictorially, in all OTC drug advertisements?

The rule does not require claims for a product to be made by way of words. Of course, visual content can give rise to representations to which the rule would apply.

The Committee takes the position, as indicated above, that the rule should only allow the claims specifically approved by the FDA. The FDA would not allow a label to have visual or pictorial claims. Similarly, the FTC should not allow advertising to make such claims. All claims, both on the labels and in advertisements, should be the specific verbal claims approved by the FDA.

Consequently, no claims should be permitted visually or pictorially. Visual and pictorial content should be permitted only as long as it simply reflects, and is totally consistent with, the verbal claims and does not implicitly suggest any broader or different claims.

In addition, the Committee takes the following positions on questions raised in the FTC's final notice^{1/} (41 Fed. Reg. 39768, 39770):

1. Does the advertising of a drug under conditions placed in Category III by FDA for labeling nullify important public policies? Is it deceptive or unfair?

The Committee takes the position that the advertising should not be permitted of drugs or of claims which have been found to come within Category III. Drug manufacturers have had 14 years to establish the safety and effectiveness of their drugs. The FDA has permitted them for several additional years to continue to market some drugs which have not been proved to be safe and effective by placing them in Category III. This allows established customers to continue to use the drug. However, there is no reason to permit manufacturers to advertise for new customers in the absence of full compliance with the statute. Such advertising of drugs which are not in full compliance with the statute is inconsistent with the important public policy of requiring proof of safety and effectiveness.^{2/}

^{1/} The Committee's position on other issues raised in the final notice are set forth in the Notification of Interest filed by the Committee which is attached.

^{2/} It is extremely likely, based on the FDA's experience with prescription drugs, that manufacturers will not even attempt to develop proof of the safety and/or effectiveness for many of these drugs but will instead market them as long as possible and then take them off the market when required to do so. The remedies of prohibiting advertising or requiring disclosure will reduce the benefits to the manufacturers and the harm to the public from this approach.

The Committee further takes the position that the advertising of drugs in Category III is inherently deceptive and unfair. The advertising of a drug, by itself, is implicitly a claim that the drug is safe and effective. The Staff Report on the proposed rule (pp. 7-8) shows that large numbers of consumers believe that the government assures the safety and effectiveness of drugs. In fact, as to Category III drugs, the FDA has found that there is not adequate proof that the drugs are safe and effective.

The FTC will have contributed to the deception and unfairness if it fails either to prohibit advertising of Category III drugs and claims or, at the least, to require disclosure of the FDA finding that there has been no showing of safety and effectiveness. Prior to the promulgation of this rule, the FTC can not fairly be said to require full disclosure of the safety and effectiveness of OTC drugs. With the promulgation of this rule, the FTC will have entered this field and consumers will be led to rely even more heavily on the government to assure the safety and effectiveness of OTC drugs. In these circumstances, the FTC has a particularly heavy responsibility to ensure that deception and unfairness do not occur.

2. Should the FTC: (a) prohibit all such advertising; (b) require affirmative disclosures in such advertising (and, if so, what should those disclosures be); or (c) adopt some other remedy?

The Committee takes the position that all advertising of Category III drugs should be prohibited. As indicated above, until full compliance with the statute, drug manufacturers should not be allowed to seek new customers for drugs which have not been proven to be safe and effective.

If, however, advertising of Category III drugs is permitted, the FTC should require that advertisements disclose the FDA's finding that the drug has not been proven to be safe and/or effective. The disclosure that such proof is lacking is essential to avoid deception and unfairness.

4. Is it a material fact to consumers that the Commissioner of Food and Drugs has not yet completed his evaluation of a particular drug category or established conditions under which products in that category are considered safe and effective?

The Committee takes the position that it is not a material fact to consumers that the FDA has not yet completed its work on a particular drug category. It would be possible to claim that the belief of consumers that the government has approved drug claims makes the lack of such approval a material fact. However, the required disclosure in advertising that the FDA has not approved a drug would probably suggest to consumers that the drug was not safe or effective. Consequently, the disclosure might itself be deceptive or unfair.

On the other hand, the Committee takes the position that the findings of an FDA panel and the tentative conclusions of the FDA that a drug or claim should be placed in Category II or Category III are material facts even though the FDA's final decision has not been made. The failure to disclose such findings, even though not final, is deceptive and unfair.

5. Does the failure to disclose this fact nullify important public policies?

As indicated above, the Committee takes the position that the failure to disclose the fact that the FDA has not completed its work does not nullify important public policies. We believe that public policy can

best be implemented by the FDA completing its evaluation.

We believe that the failure to disclose findings of an FDA medical panel and tentative conclusions of the FDA do nullify important public policies. The FDA's ultimate determinations have overwhelmingly been the same as the findings of the medical panels and the tentative conclusions of the FDA. Important public policies in conveying adequate information to the public which underly the Food, Drug and Cosmetic Act and the Federal Trade Commission Act require disclosure.

The Presiding Officer has designated as issues of fact three questions concerning whether alternative terminology is available for the FDA terminology which will convey the same meaning to consumers. 41 Fed. Reg. 39768, 39769. As indicated above, whether or not such terminology exists, the Committee believes that drug advertisers should not be permitted to vary the FDA-approved terminology. Otherwise, enforcement of the rule will become almost impossible.

In short, the Committee will clearly take a substantially different position than the staff on numerous important issues at this proceeding. It will urge a significantly stronger rule to protect consumers from OTC drug advertising. We believe that it is extremely important that this much stronger consumer position be represented.

b. The Participation of the Committee is Appropriate
and Necessary for the Representation of Consumers

Americans for Democratic Action is a nonprofit independent membership organization which was founded in 1947 and has a current membership of 75,000. It takes positions on numerous issues of public policy and works in the

Executive Branch, Congress, and through the media to have these positions adopted. ADA national policy is established at its annual convention in Washington which is attended by representatives of local chapters and members-at-large. A national board of directors, on which serves the Committee's current chairwoman, and a national executive committee govern between conventions.

Americans for Democratic Action is organized into chapters located throughout the country. The Greater Washington Chapter has a membership of 1200. The Consumer Affairs Committee is a committee of this chapter. However, it has been delegated by the national organization to represent it as well as the local chapter. The chairwoman of the Committee since its founding in 1970 has been Ms. Ann Brown who has been a leading consumer advocate throughout this period.

The Consumers Affairs Committee engages in surveys, investigations, and testimony on a broad range of consumer issues including consumer credit, rising energy costs, fair trade laws, food and non-food item pricing, food quality, unsanitary conditions in drug stores, markets, and restaurants, and occupational licensing board reform. Committee representatives have testified on consumer issues before the D.C. City Council, Metropolitan Washington Council of Governments, the Food and Drug Administration, and Congressional committees. Committee members have often addressed community groups and have appeared on numerous television and radio programs. The Committee's chairwoman is a member of the Advisory Board to the District of Columbia Office of Consumer Affairs. A complete list of Committee activities for 1975 is appended to this application.

The Committee has done considerable work in the drug field. It did a pricing survey on the cost of OTC drugs in the District of Columbia. It submitted comments to the FTC on retail prescription drug prices. It did a study on the lack of effectiveness of OTC diet pills which was presented to the FDA panel reviewing those drugs. It is now investigating vitamins and iron supplements. The Committee is also monitoring the monographs of the various FDA panels on the OTC drugs. A representative of the Committee will also be participating in an FDA-sponsored conference concerning the use of package inserts which are designed to provide consumers with information about prescription drugs.

The Committee would be a vigorous representative of the interests of consumers in this proceeding. As indicated above, the Committee urges adoption of a considerably stronger rule than does the staff. Throughout its history, the Committee has competently and forcefully advocated consumer interests in numerous fields.

Moreover, the Committee has had other experience in participating in proceedings before the Federal Trade Commission. It has received compensation from the FTC for participating in the proposed trade regulation rule proceedings on the advertising of ophthalmic goods and services and the funeral industry. It filed petitions with the FTC to regulate the use of discounts by grocery stores and to extend the regulation of specials by grocery stores to all stores. It submitted comments to the FTC on retail prescription drug prices in 1974 and testified before the FTC on warranties in 1975. It has presented testimony at oversight hearings on the FTC before the Senate Commerce Committee.

The Committee will be represented by Bruce J. Terris and Lonnie Von Renner. Their resumes are attached. They represented the Committee at five sets of FTC hearings in the rulemaking proceedings on the advertising of ophthalmic goods and services and the funeral industry. The Committee believes that they have demonstrated their qualifications to represent consumer interests strongly and effectively. The Committee therefore believes that its participation is necessary and important for the adequate representation of consumer interests.

c. The Committee Will Require Compensation
to Participate in These Proceedings

Consumers generally can obviously not provide the large amount of funds needed to participate in this proceeding. Individual consumers only spend small amounts of money for OTC drugs even though the total of all such purchases is enormous. The cost of soliciting funds for this purpose from individual consumers and the doubtfulness of success makes such an approach to financing completely impractical.

The Greater Washington chapter of ADA operates on an annual budget of \$5,000 to \$7,000 derived entirely from membership dues. This money is used mainly to pay a minimal salary to a Chapter Director and for miscellaneous printing and postage. The Consumer Affairs Committee receives no funds from the national organization; its only funding is an annual allotment from the local chapter of about \$2,000. This is used for operating expenses and to pay for the part-time services of one secretary. All other workers are volunteers.

It would not be feasible to solicit by mail or otherwise from ADA members the contributions necessary to support this representation. The

cost of representation far exceeds the contributions by members to all local chapter activities for an entire year. It would, in short, be impossible to participate effectively in the hearing without financial support to obtain the services which are necessary.

d. The Committee's Use of the Funds Sought

The Committee believes that the principal issues in this proceeding involve matters of public policy rather than designated issues of fact. More specifically, the basic issue is how the FDA's determinations concerning the safety and efficacy of OTC drugs made under the Food, Drug and Cosmetic Act for purposes of labeling should be applied by the FTC to advertising.^{1/}

We have discussed above the Committee's position concerning the substance of the proposed rule. We contend that the designated issues of fact concerning whether alternative terminology exists are not of crucial importance. Regardless whether such alternative terminology exists or not, problems of enforceability of any rule which permits alternative terminology to be used should lead to the conclusion that alternative terminology cannot be used without FDA approval. Similarly, such issues as whether claims not approved or disapproved by the FDA can be made, whether the FDA-required

^{1/} The Presiding Officer appears to have recognized the limited importance of factual issues in this proceeding by designating only three issues of fact, all of which are realted. 41 Fed. Reg. 39768, 39769.

warnings must be given, and whether notice must be given that drugs have been placed in Category III largely involve issues of policy rather than fact.

The Committee therefore does not propose to present testimony on the designated issues of fact. Instead, we will attempt to obtain and develop the testimony of witnesses from the FDA and the FDA panels concerning the purpose of the FDA monographs. More specifically, these witnesses would testify on such issues as whether the drug manufacturers can make label claims which were neither approved nor disapproved by the FDA, what is the purpose of the FDA disapproving only certain claims, whether manufacturers can vary the terminology on labels, whether the making of claims without the FDA-required warnings is deceptive or otherwise unfair to consumers, the kinds of warnings which are particularly important, the frequency and duration of court actions challenging FDA drug regulations, and the relationship between the regulation of labeling and advertising. The testimony would relate directly to the policy choices which the Commission will have to make. The testimony would be of particular importance since the Commission in this proceeding is effectuating the policies of the FDA pursuant to its authority under the Food, Drug and Cosmetic Act.

The Committee's hearing participation will consist of the direct examination of the FDA and FDA panel witnesses and of cross-examination which will be designed to obtain information which supports the positions of the Committee which we have described above.

The Committee will submit detailed written comments on the Presiding Officer's Summary of Record and the Staff Recommendations and Comments.

The comments will in effect be a brief in support of the substantially stronger rule as described above. The Committee's comments will utilize the hearing record on the designated issues of fact. However, as to the policy issues, the Committee will rely on both the hearing record and other materials such as the FDA monographs, and the legislative history and administrative and judicial interpretation of the meaning and purpose of the Food, Drug and Cosmetic Act.

e. The Relation of the Proposed Activities of
the Committee to the Proceedings

We have described above the relation of the proposed activities to the issues in the proceedings. ;

f. The Resumes of the Persons Who Will Participate

The resumes of Bruce J. Terris and Lonnie C. Von Renner are attached.

March 1976

RESUME

Bruce J. Terris

Office

1908 Sunderland Place, N.W.
 Washington, D.C. 20036
 (202) 785-1992

Home

1855 Shepherd Street, N.W.
 Washington, D.C. 20011

XXXXXXXXXXXXXX

Born: Detroit, Michigan

Birthdate: August 3, 1933

Education: A.B. Summa Cum Laude Harvard 1954, Phi Beta Kappa
 LL.B. Magna Cum Laude Harvard 1957, Article Editor,
 Harvard Law Review
 Post Graduate Georgetown University,
 Political Science

Professional Experience:

- 1957-1958 Attorney, Internal Security Division, Appellate
 Section, U.S. Department of Justice
- 1958-1959 Personal Assistant to Solicitor General, J. Lee
 Rankin, Department of Justice
- 1959-1965 Assistant to the Solicitor General, Department of
 Justice

Argued 16 Supreme Court cases on behalf of the
 government, including Wesberry v. Sanders (the
 Congressional redistricting case), Schneider v.
Rusk, and Kennedy v. Mendoza-Martinez (the con-
 stitutionality of two federal statutes relating
 to the expatriation of citizens)

Wrote or extensively reviewed approximately 70
 Supreme Court briefs, including Abel v. United
States (a Soviet espionage case), Baker v. Carr
 and the 1964 reapportionment cases, and a large
 number of civil rights and criminal cases

- 1965 Co-Chairman, National Conference on Law and Poverty
 sponsored by the Attorney General and the Director
 of the Office of Economic Opportunity -- this con-
 ference had a major part in starting OEO legal
 services for the poor

Professional Experience Cont.

- 1965-1967 Assistant Director, National Crime Commission -- supervised all work on police/community relations and early work on narcotics and dangerous drugs
- 1967 Consultant, Community Relations Service, Department of Justice, on police/community relations
- 1967 Consultant, RAND Corporation, on crime and the police
- 1967-1969 Consultant, University Research Corporation -- wrote proposals on training the poor to be lawyer's aides and relating to crime
- 1967-1968 Assistant to the Vice President for the District of Columbia -- worked on youth programs and the District's problems generally -- developed a detailed program to coordinate all activities of SBA, EDA, and other government agencies relating to minority business
- 1967-1968 Visiting Professor of Law, Catholic University (teaching two sections of constitutional law)
- 1968 Campaign staff of Senator Robert Kennedy, doing research on urban problems
- 1968-1969 Executive Director, Anacostia Assistance Corporation, a nonprofit organization of businessmen and others, to provide financial and technical assistance relating to economic development, housing and education to community groups in a poverty area of Washington, D.C. -- established a center for packaging black businesses, started a local development company, worked on beginning a community electronics plant (which never came to fruition), and wrote an elaborate proposal for a special impact grant
- 1969-1970 Co-founder and Senior Attorney, Center for Law and Social Policy, a nonprofit organization which represents consumers, the poor, and other usually unrepresented persons before federal administrative agencies and in the courts concerning consumer, environment, health, and other problems, and which has law students who come to the Center for five months and receive a semester's credit -- personally represented the California farm workers union in a suit to prevent Mexican nationals from entering the United States to work in the fields which was lost, 5-4, in the Supreme Court (Bustos v. Mitchell) --

Professional Experience Cont.

represented physicians at D.C. General Hospital and the District chapter of the Medical Committee on Human Rights in legal actions to improve the care at the hospital -- represented the American Public Health Association and the National Council of Senior Citizens in a suit which resulted in an order requiring the FDA to speed procedures to get several thousand ineffective drugs off the market (United States District Court for the District of Columbia) -- and represented Ralph Nader in proceedings before the Federal Trade Commission -- ran educational program

1970

Attorney, private practice, Washington, D.C. -- principally public interest law including environmental, consumer, and employment cases for such clients as the Sierra Club, Natural Resources Defense Council, National Wildlife Federation, Wilderness Society, National Audubon Society, Friends of the Earth, Izaak Walton League of West Virginia, Society for Animal Rights, New England Governors' Conference, fifteen cities and counties in Southern California, Citizens Association of Georgetown, Thomas Legal Defense Fund, and Congressman John M. Murphy of New York -- handled Sierra Club v. Fri, 412 U.S. 541 (1973) in which the Supreme Court held, by affirming the court of appeals, 4-4, that the Clean Air Act prohibited significant deterioration of air quality in clean air areas, Sierra Club v. Butz, 349 F.Supp. 934 (N.D. Cal. 1969), in which the court ordered the Forest Service, under the National Environmental Policy Act, to prepare environmental impact statements before allowing development of roadless areas in national forests, Upper Pecos Ass'n v. Peterson, in which, after the Supreme Court granted certiorari, the Department of Commerce and the Forest Service agreed to prepare an environmental impact statement before constructing a road in a national forest, Sierra Club v. Morton, 514 F.2d 856 (C.A. D.C. 1975), in which the court of appeals held that the standard Environmental Policy Act required preparation of a regional environmental impact statement for the entire coal development in the Northern Great Plains (the case is being reviewed by the Supreme Court), Sierra Club v. Morton, 395 F.Supp. 1187 (D.D.C. 1975), in which the district court held that the National Environmental Policy Act required preparation of an environmental impact statement on the

Professional Experience Cont.

annual budget of the National Wildlife Refuge System (the case is on appeal), Wilderness Society v. Hathaway, Civil No. 75-1004 (D.C.D.C. July 28, 1975), in which the district court held that the Department of Interior could not transfer game ranges out of control of the Fish and Wildlife Service; and West Virginia Division of the Izaak Walton League of America v. Butz, 522 F.2d 945 (C.A. 4, 1975) in which the court of appeals declared that the Forest Service practice of clearcutting in national forests violates the Organic Act of 1897.

Publications:

Author of article in November 1968 issue of Annals of the American Academy of Political Science, "The Role of the Police," reprinted in Violence in the Streets, edited by Shalom Endelman (Quadrangle Books, Chicago, 1969), The Ambivalent Force: Perspectives on the Police, edited by Abraham Niederhoffer and S. Blumberg (Ginn and Co., N.Y. 1970), and Livingston Hall, et al., Modern Criminal Procedure (West Publishing Co., 1969, 3d ed)

Author of article in February 1968 issue of New Jersey Municipalities, "The Responsibility of City Government; Win the War or Preserve the Peace"

Author of article in Winter 1968 issue of Legal Issue (Catholic University), "Black Versus Blue: The Crisis in Police Community Relations"

Author of chapter on "The Chain-Independent Retail Store" in Practicing Law Institute, The Local Economic Development Corporation: Legal and Financial Guidelines (GPO, 1970)

Speech at the National Institute on New Techniques in Regulating Business: The Ash Council's Recommendations, April 16-17, 1971, in 23 Administrative Law Review 445 (1971)

Author of Legal Services for the Elderly (National Council on the Aging, 1972)

Speech at the American Bar Association National Institute, November 1-2, 1973, in 7 National Resources Lawyer 217 (1974)

Author of article in July, August 1974 issue of Juris Doctor, "Hard times Ahead for Public Interest Law"

Volunteer Activities:

- 1960 Co-founder of a credit union in the slums, one of the first organized on a geographic basis
- 1961-1965 Co-founder and president of Better Homes, Inc., a nonprofit corporation with the purpose of buying and improving housing in slum areas in Washington (the corporation was the model for approximately half a dozen other similar non-profit organizations in Washington, and was the recipient of the first funds in Washington under the Federal Housing Act of 1961 for the rehabilitation of houses for low-income families)
- 1961-1966 Co-organizer of the 1500 Block Club, an organization of the people living in two blocks of the slums of Washington (the organization had a small community center, women's and men's clubs, and a large tutoring program)
- 1965- Co-founder of the Housing Development Corporation, now a member of the board -- wrote the proposal for the creation of this large, well-financed, nonprofit real-estate development corporation to provide housing for low-income families throughout the Washington area-- the first of its kind in the country, it formerly received over \$300,000 a year from the Office of Economic Opportunity - OEO used it as a model elsewhere -- it is now being disbanded
- 1965-1970 Co-founder and member of the board of Community Action and co-founder of Community Laundries - the former was a community center which provided services and organized the poor with OEO financing; the latter was a community owned, coin-operated laundry-- this was a demonstration project to test whether community centers would operate more effectively when they are next door to, and work integrally with, a community-owned business
- 1965-1966 Member, Coalition of Conscience, a coalition of organizations to promote civil rights in the District of Columbia
- 1967-1969 Founding member of the board of Capital East Foundation-- this was an organization devoted to community organization in the Capital East area which is financed by church groups and foundations

Volunteer Activities Cont.

- 1968-1972 Member and chairman, District of Columbia Democratic Central Committee
- 1968-1972 President and member of the Board, Project Share -- this was an organization which raised over \$100,000 in funds provided to non-profit housing for low and moderate income people
- 1968-1974 Member of the board, District of Columbia Home Rule Committee
- 1970-1971 Member of the board, Anacostia Citizens and Merchants, a broadly representative citizens group with the purpose of improving the Anacostia area
- 1971-1974 Member of Metropolitan Steering Committee, Self Determination for D.C.
- 1972 Member, Visiting Commission to the School of Architecture and City Planning, Howard University
- 1973-1976 Member of the board, Consumers United Group, Inc., a private corporation which sells group insurance
- 1974- Member of the board and Secretary, District of Columbia Development Corporation, a nonprofit corporation designed to develop housing for low and moderate income people and support business ownership by minorities
- 1974- Member of the board and Secretary, MODEDCO, a nonprofit corporation to provide funds for business ownership by minorities

EDWARD H. COMER
2753 Brandywine Street N.W.
Washington, D. C. 20008

DATE OF BIRTH: February 1, 1950
TELEPHONE: (Home) XXXX
(Work) (202) 254-8606

EDUCATION

University of Chicago	1967-1971	B.A. Russian History (Honors) Public Affairs
University of Pennsylvania Law School	1971-1974	J.D. (top 25% of class)

Indigent Prisoners' Litigation Project - 3rd year
Conducted suit in U.S. District Court on behalf of
indigent prisoner deprived of the right to counsel.

PROFESSIONAL EXPERIENCE

June 1974 - present: Attorney, Office of Exceptions and Appeals
Federal Energy Administration
Washington, D.C.

I am responsible for analyzing and recommending decisions on claims of serious hardship or gross inequity arising from the FEA allocation and price regulations on the sale of crude oil and refined petroleum products. I similarly consider Appeals of initial orders or determinations which are issued by other offices of the FEA. A primary responsibility in each case is to write the formal Decision and Order regarding each claim. I have completed over 90 cases during my tenure at the FEA. Additionally, I supervise new employees and train them in the substantive and procedural policies of the office.

Received Certificate of Superior Service, November, 1975.

Fall, 1973: Student Intern
Center for Law and Social Policy
Washington, D.C.

Analyzed whether the policies which the Tennessee Valley Authority followed in setting rates for the sale of electricity could be successfully altered through litigation in order to achieve consumer- and conservation- oriented objectives. Additionally researched the applicability of anti-trust statutes to the requirement, imposed by large credit card firms, that member stores refuse to offer price discounts for cash purchases.

Summer, 1973: Legal Intern
Health Law Project, Philadelphia, Pennsylvania

Researched whether the term "family planning services" as used in the Social Security Act included abortion services. Also researched material for "Blue Cross, What Went Wrong?" which was authored by Sylvia Law and the Health Law Project.

Summer, 1972 Legal Intern
Labor Relations Office, Government Printing Office
Washington, D.C.

Admitted to the Commonwealth of Pennsylvania Bar, December, 1974
Admitted to the District of Columbia Bar, August, 1975.

My other interests include outdoor activities such as jogging, swimming and bikeriding as well as films, plays and an eclectic reading list.

Draft Status: Conscientious Objector

References will be furnished upon request.

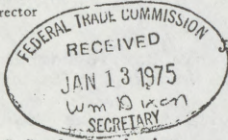
(Material referred to on p. 59.)

Lawrence
Inc. Finishing School and Model Agency

BEVERLY LAWRENCE
 Director

PHONE: 475-4980

STUDIO: HOTEL DuPONT
 WILMINGTON, DELAWARE 19801



January 8, 1975

Federal Trade Commission
 Washington, D. C.
 20580

To Whom It May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

Apparently, as a class, you have indicted, tried, and adjudged us all guilty of the alleged abuses against which you are proposing to enforce rules.

Why do you advertise for dissatisfied students as part of your "evidence" gathering program to discredit all proprietary vocational schools? Why do you not contemporaneously advertise for satisfied students?

Without our industry ever having had an opportunity to raise a voice in our defense, you have instigated a five-year ongoing program to discredit all vocational schools, making use of the public service facilities of all advertising media to compound this unfair practice, you have used our tax-paid dollars to put this program into effect. In other words, we are paying to put ourselves in a position where we have to pay to defend ourselves against unfair, discriminatory claims that do not apply to the vast majority of vocational schools.

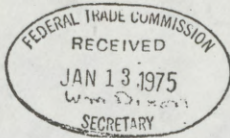
The restrictions you propose under Rule 438 will accomplish one thing effectively: in weeding out the few, you will plow under and permanently put out of business a considerable sector of the American small business community who do not deserve such unfair, discriminatory strangulation.

The American system decrees that we are innocent first. Not guilty first as you have apparently adjudged all vocational schools as a class. I welcome putting the onus where it belongs: on the unscrupulous operator, no matter what type of business, but I vigorously protest all vocational schools being classed as guilty or highly suspect, and who must all be ruled to death in order to route a few poor operators.

Very truly yours,

Beverly Lawrence Reeder
 Beverly Lawrence Reeder

BLR/jc



MODELING / FINISHING SCHOOL / AGENCY

January 7, 1975

To Whom It May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

Apparently, as a class, you have indicted, tried, and adjudged us all guilty of the alleged abuses against which you are proposing to enforce rules.

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The American system decrees that we are innocent first. Not guilty first as you have apparently adjudged all vocational schools as a class.

3128 Carlisle Street / Columbia, South Carolina 29205 / Telephone 254-5161





MODELING / FINISHING SCHOOL / AGENCY

I welcome putting the onus where it belongs: on the unscrupulous operator, no matter what type of business, but I vigorously protest all vocational schools being classed as guilty or highly suspect, and who must be ruled to death in order to route a few poor operators.

Respectfully yours,

Millie Lewis
 Millie Lewis, director
 Millie Lewis Studios



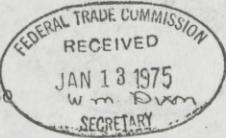
Carol Russell

SCHOOL of CHARM & MODELING

120 CHESTNUT STREET

SPRINGFIELD, MASSACHUSETTS 01103

Telephone (413) 781-6343



January 9, 1975

Federal Trade Commission
Washington, D. C. 20580

To Whom It May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

Apparently, as a class, you have indicted, tried, and adjudged us all guilty of the alleged abuses against which you are proposing to enforce rules.

Why do you advertise for dissatisfied students as part of your "evidence" gathering program to discredit all proprietary vocational schools? Why do you not contemporaneously advertise for satisfied students?

Without our industry ever having had an opportunity to raise a voice in our defense, you instigated a five-year ongoing program to discredit all vocational schools, making use of the public service facilities of all advertising media to compound this unfair practice, you have used our tax-paid dollars to put this program into effect. In other words, we are paying to put ourselves in a position where we have to pay to defend ourselves against unfair, discriminatory claims that do not apply to the vast majority of vocational schools.

The restrictions you propose under Rule 438 will accomplish one thing effectively: in weeding out the few, you will plow under and permanently put out of business a considerable sector of the American small business community who do not deserve such unfair, discriminatory strangulation.

The American system decrees that we are innocent first. Not guilty first as you have apparently adjudged all vocational schools as a class. I welcome putting the onus where it belongs: on the unscrupulous operator, no matter what type of business, but I vigorously protest all vocational schools being classed as guilty or highly suspect, and who must all be ruled to death in order to route a few poor operators.

Sincerely,

Carol Russell

Carol Russell
Director

cc: Donald Carbone

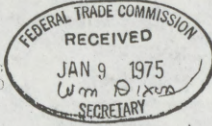
CR/cap

Member - Modeling Association of America



PLAZA 3

Federal Trade Commission
Washington, D. C. 20580



To Whom It May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

Apparently, as a class, you have indicted, tried, and adjudged us all guilty of the alleged abuses against which you are proposing to enforce rules.

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The American system decrees that we are innocent first. Not guilty first as you have apparently adjudged all vocational schools as a class. I welcome putting the onus where it belongs: on the unscrupulous operator, no matter what type of business, but I vigorously protest all vocational schools being classed as guilty or highly suspect, and who must all be ruled to death in order to route a few poor operators.

Sincerely,

Dorlene Hyatt

modeling and finishing sch

4343 north sixteenth street phoenix, arizona 85016 telephone 602/264-9703

PLAZA 3

Federal Trade Commission
Washington, D. C. 20580



To Whom It May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

Apparently, as a class, you have indicted, tried, and adjudged us all guilty of the alleged abuses against which you are proposing to enforce rules.

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The restrictions you propose under Rule 438 will accomplish one thing effectively: in weeding out the few, you will plow under and permanently put out of business a considerable sector of the American small business community who do not deserve such unfair, discriminatory strangulation.

The American system decrees that we are innocent first. Not guilty first as you have apparently adjudged all vocational schools as a class. I welcome putting the onus where it belongs: on the unscrupulous operator, no matter what type of business, but I vigorously protect all vocational schools being classed as guilty or highly suspect, and who must all be ruled to death in order to route a few poor operators.

Sincerely,

Helen Thomas

modeling and finishing school

4343 north sixteenth street phoenix, arizona 85016 telephone 602/264-9703

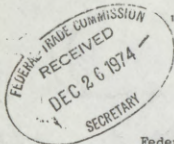
JOHN ROBERT

100311

POWERS SCHOOL

1237 EAST LAS OLAS BOULEVARD, FORT LAUDERDALE, FLORIDA 33301 - 525-2938

Dec. 20, 1974

Federal Trade Commission
Washington, D.C. 20580

To Whom It May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

Apparently, as a class, you have indicated, tried, and adjudged us all the guilty of the alleged abuses against which you are proposing to enforce rules.

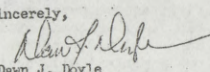
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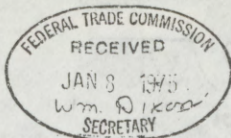
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Sincerely,


 Dawn J. Doyle
 Director



Federal Trade Commission
Washington, D. C. 20580

To Whom It May Concern:

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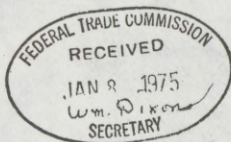
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Maizie Murphy Kline
220 Sunrise Ave -
Palm Beach,
Florida 33480

joan jewett
career school

January 6, 1975



Federal Trade Commission
 Washington, D.C. 20580

To Whom It May Concern:

As a proprietary vocational school owner and operator, I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

Apparently, as a class, you have indicted, tried, and adjudged us all guilty of the alleged abuses against which you are proposing to enforce rules.

The restrictions you propose under Rule 438 will accomplish one thing effectively: in weeding out the few, you will plow under and permanently put out of business a considerable sector of the American small business community, who do not deserve such unfair and discriminatory strangulation.

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This school has been in operation for nearly twenty years and enjoys an impeccable reputation. I am of the opinion that longevity due to a fine reputation is much more forceful than any FTC policy in terms of fairness to the consumer. The proposed ruling that this letter is in response to will most certainly bring to an end several small businesses such as this one.

It is most pathetic that in times of widespread ignorance the private school must comply with insensitive and expensive rulings that place education on a level apparently beneath that of a used car.

Very truly yours,

JOAN JEWETT CAREER SCHOOL

Drew Jewett
 Manager

r

MANNEQUIN
MANOR

fashion
merchandising
school

Federal Trade Commission
Washington, D. C. 20580



January 6, 1975

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Sincerely,

Jesse L. Simon
Jesse L. Simon
Vice President

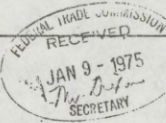
512 North Mesa / El Paso, Texas 79901 / (915) 533-6311



MANNEQUIN MANOR

512 N. MESA / EL PASO, TEXAS 79901

533-8108



January 3, 1975



Federal Trade Commission
Washington, D. C. 20580

To Whom it May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

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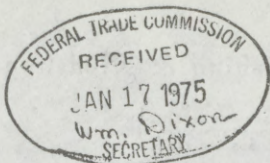
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Sincerely,

Mary Frances Simon (Mrs)
Owner & Director

Southwest's Finest School of Finishing, Fashion Merchandising and Modeling



Jan. 15 - 1975

Federal Trade Commission
Washington, D. C. 20580

To Whom It May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

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Sincerely,

Blanche B. Evans

Blanche B. Evans

Owner/Director

Blanche B. Evans

School of Charm and Modeling

4311 Audubon Place, Boise, Idaho 83705

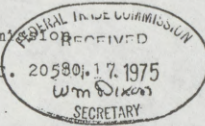


Eileen Seals Finishing & Modeling School

SUITE D
601 EAST NORTHERN LIGHTS
ANCHORAGE, ALASKA 99503
907-277-2425

Federal Trade Commission

Washington, D.C. 20580



To whom it may concern,

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 C.F.R Part 438.

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Eileen Seals Finishing & Modeling School

SUITE D
601 EAST NORTHERN LIGHTS
ANCHORAGE, ALASKA 99503
907-277-2425

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Eileen Seals
President.

Mable Bailey School of Modeling

1332 19th Street - Columbus, Georgia 31901

Telephone: 524-4295 - 96

January 14, 1975

RECEIVED

JAN 17 1975

The Director
SECRETARYFederal Trade Commission
Washington, D. C. 20580

To Whom It May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 433.

Apparently, as a class, you have indicted, tried, and adjudged us all guilty of the alleged abuses against which you are proposing to enforce rules.

Why do you advertise for dissatisfied students as part of your "evidence" gathering program to discredit all proprietary vocational schools? Why do you not contemporaneously advertise for satisfied students?

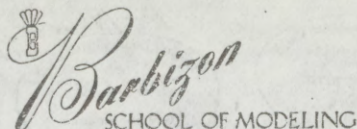
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The restrictions you propose under Rule 433 will accomplish one thing effectively: in weeding out the few, you will plow under and permanently put out of business a considerable sector of the American small business community who do not deserve such unfair, discriminatory strangulation.

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Sincerely,

*Mable Bailey*Mable Bailey
Owner and Director



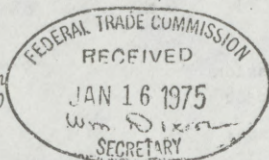
MONTAUK HIGHWAY & ROUTE 109

BABYLON, NEW YORK 11702

(516) 587-6100

LICENSED BY THE STATE OF NEW YORK

January 13, 1975

Federal Trade Commission
Washington, D.C. 20580

To Whom It May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

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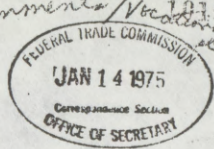
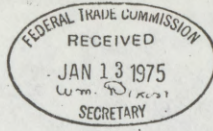
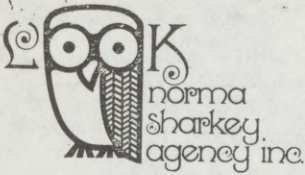
Sincerely,

M. Charles Rullo

M. Charles Rullo

CR:ab

DISTINCTIVE TRAINING IN FASHION AND PHOTOGRAPHIC MODELING SINCE 1939



41 East First Street · Dayton, Ohio 45402 · (513) 274-3971 · 222-5116

Federal Trade Commission
Washington, D.C. 20580

To Whom It May Concern:

As a proprietary vocational school owner and operator I take strenuous exception to the rules the Federal Trade Commission proposes for our small business industry under 16 CFR Part 438.

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AFFIDAVIT OF
ELWIN C. THIELE
IN OPPOSITION TO THE PROPOSED TRADE REGULATION RULES
OF THE
FEDERAL TRADE COMMISSION
RELATING TO
FUNERAL INDUSTRY PRACTICES

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

ELWIN C. THIELE, being first duly sworn on oath deposes and says:

That I reside at 1619 Jefferson Street N.E., Minneapolis, Minnesota, have lived in that community for thirty-two (32) years and am a Cabinet Maker.

That in the past four years, my family unfortunately had the need for the services of a funeral director on three different occasions.

The personal guidance and assistance he offered to our family did indeed help us to endure this tragic period in our lives. He was most helpful to us in explaining all the costs of the funeral and in detailing all the services of his funeral chapel.

We can see no need to change the direct personal funeral services, that reflect local customs and concerns, as offered by Washburn McReavy Funeral Chapels.

That in addition to the deaths in my family, I have attended at least thirty-five (35) wakes or funerals in my community.

That based upon my personal experiences with funeral directors, as well as other associations with death, funerals and the bereaved, I am aware of no instances of any unlawful or unethical practices of funeral directors.

That I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral licenses in that I have never even heard of a complaint against a funeral home or a funeral director.

That I believe the regulation of Minnesota funeral homes should be accomplished locally, and to meet local customs, mores and religious attitudes.

That I believe that information about funeral costs, merchandise, and services is readily available to the public in the State of Minnesota.

That I am thoroughly satisfied with funeral service as practiced in my community and believe that Federal regulation is unnecessary, an improper infringement on the right of independent businessmen, and an improper infringement on a private matter between a bereaved family and its choice of a professional consultant.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the right to appear at said hearing and present oral testimony within the purview of this written Statement of Testimony.

FURTHER AFFIANT SAYETH NOT.

DATED this 14th day of April, 1976.

Subscribed and sworn to before me
this 14th day of April, 1976.

J. Richard Breen
NOTARY PUBLIC J. RICHARD BREEN

Notary Public, Hennepin County, Minn.
My Commission Expires Nov. 25, 1978.

Elwin C. Thiele
ELWIN C. THIELE

AFFIDAVIT OF
 HAL MCINTYRE
 IN OPPOSITION TO THE PROPOSED TRADE REGULATION RULES
 OF THE
 FEDERAL TRADE COMMISSION
 RELATING TO
 FUNERAL INDUSTRY PRACTICES

264

STATE OF MINNESOTA)
) ss.
 COUNTY OF HENNEPIN)

HAL MCINTYRE, being first duly sworn on oath deposes and says:

That he resides at 4600 Douglas Avenue South, Minneapolis, Minnesota, has lived in that community for fifty (50) years, and by occupation is a Special Agent with the Northwestern Mutual Life Insurance Company.

That in the past few years I have lost my father, father-in-law and uncle where I have had the responsibility of arranging for the funerals. In all three instances, my relationship with the three different funeral directors were on a very high level -- at no time was I pressured in any way. All costs were in writing for the services I requested. In fact, one mortician suggested that due to the financial situation of my deceased uncle, I should select a lower priced casket. I feel that I was served honestly in all respects.

While none of us like to think of our own death or the death of a family member, we know it must ultimately occur, and it is a comfort to know that there are reliable morticians that will act in a professional capacity and with understanding when that time comes.

I know four morticians personally -- I know the service organizations they belong to and the professional manner in which they conduct their business. Being in the life insurance business and providing the funds for funerals, etc. to beneficiaries, I do not know of one case where there was a "rip-off" for the mortician's personal gain.

That based upon my personal experiences with funeral directors, as well as other associations with death, funerals and the bereaved, I am aware of no instances of any unlawful or unethical act by a funeral director.

That I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral licenses in that I have never even heard of a complaint against a funeral home or a funeral director.

That I firmly believe that whatever regulations are needed (and I assume that this business is no different in this respect from other businesses) should remain at the local level and not under Federal control.

That I believe that information about funeral costs, merchandise, and services is readily available to the public in the State of Minnesota.

That I am thoroughly satisfied with funeral service as practiced in my community and believe that Federal regulation is unnecessary and an improper infringement on the right of independent businessmen.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning on May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the

right to appear at said hearing and present oral testimony within the purview of this written Statement of Testimony.

FURTHER AFFIANT SAYETH NOT.

DATED this 14th day of April, 1976.

Hal McIntyre
HAL MCINTYRE

Subscribed and sworn to before me this
14th day of April, 1976.

J. Richard Baker
NOTARY PUBLIC

J. RICHARD BAKER
Notary Public, Hennepin County, Minn.
My Commission Expires Nov. 29, 1978.

AFFIDAVIT OF
MILDRED A. WADE
IN OPPOSITION TO THE PROPOSED TRADE REGULATION RULES
OF THE
FEDERAL TRADE COMMISSION
RELATING TO
FUNERAL INDUSTRY PRACTICES

265

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

MILDRED A. WADE, being first duly sworn on oath deposes and says:

That I reside at 9710 - 37th Place North, Minneapolis, Minnesota, have lived in that community for forty-six (46) years, and am a Housewife.

That I was served by the Washburn-McReavy Funeral Home on the death of my husband, Roy L. Wade who died suddenly on June 28, 1975.

That I am unalterably opposed to the Trade Practice Rules for all morticians and mortuaries in the United States which the Federal Trade Commission is attempting to establish. I feel that I can speak first hand to the service and treatment which I received from my Funeral Director.

The service I received was beyond reproach. Every arrangement was fulfilled to the last detail. Mr. McReavy explained all of the options available to me and he was honest with me in all of our dealings.

The death of a loved one is a very traumatic experience and the service which I received from my funeral director in the recent death of my husband was one of the key factors in my being able to cope with that sad experience.

That I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral licenses in that I have never even heard of a complaint against a funeral home or a funeral director. There simply is no just reason why this authority should be transferred from the State level to an agency of the Federal Government.

That I believe the regulation of Minnesota funeral homes should be accomplished locally, and to meet local customs, mores and religious attitudes.

That I believe that information about funeral costs, merchandise, and services is readily available to the public in the State of Minnesota.

That I am thoroughly satisfied with funeral service as practiced in my community and believe that Federal regulation is unnecessary, an improper infringement on the right of independent businessmen, and an improper infringement on a private matter between a bereaved family and its choice of a professional consultant.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the right to appear at said hearing and present oral testimony within the purview of this written Statement of Testimony.

FURTHER AFFIANT SAYETH NOT.

DATED this 15th day of

April, 1976. Mildred A. Wade

Subscribed and sworn to before me this
15th day of April, 1976.

J. Richard Baken
NOTARY PUBLIC

J. RICHARD BAKEN
Notary Public, Hennepin County, Minn.
My Commission Expires Nov. 29, 1978.

AFFIDAVIT OF
JOHN P. MESSER
IN OPPOSITION TO THE PROPOSED TRADE REGULATION RULES
OF THE
FEDERAL TRADE COMMISSION
RELATING TO
FUNERAL INDUSTRY PRACTICES

266

STATE OF MINNESOTA)
) ss.
COUNTY OF FARIBAUT)

JOHN P. MESSER, being first duly sworn on oath deposes and says:

That I reside at Blue Earth, Minnesota, have lived in that community for eighteen (18) years, and am a County Veteran Service Officer.

That in addition to the deaths in my family, I have attended funerals and/or assisted families of deceased veterans in part of funeral arrangements in approximately nine-hundred (900) instances.

During my twenty-one (21) years as Faribault County Veterans Service Officer, I have worked closely with all of the Funeral Homes in Faribault County, as well as ones in Northern Iowa and surrounding counties in Minnesota, and found them to be very sympathetic to the families that have lost loved ones. As I have assisted many families in making arrangements I can honestly say that I have never evidenced any cases of price gouging or high pressure tactics. Nearly all of the families that I have assisted over the many years that I have been Service Officer remark to me that they were very satisfied with the Funeral Homes and Directors, in that they were not pressured into buying a service that they could not afford.

As a veteran service officer, I have had personal contacts with many funeral homes in this area and I can find no basis for violation of any State regulation.

I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral licenses in that I have heard of only one (1) complaint, which was investigated by the Board of Health and was satisfactorily resolved.

Further, I believe the regulation of Minnesota funeral homes should be accomplished locally, and to meet local customs, mores and religious attitudes. I believe that information about funeral costs, merchandise and services is readily available to the public in the State of Minnesota.

I am thoroughly satisfied with funeral service as practiced in my community and believe that Federal regulation is not only unnecessary but is an improper infringement on the right of independent businessmen.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the right to appear at said hearing and present oral testimony within the purview of this written Statement of Testimony.

FURTHER AFFIANT SAYETH NOT.

DATED this 15th day of April, 1976.

Subscribed and sworn to before me
this 15th day of April, 1976.

John P. Messer
JOHN P. MESSER

Francis S. Clarke
NOTARY PUBLIC

FRANCIS S. CLARKE
Notary Public - Faribault Co., Minn.
My Commission Expires Sept. 7, 1978

AFFIDAVIT OF
R. F. FOLEY
IN OPPOSITION TO THE PROPOSED TRADE REGULATION RULES
OF THE
FEDERAL TRADE COMMISSION
RELATING TO
FUNERAL INDUSTRY PRACTICES

267

STATE OF MINNESOTA)
) ss.
COUNTY OF ROSEAU)

R. F. FOLEY, being first duly sworn on oath deposes and says:

That he resides at 701 North Main Avenue, Roseau, Minnesota, has lived in that community for fifteen (15) years and by occupation is a Banker.

That he has been served by the Helgeson Funeral Chapels on the following occasions:

Irene Fikkan	Executor of Estate	November 13, 1973
Milo Peterson	Executor of Estate	November 1, 1972
Frank Kroska	Executor of Estate	November, 1964

A number of other estates have been handled by me as Executor or as Administrator.

That in addition to the deaths in my family, I have attended at least fifty (50) wakes or funerals in my community.

That based upon my personal experiences with funeral directors, as well as other associations with death, funerals and the bereaved, I am aware of no instances of unauthorized embalming; removals without authorization; refusal to release bodies; misrepresentation of cash advances; legal, health or religious requirements; the effect of embalming, caskets or vaults as to natural decomposition or to airtightness or watertightness; or cemetery vault requirements; disparaging or defaced merchandise; discouraging concern about prices; concealment of price information or alternatives to earth burial; required tie-in purchases; restrictions on pre-need counseling; harassment of memorial societies or discouraging the use of immediate disposal; pressures to purchase expensive merchandise.

That I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral licenses in that I have never even heard of a complaint against a funeral home or a funeral director.

That I believe the regulation of Minnesota funeral homes should be accomplished locally, and to meet local customs, mores and religious attitudes.

That I believe that information about funeral costs, merchandise, and services is readily available to the public in the State of Minnesota.

That I am thoroughly satisfied with funeral service as practiced in my community and believe that Federal regulation is unnecessary.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the right to appear at said hearing and present oral testimony within the purview of this written Statement of Testimony.

FURTHER AFFIANT SAYETH NOT.

DATED this 13th day of April, 1976.

Subscribed and sworn to before me
this 12 day of April, 1976.

ROSEAU CITY, MINNESOTA
NOTARY PUBLIC

R. F. Foley
R. F. FOLEY

AFFIDAVIT OF
THEODORE M. LEE
IN OPPOSITION TO THE PROPOSED TRADE REGULATION RULES
OF THE
FEDERAL TRADE COMMISSION
RELATING TO
FUNERAL INDUSTRY PRACTICES

STATE OF MINNESOTA)
) ss.
COUNTY OF WRIGHT)

259

THEODORE M. LEE, being first duly sworn on oath deposes and says:

That I reside in Cokato, Minnesota where I serve as Pastor of Knapp, Grace & Redeemer Lutheran Church, a position which I have held for eleven (11) years.

That I am a graduate of Augustana Theological Seminary and have previously served my church in the following locations:

PLACE	DATES	
St. Luke's Lutheran Church, Garfield, Minn.	1961-1965	Served three
Zionsborg Lutheran Church, Evansville, Minn.	1961-1965	(3) parishes in
Bethany Lutheran Church, Williams, Minn.	1955-1961	and around Bruno,
Ebenezer Lutheran Church, Roosevelt, Minn.	1955-1961	Minn. 1948-1955.
Mt. Carmel Lutheran Church, RFD, Roosevelt, Minn.	1955-1961	

That I have conducted approximately one-hundred seventy-five (175) funerals during my ministry and have also been involved with the arrangement of approximately six (6) funerals for my own family.

That in all of my some over twenty-seven (27) years as a minister of the gospel and in all of my working together with funeral directors in that period of time, I have not a single complaint to make. To the contrary, I have always felt that there has been a good working relationship with the funeral directors in the areas and communities where I have served as a pastor.

That based upon my personal experiences with funeral directors, as well as other associations with death, funerals and the bereaved, it is my opinion that none of the proposed F.T.C. rules pertain to any funeral director I have come in contact with. They have all been above reproach and have conducted themselves in a very professional manner and have served their families well.

That I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral licenses in that I have never even heard of a complaint against a funeral home or a funeral director.

That I believe the regulation of Minnesota funeral homes should be accomplished locally, and to meet local customs, mores and religious attitudes.

That I believe that information about funeral costs, merchandise, and services is readily available to the public in the State of Minnesota. I have attended Funeral Director - Clergymen seminars and found them to be very helpful. The funeral home of George E. Peterson is always open for inspection and his services for consultation.

That I am thoroughly satisfied with funeral service as practiced in my community and believe that Federal regulation is unnecessary, an improper infringement

on the right of independent businessmen, and an improper infringement on a private matter between a bereaved family and its choice of a professional consultant.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the right to appear at said hearing and present oral testimony within the purview of this written Statement of Testimony.

FURTHER AFFIANT SAYETH NOT.

DATED this 31st day of March, 1976.

Theodore M. Lee
THEODORE M. LEE

Subscribed and sworn to before me this
31 day of March, 1976.

Janet E. Menke
NOTARY PUBLIC
JANET E. MENKE
Notary Public, Wright County, Minn.
My Commission Expires Nov. 10, 1978.

AFFIDAVIT OF
HALL L. SHELLA
IN OPPOSITION TO THE PROPOSED TRADE REGULATION RULES
OF THE
FEDERAL TRADE COMMISSION
RELATING TO
FUNERAL INDUSTRY PRACTICES

258

STATE OF MINNESOTA)
COUNTY OF Pipestone) ss.

HALL L. SHELLA being first duly sworn on oath deposes and says:

That he resides at Jasper, Minnesota and has lived in that community for forty-three (43) years, and by occupation is an Office Manager for Home Light and Power Company.

That he has been served by the Foster Funeral Chapel, Jasper, Minnesota on the following occasions:

NAME	RELATIONSHIP	DATE OF DEATH
Edmund Shella	Father	November 26, 1975
Otto Krapf	Father-in-Law	March 5, 1976

That in addition to the deaths in my family, I have attended at least five (5) or (6) wakes or funerals in my community.

That based upon my personal experiences with funeral directors, as well as other associations with death, funerals and the bereaved, I am aware of no instances of any pressures, misrepresentations, concealment of price information or any other unethical practice.

That in my own experiences in arranging funerals, etc., the funeral director explained service, caskets, vaults and price, then left so the family could be alone and make their own decisions as to what they as a family wanted without any pressure from the funeral director.

That I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral licenses in that I have never even heard of a complaint against a funeral home or a funeral director.

That I believe the regulation of Minnesota funeral homes should be accomplished locally, and to meet local customs, morals and religious attitudes.

That I believe that information about funeral costs, merchandise, and services is readily available to the public in the State of Minnesota.

That I own and operate with my brother one of the smallest privately owned electric utilities in the United States. I know what is to be put under rules and regulations both by the State of Minnesota and the Federal Government. I'm fighting for my business life. If the State and the Federal Government can't agree to who rules and regulates my business pretty soon, I won't be in business very long. Our business was started by my father 58 years ago and I think that I

know what is best for my customers more so than the State or the Federal Government.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the right to appear at said hearing and present oral testimony within the purview of this written Statement of Testimony.

FURTHER AFFIANT SAYETH NOT.

DATED this 30th day of MARCH, 1976.

HAL L. SHELLA
HAL L. SHELLA

Subscribed and sworn to before me this
31st day of March, 1976.

PAUL M. [Signature]
NOTARY PUBLIC

Notary Public
PAUL M. [Signature]
Jasper, Indiana
My Commission Expires 12-27-77

STATE OF MINNESOTA)
) ss.
COUNTY OF LYON)

That I reside in Marshall, Minnesota where I serve as Pastor of Christ United Presbyterian Church, a position which I have held for two and one-half (2½) years.

United Presbyterian Church, Albia, Iowa - January, 1968 - February, 1970.
East End Presbyterian Church, Ottumwa, Iowa - February, 1970 - July, 1973.
Christ United Presbyterian Church, Marshall, Minnesota - August, 1973 - Pres.

* That based upon my personal experiences with funeral directors, as well as other associations with death, funerals and the bereaved, I am aware of no instances of unauthorized embalming; removals without authorization; refusal to release bodies; misrepresentation of cash advances; legal, health or religious requirements; the effect of embalming, caskets or vaults as to natural decomposition or to airtightness or watertightness; or cemetery vault requirements; disparaging or defaced merchandise; discouraging concern about prices; concealment of price information or alternatives to earth burial; required tie-in purchases; restrictions on pre-need counseling; harassment of memorial societies or discouraging the use of immediate disposal; pressures to purchase expensive merchandise.

That I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral licenses in that I have never even heard of a complaint against a funeral home or a funeral director.

That I believe the regulation of Minnesota funeral homes should be accomplished locally, and to meet local customs, mores and religious attitudes.

That I believe that information about funeral costs, merchandise, and services is readily available to the public in the State of Minnesota.

That I am thoroughly satisfied with funeral service as practiced in my community and believe that Federal regulation is an improper infringement on a private matter between a bereaved family and its choice of a professional consultant.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the right to appear at said hearing and present oral testimony within the purview

of this written Statement of Testimony.

FURTHER AFFIANT SAYETH NOT.

DATED this 7th day of April, 1976.



Stephen E. Morse
STEPHEN E. MORSE

Subscribed and sworn to before me this
7 day of April, 1976.

[Signature]
NOTARY PUBLIC

AFFIDAVIT OF
CLIFFORD M. WITTSTRUCK
IN OPPOSITION TO THE PROPOSED TRADE REGULATION RULES
OF THE
FEDERAL TRADE COMMISSION
RELATING TO
FUNERAL INDUSTRY PRACTICES

256

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

CLIFFORD M. WITTSTRUCK, being first duly sworn on oath deposes and says:

That I reside in Bloomington, Minnesota (8423 Columbus) where I serve as Minister of Portland Avenue United Methodist Church; that I have been a practicing minister for thirty-five (35) years.

That I am a graduate of Dakota Wesleyan University, Mitchell, South Dakota and Drew Theological Seminary, Madison, New Jersey, and have previously served my church in the following locations:

PLACE	DATES
Housatonic, Massachusetts	1940-1942
Philmont, New York	1942-1946
Ardsley, New York	1946-1949
Lakefield, Minnesota	1949-1958
Pipestone, Minnesota	1958-1967
Montevideo, Minnesota	1967-1974
Bloomington, Minnesota	1974-----

That I have conducted approximately six-hundred (600) funerals during my ministry and have also been involved with the arrangement of approximately five (5) funerals for my own family.

That based upon my personal experiences with funeral directors, as well as other associations with death, funerals and the bereaved, I am aware of no instances of any violations of law or regulations, high pressure sales tactics, misrepresentations as to funeral merchandise or services, or any other matters contained in the proposed rules of the F.T.C. That the few complaints that I have received from parishioners have involved crude or calloused attitudes rather than the issues presented by the F.T.C. staff.

That I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral license.

That I believe that information about funeral costs, merchandise, and services is readily available to the public in the State of Minnesota.

That I have attended seminars sponsored by morticians and I have taken Confirmation classes on tours of mortuaries for a number of years.

Why not give the average citizen the credit of some intelligence? Word does get around as to who renders excellent service at a reasonable price. People do have a choice of mortuaries. Morticians do not have a monopolistic control as some big industries do. Why not get to work on the oil companies and other big industries whose corruption of our government and other governments is well documented.

We do not need Federal control of our mortuaries or morticians. If the

people have the information, (and they have some obligation on their own part to be informed) I believe can make their own decisions, as to which mortician and what kind of funeral they want.

That I am thoroughly satisfied with funeral service as practiced in my community and believe that Federal regulation is totally unnecessary. That in my opinion we already are engulfed in a sea of paper work, - forms on forms - files on top of files, which serve little value other than to make work for more political appointees. Also have we not learned that more laws, more policemen, more guns, are not the answer. THOSE WHO ARE INCLINED TO DO SO, WILL ALWAYS FIND WAYS TO CIRCUMVENT THE LAW, EITHER BY DECEIT, OR FURTHER CORRUPTION OF PUBLIC OFFICIALS. Let us leave this area of control to the states and to the good judgment of the people.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the right to appear at said hearing and present oral testimony within the purview of this written Statement of Testimony.

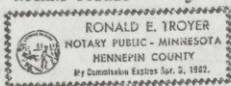
FURTHER AFFIANT SAYETH NOT.

DATED this 31st day of March, 1976.

Clifford M. Wittstruck
CLIFFORD M. WITTSTRUCK

Subscribed and sworn to before me this
31st day of March, 1976.

Ronald E. Troyer
NOTARY PUBLIC



AFFIDAVIT OF
 RUSSELL A. PETERSON
 IN OPPOSITION TO THE PROPOSED TRADE REGULATION RULES
 OF THE
 FEDERAL TRADE COMMISSION
 RELATING TO
 FUNERAL INDUSTRY PRACTICES

251

STATE OF MINNESOTA)
) ss.
 COUNTY OF WRIGHT)

RUSSELL A. PETERSON, being first duly sworn on oath deposes and says:

That I reside in Cokato, Minnesota where I serve as Pastor of Cokato Evangelical Lutheran Church, a position which I have held for fourteen (14) years.

That I am a graduate of Augustana Theological Seminary and have previously served my church in the following locations:

PLACE	DATES
East Chain Lutheran Church, Route 1, Blue Earth, Minnesota	1955 to Jan. 1962
Salem Lutheran Church, Elmore, Minnesota (Above served in addition to East Chain)	1959 to 1962

* That in the twenty years I have served as a parish pastor and have counseled with families at time of death, I have never heard a complaint about the ethics or practices of the funeral directors involved. There have been words of gratitude expressed for the services they have rendered. During these years I have officiated at almost three hundred (300) funerals. There have been at least twelve (12) different funeral homes involved. I feel the State Licensing Agency has done a very effective job in the checking of funeral homes in our State.

That I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral licenses in that I have never even heard of a complaint against a funeral home or a funeral director.

That I believe the regulation of Minnesota funeral homes should be accomplished locally, and to meet local customs, moves and religious attitudes.

That I believe that information about funeral costs, merchandise, and services is readily available to the public in the State of Minnesota. I have attended Funeral Director - Clergyman conferences and have found them very beneficial. George E. Peterson has also conducted seminars in this community and his funeral home is always available for tours and he himself is available for consultation on pre-need services.

That I am thoroughly satisfied with funeral service as practiced in my community and believe that Federal regulation is unnecessary, an improper infringement on the right of independent businessmen and an improper infringement on a private matter between a bereaved family and its choice of a professional consultant.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the right to appear at said hearing and present oral testimony within the

purview of this written Statement of Testimony.

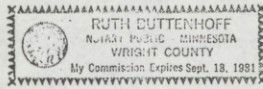
FURTHER AFFIANT SAYETH NOT.

DATED this 31st day of March, 1976.

Russell A. Peterson
RUSSELL A. PETERSON

Subscribed and sworn to before me this
31st day of March, 1976.

Ruth Buttenhoff
NOTARY PUBLIC



AFFIDAVIT OF
 REVEREND HENRY E. GESSNER
 IN OPPOSITION TO THE PROPOSED TRADE REGULATION RULES
 OF THE
 FEDERAL TRADE COMMISSION
 RELATING TO
 FUNERAL INDUSTRY PRACTICES

STATE OF MINNESOTA)
) ss.
 COUNTY OF HENNEPIN)

REVEREND HENRY E. GESSNER, being first duly sworn on oath deposes and says:

That I reside in Richfield, Minnesota where I serve as Pastor of St. Peter's Catholic Church, a position which I have held for two (2) years.

That I am a graduate of Immaculate Conception Seminary, Darlington, New Jersey and have previously served my church in the following locations:

Seton Hall University, South Orange, New Jersey	1947-1959
St. Mary's Church, Waverly, Minnesota	1959-1965
St. Therese Church, Deerhaven, Minnesota	1965-1969
Sacred Heart Church, Rush City, Minnesota	1969-1974

That I have conducted approximately five-hundred (500) funerals during my ministry and have also been involved with the arrangement of approximately two (2) funerals for my own family or for parishioners.

That based upon my personal experiences with funeral directors, as well as other associations with death, funerals and the bereaved, I am aware of no instances of any illegal or unethical conduct by funeral directors. On the contrary, I have found them to be compassionate and concerned. That I have never observed any of the practices addressed by the proposed rules.

That I believe the Minnesota State Board of Health does an excellent job of regulating funeral homes and funeral licenses in that I have never even heard of a complaint against a funeral home or a funeral director.

That I believe the regulation of Minnesota funeral homes should be accomplished locally, and to meet local customs, mores and religious attitudes.

That I believe that information about funeral costs, merchandise, and services is readily available to the public in the State of Minnesota.

That I am thoroughly satisfied with funeral service as practiced in my community and believe that Federal regulation is unnecessary, an improper infringement on the right of independent businessmen and an improper infringement on a private matter between a bereaved family and its choice of a professional consultant.

This document is a Statement of Testimony to be given as part of the hearing on the funeral service trade practice rules to be held in Chicago beginning May 10, 1976. It should be understood I am hereby requesting the privilege and asserting the

(Material referred to on p. 62.)

BACKGROUND STATEMENT
PREPARED AT THE REQUEST OF
SUBCOMMITTEE STAFF BY
STEVEN D. NEWBURG-RINN
STAFF ATTORNEY
FEDERAL TRADE COMMISSION

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON THE
PUBLIC PARTICIPATION IN FEDERAL AGENCY PROCEEDINGS ACT
OF 1977
S.270
JUNE 21, 1977

These remarks represent the views of a Federal Trade Commission Staff member. They are not intended to be, and should not be so construed as, representative of the views of the Federal Trade Commission or any Commissioner.

My name is Steven D. Newburg-Rinn. I am a senior attorney in the Bureau of Consumer Protection of the Federal Trade Commission. Since October 1975, I have served as lead attorney in the Federal Trade Commission's Rulemaking Proceeding for the Hearing Aid Industry. In that capacity, I am intimately familiar with the application of the Magnuson-Moss Federal Trade Commission Improvement Act and the Commission's rules promulgated pursuant thereto as relates to rulemaking, in general, and am personally familiar with the treatment accorded witnesses in the Hearing Aid Rulemaking Proceeding in particular.

I have read the testimony presented by Mr. Curt Clinkscales on May 9, 1977, in opposition to S.270. Since much of that testimony concerns alleged actions of FTC staff, it is important that the Committee be provided with a factual discussion of the various contentions made by Mr. Clinkscales.

This statement does not address Mr. Clinkscales' reasons for opposing any sort of public participation program. The Commission has already addressed this general issue in detail,¹ and the purpose of this statement is solely to discuss the various factual assertions made by Mr. Clinkscales with respect to the

¹ See Testimony of Calvin J. Collier before the Subcommittee on Administrative Practices and Procedures of the Committee on the Judiciary, U.S. Senate, on the Public Participation in Government Proceedings Act of 1977, S.270, Feb. 3, 1977.

Hearing Aid Rulemaking Proceeding.² I will address them in the order presented by Mr. Clinkscales.³

1. FTC Proceedings were unfair because the National Alliance of Senior Citizens was not asked to appear and in fact had to ask to appear to testify.⁴

To the best of staff's knowledge, prior to the June 29, 1976, when our San Francisco Regional Office received his letter requesting to testify, no one at the Federal Trade Commission connected with the Hearing Aid Rulemaking Proceeding knew of the existence of the National Alliance. In Washington, out of which the Hearing Aid Rulemaking staff operated, staff did not know of the existence of Mr. Clinkscales or his organization until it received his prepared statement on July 14, 1976, from our San Francisco office.

It has always been the view of the staff of the Hearing Aid Rulemaking Proceeding that the widest public participation was desirable. Had staff known of Mr. Clinkscales' organization,

² Reference is made to the draft transcript of that session, designated as pp. 11-EJC-Job Sest.-Doc. through 18-EJC-Job Sest.-Doc.

³ For the sake of a full understanding by the Committee of Mr. Clinkscales' testimony before it, appended hereto as Attachment A is a copy of his testimony before the FTC. (Tr. 10619-10689). Attachment B is Hearing Exhibit 170, a newspaper article relating to Mr. Clinkscales and his organization, while Attachment C is Hearing Exhibit 171, a copy of the first edition of The Senior Independent, a quarterly newspaper of the National Alliance of Senior Citizens. Both were submitted during the FTC proceedings.

⁴ "I requested permission to testify, never having been asked to appear." (12-EJC).

we would have placed his name on our hearing aid mailing list (as it now is due to his appearance at the proceeding), he would have received notice of the proceeding and an invitation to participate, and we would have welcomed his earlier participation in this proceeding.

From the outset, the staff of the Federal Trade Commission had made a conscientious effort to insure wide public participation in the Hearing Aid Rulemaking Proceeding. In addition to complying with the legal requirement of publishing the "initial" notice of the proceeding in the Federal Register (June 24, 1975, at 40 Fed. Reg. 26646), staff mailed out nearly 10,000 copies of that notice together with an invitation to participate to all persons whom it believed might be interested in the proceeding. This included copies to several members of Congress, some 4,500 hearing aid sellers, approximately 4,500 audiologists, all known hearing aid manufacturers in this country, all state attorneys general and consumer protection offices, all hearing aid seller licensing boards, every group that staff was able to find that might be interested in the proceeding (including groups representing the elderly), and consumers who had indicated an interest in hearing aid problems. Furthermore, on December 30, 1975, the "final" notice for the proceeding (which set dates and procedures for oral hearings) was published in the Federal Register (40 Fed. Reg. 59746). In addition, several publications, including the Hearing Aid Journal and the AARP Monthly Newsletter to its membership, contained announcements of the pendency of these proceedings.

2. The FTC funded and condoned misconduct by the National Council of Senior Citizens.⁵

Mr. Clinkscales made various accusations of misconduct by the National Council of Senior Citizens ("NCSC") relating to its Miami activities. Staff believes that Mr. Marlin of NCSC has answered the specifics of these accusations in his May 16, 1977, letter to Senator Abourezk.

The role of the FTC staff in regulating the performance of a party once a compensation grant has been made is limited. The staff could and indeed should intervene if a compensated party or any other party is engaged in illegal or clearly dishonest activity (or, of course, acting outside the scope of the compensation grant for a compensated party), but no closer degree of supervision could take place without seriously interfering with the properly independent role of a party receiving compensation to represent a point of view which would be unrepresented or inadequately represented without FTC funding.

It should be noted that the oral FTC hearings provided a forum for NCSC's activities to be explored by industry counsel through cross-examination, and NCSC's representatives

⁵ "I was not prepared to learn of the incredible tactics of the NCSC in their attempt to destroy the reputations of all hearing aid specialists to achieve their end." (12-EJC). NCSC's Miami newspaper article was "playing one's case before the media in a true fishing expedition . . . the worst possible way to gain truth." (12-EJC). And finally, that NCSC was the source of the Miami newspaper statements. (13-EJC).

were in fact subjected to vigorous cross-examination. The industry also has had the opportunity to submit rebuttal to NCSC's presentation at the hearings.

3. The Federal Trade Commission just accepted the NCSC materials without challenging the veracity of the data in the light of the methodology NCSC used.⁶

The Commission has not as yet made any analysis of the veracity of NCSC's data, let alone accepted it without challenge.

Magnuson-Moss, as implemented by the Commission's rules, provides for a) examination and cross-examination by group representatives representing all viewpoints; b) the submission of rebuttal materials by such parties; c) the preparation of a report by the Presiding Officer summarizing the record and making findings on the designated issues; d) the preparation of a detailed report by the staff which considers the record and the arguments of all the parties and makes recommendations to the Commission; e) public comment on the Presiding Officer and Staff Reports; and finally, f) a determination by the Commission of what, if any, rule should be promulgated. These many levels of analysis and input help to insure the accuracy of the Magnuson-Moss rulemaking record, and allow the Commission the opportunity to make informed judgments as to the weight to be accorded the evidence.

⁶ "It was incredible to us that the Federal Trade Commission would allow such a blatantly unfair use of our tax dollars without even challenging the veracity [sic] of the data yielded in the light of the methodology."⁷ (13-EJC).

In the Hearing Aid Rulemaking Proceeding, only steps a) and b) have taken place as of this time. Any person who wished to challenge the veracity of NCSC's submission could of course do so during either of these steps. Neither the Presiding Officer, nor the staff, nor the Commission have as yet made any finding or recommendation as to the weight to be accorded NCSC's Miami presentation.

4. The FTC staff has acted in collusion with NCSC.⁷

Mr. Clinkscales bases this charge on the fact that Mr. Marlin of NCSC knew of his testimony in advance. Mr. Marlin did in fact have such knowldge, but so did all of the designated group representatives as part of the normal hearing process.

⁷ "I had submitted the testimony one month prior to the hearing to the FTC. There was no way the NCSC could have been aware of my remarks unless they were supplied with a copy in advance. Without collusion with the FTC staff and the NCSC, they could not have decided I posed such a threat as to be unable to rely on their other paid lawyer to ask me questions." (13-EJC).

"I felt there was linkage between the Federal Trade Commission staff, which was seeking to discredit the hearing aid specialists, and the National Council" (14-EJC).

"The reason for my opposition was the means by which he was there. No. 1, the FTC had clearly given the National Council of Senior Citizens a copy of my testimony. Why else would the National Council of Senior Citizens not rely on the lawyer they already had out there? It was a San Francisco lawyer they were paying. Why else would they fly a man all the way out to San Francisco to cross-examine me and make it the top legal man in their legal department?

"The only reason is that they had seen my testimony in advance. I felt that this was wrong, regardless of whatever right they might have to be there. To me, it was morally wrong for that man to be there." (16-EJC).

On March 5, 1976, the Presiding Officer designated NCSC as the "group representative" for the elderly.⁸ The Commission's Washington staff for the Hearing Aid Rulemaking Proceeding (which had been designated by the Presiding Officer to handle all logistical arrangements concerning the filing of statements and their distribution to group representatives) received a copy of Mr. Clinkscales' prepared testimony on July 14, 1976. Mr. Clinkscales' statement had been submitted prior to his actual appearance pursuant to the Presiding Officer's requirement, set forth in his "Instructions to Witnesses" contained in the "Final Notice" 40 Fed. Reg. 59747, Dec. 30, 1975, that such material be filed in advance. This procedure was designed to apprise the interested parties of expected testimony so they could determine their need for examination, including cross-examination, or rebuttal submissions. Shortly thereafter, on July 20, 1976, staff acting in accord with the standard in effect throughout these proceedings, made this document public, and furnished

⁸ See document 215-44-1-53. Other group representatives also so designated represented a) hearing aid sellers; b) hearing aid manufacturers; c) otolaryngologists; d) audiologists; and e) the deaf and other consumers. On May 12, 1976, the latter group representative, which had not taken active part in the proceedings, notified the Presiding Officer (doc. 215-44-1-127) that it was no longer able to serve as a group representative for the deaf and other consumers, leaving NCSC as the group representative for all consumers in the proceeding.

it to all the group representatives actively participating in the proceeding at that time,⁹ including NCSC.

5. The FTC knew that NCSC and NASC were adversaries, and this added to the collusion between NCSC and staff.¹⁰

As noted previously with respect to assertion Number 1, staff connected with the Hearing Aid Rulemaking Proceeding did not even know of NASC's existence until June 29, 1976. It was not until July 14, 1976, that the Washington Hearing Aid Rulemaking staff, which had sole responsibility for the examination and cross-examination of witnesses, knew that a significant portion of Mr. Clinkscales' testimony would pertain to NCSC. Since NCSC had been named a group representative on March 5, 1976, and its participation in the San Francisco hearing

⁹ See the list of group representatives in note 8. Copies were not furnished to the group representative for the deaf for the reasons explained previously, or to the group representative for otolaryngologists at their request since they were not taking an active part in the proceeding.

¹⁰ "It is a well-known fact the NCSC and the alliance [sic] are deeply divided over issues" (13-EJC);

"I felt deeply offended to have my integrity challenged . . . by the highly paid representative of a special interest group which the Federal Trade Commission staff knew were deeply opposed to all I and our organization stand for." (13-EJC); and

"Senator Thurmond. Do you feel the FTC inspired this organization, of which Mr. Marlin was an attorney, to cross-examine you?"

"Mr. Clinkscales. I just think that in the face of it, it is pretty evident that they did." (16-EJC).

settled shortly thereafter, there is no basis for the imputation that staff had any advance knowledge of the animus between the groups. During Mr. Clinkscales' testimony, however, the animus referred to by Mr. Clinkscales was in fact made clear, as was the fact that NASC had been formed partially in an effort to counter the influence of NCSC.¹¹

6. Mr. Clinkscales' refusal to be questioned by NCSC's counsel was of no consequence since he did answer questions from the many attorneys present.¹²

During the hearings at which Mr. Clinkscales testified, he was examined by four persons, two of whom were basically in agreement with his position, and two of whom had questions concerning the accuracy of his factual assertions. The total examination which the Presiding Officer permitted these four persons to engage in took slightly over one hour and in no sense could be compared to the sort of vigorous cross-examination that would have occurred had this been an adjudicative proceeding.

¹¹ This was confirmed by Mr. Clinkscales during his testimony. See Hearing Exhibit 170, an article by Jack Anderson, as to which Mr. Clinkscales testified: "I don't think that Mr. Anderson was inaccurate in what he said." (Tr. 10678). Furthermore, of the 15 major articles in the first edition of the Senior Independent, NASC's quarterly newspaper, five directly attacked NCSC, while a sixth, occupying two of the newspaper's eight pages, establishes a congressional rating system to directly confront NCSC's congressional rating system. See Hearing Exhibit 171.

¹² "I did not, of course, apply this exclusion to any other of the many attorneys present." (13-EJC).

Despite the fact that Mr. Clinkscales had made serious charges concerning Mr. Marlin and NCSC, these charges were not of prime concern to the four parties whose questions he would answer. As a consequence, he was asked only two basic questions relating to his NCSC charges. Thus, there was an important consequence to Mr. Clinkscales' refusal to be examined by NCSC's counsel, namely that there was no opportunity to ascertain the basis, if any, behind these accusations.

7. The FTC treated Mr. Clinkscales unfairly when it informed him that his refusal to answer questions from NCSC could affect the weight to be accorded his testimony.¹³

The refusal of a witness to subject himself or herself to cross-examination is always treated seriously. In more formal proceedings, such a witness's testimony would be stricken in its entirety. Due to the informality of Magnuson-Moss proceedings Mr. Clinkscales' testimony was not stricken. He was simply informed by the Presiding Officer that this would affect the weight to be accorded his testimony.¹⁴ In the one other instance where a witness refused to submit to additional questions from industry counsel, she was likewise informed that this would reflect adversely on the weight to be accorded her testimony.¹⁵

¹³ "I was informed that this refusal could have a bearing on the impact of my testimony, but I stood fast." (13-EJC).

¹⁴ Tr. 10632.

¹⁵ See Tr. 6952-3.

8. The FTC staff had intended to rely heavily upon the cross-examination of Mr. Clinkscales by NCSC, and when he refused to submit to their questioning they were not able to engage in adequate substantive examination of him.¹⁶

At no time during the hearings did staff count on the representatives of another interested party to do its job of examination, and the examination of Mr. Clinkscales was no exception.

The staff's examination of Mr. Clinkscales established:

- a) that Mr. Clinkscales had no personal knowledge in any depth of whether hearing aid buyers in general

¹⁶ "Mr. Steven Newberg-Rinn [sic] . . . the FTC lawyer, appeared to have lost his ace in the hole as his questioning was filled with excuses of time restraints and little substance relating to the testimony I had presented." (13-EJC)..

"As I said in my testimony, Mr. Newburg-Rinn was absolutely without words. If you could have seen his face when I made the statement that I would not submit to Mr. Marlin's questions. He was flustered. He did not seem to know how to handle the questioning. He handled other people very well, but he did not handle me well. His whole thing was 'Well, I don't have enough time. There are so many things I want to ask.' Yet, he had half an hour to ask me questions, none of which did he really get to. He just sat there and complained about the fact that he did not have enough time and offered excuses.

"I just feel that it is kind of clear that he lost his ace in the hole as I put it, when he was really going to take care of me with this man he flew out from Washington. I feel that is kind of clear that there was, indeed, a plan to have this man be the rebuttal to my testimony." (16-EJC).

or elderly hearing aid buyers more specifically had had difficulties with their hearing aids or hearing aid sellers;¹⁷

- b) that Mr. Clinkscales had obtained the background materials from which he based his factual assertions from the past executive director of the Hearing Aid Industry Conference (the manufacturers' organization) and the executive director of a nonprofit organization funded largely by the Hearing Aid Industry Conference and the National Hearing Aid Society;¹⁸
- c) that although Mr. Clinkscales is located in Washington, he had not studied the record already filed prior to preparing his testimony, or even the "consumer complaint" parts of that record;¹⁹
- d) that although Mr. Clinkscales had testified (Tr. 10620-21) that state "licensing program requirements as well as the penalties accompanying their misuse offer consumers the best possible protection from any potential malpractice in this field," he had not in fact researched the effectiveness of state licensing in general or even for any one particular state, and in addition had no personal knowledge on the subject;²⁰

¹⁷ See Tr. 10644-47, 10654. Mr. Clinkscales did state that he had asked his membership what they thought about government regulation of hearing aids. Since his testimony as a whole makes clear that he is philosophically opposed to government regulation in general, staff asked Mr. Clinkscales to be specific about what he had asked his membership about hearing aids. This was to ascertain whether Mr. Clinkscales had biased the answers by the question he asked. Mr. Clinkscales could not recall the specific question he asked, and although he promised to voluntarily furnish this document to the Presiding Officer he failed to do so. (See Tr. 10644-45).

¹⁸ See Tr. 10647-48.

¹⁹ See Tr. 10648-49, 10655. Mr. Clinkscales stated that the part of the record he had studied was NCSC's "work and what they had to say," (Tr. 10648), and then went on to testify that he had not in fact read the testimony of the witnesses NCSC sponsored (Tr. 10648-49).

²⁰ See Tr. 10650-51.

- e) that although Mr. Clinkscales had testified about the assurances of product quality already offered by the industry (Tr. 10622), he had no personal knowledge on the subject;²¹
- f) that despite the fact that Mr. Clinkscales testified about the economic effects of the "buyers-right-to-cancel" portion of the proposed rule (Tr. 10623-5), he had made no study of the economic effects of that proposal and knew nothing about the economic experience of those reputable hearing aid sellers who offer something similar (although totally free to the buyer) to their purchasers;²² and
- g) that a significant factor leading to the establishment of NASC was the philosophical and other opposition of its organizers to NCSC, a fact which he failed to reveal when describing his organization (Tr. 10619, 10643-44) or attacking NCSC's activities (Tr. 10627-31).²³

Staff's view of the effect of this examination on the weight to be accorded Mr. Clinkscales' testimony is obviously somewhat different than his.

9. The FTC staff's cross-examination "was filled with excuses of time restraints and little substance."²⁴

As noted with respect to the previous assertion, staff believes that its examination of Mr. Clinkscales reached the most important matters of substance regarding his FTC testimony.

²¹ See id.

²² See Tr. 10658-9.

²³ See the discussion of this previously with respect to assertion no. 5.

²⁴ Staff's "questioning was filled with excuses of time restraints and little substance" (13-EJC); and "Mr. Newburg-Rinn . . . had half an hour to ask me questions, none of which did he really get to. He just sat there and complained about the fact that he did not have enough time and offered excuses." (16-EJC).

The subject of time constraints did arise several times because staff would have liked to ask even more questions.²⁵ Mr. Clinkscales' assertion may be based upon a lack of understanding of the extremely limited nature of the examination permitted under the Magnuson-Moss Act.

10. The FTC was unfair to Mr. Clinkscales by proposing to subject him to cross-examination not by a party with a true interest in the proceeding but instead by a party hired by the FTC to support its position.²⁶

²⁵ At Tr. 10643, after Mr. Clinkscales had provided an extensive but nonresponsive answer to a question, he was asked by the Presiding Officer to "answer as succinctly as possible in view of our time limitations." At Tr. 10649, when he asked to elaborate on his answer to a question, staff informed Mr. Clinkscales that of course he could do so but there were a lot of questions to be asked. At Tr. 10652, after again providing an extended nonresponsive answer to a question, staff asked for and the Presiding Officer again provided an instruction to Mr. Clinkscales to answer questions as succinctly as possible. At Tr. 10660, the Presiding Officer informed Mr. Clinkscales that he need not re-read a particular portion of the rule with which he agreed since "time is running." At Tr. 10663-64, when informed by the Presiding Officer that staff could ask but one more question, staff stated: "I would like to ask the witness some questions about his statements concerning the National Council of Senior Citizens. There is no way that I can ask one question and do that" At Tr. 10681, staff, while recognizing that any additional time for examination was limited, asked for and was permitted to ask the witness two questions relating to his views on NCSC. At Tr. 10687, when informed that its examination was being terminated by the Presiding Officer, staff commented: "Obviously I have a host of other questions, but I realize that I'm not going to get to them."

²⁶ "I felt deeply offended to have my integrity challenged, not by a rightful adversary with goals dedicated to truth and the best interests of our people, but by the highly paid representative of a special interest group which the Federal Trade Commission staff knew were deeply opposed to all I and our organization stand for." (13-EJC).

The compensation program as authorized by Congress and administered by the FTC was never intended to be used, nor has it been used, to "buy" support for FTC staff positions. The award of compensation to NCSC was intended to allow representation and the presentation of views by a group, the elderly, that would otherwise not have been able to take an active part in the proceeding. NCSC's positions in fact differed markedly from those of staff, since it urged the Commission to adopt remedies considerably stricter than those in the proposed rule.²⁷

11. The FTC was unfair to Mr. Clinkscales by subjecting him to examination heavily weighted against him which was financed by taxpayer funds.²⁸

At the time of Mr. Clinkscales' testimony, five parties would have been eligible to examine him: staff, representing the public interest; the National Hearing Aid Society ("NHAS"), representing hearing aid sellers; the Hearing Aid Industry Conference ("HAIC") representing hearing aid manufacturers;

27 For example, NCSC advocated mandatory otological and audiological clearance before a person would be permitted to buy a hearing aid (see record pp. 215-44-10-451 through 453), whereas the proposed rule asked merely whether consumers should be informed of the availability of these services (40 Fed. Reg. 26653, June 24, 1975).

28 "Senator Laxalt. Aside from the merit or demerit of the particular issue, your principal concern is the fact that, in this proceeding, you ran into a stacked deck financed by taxpayer funds?

"Mr. Clinkscales. You are precisely correct, Senator Laxalt." (14-EJC).

the American Speech and Hearing Association ("ASHA") representing audiologists; and the National Council of Senior Citizens ("NCSC") representing consumers and the elderly in particular. Staff believes that this group of five represented a broad spectrum of opinion, and in no sense can be considered a deck stacked against Mr. Clinkscales.

12. The FTC mistreated many persons in these hearings, but these other persons will not testify because of fear of reprisal by the FTC.²⁹

29 "Mr. Clinkscales. I have been made aware by a number of people who have faced this that they had serious complaints about the way they were mistreated by the FTC in those hearings.

"I will tell you that I do not think that they will come before you and tell you so. I think the reason that they are not flanking me and sitting behind me here today is that they are frankly, fearful of the reprisals that the FTC and other Government agencies would bring to bear against their industries. These people have power over them. It is so often the case that you feel like you are sitting out there alone. But if they will stand up together they would do well. But they cannot quite see that because they represent a lot of businesses, these trade associations do. They feel that, if they come up here, they will endanger those people. I think they have reason to feel that way. I think that is a heck of a thing and a sad commentary on the way agencies function." (15-EJC).

"Senator Thurmond. Why do you think that the industries which have been impacted by the FTC in its application of this law are not here today?

"Mr. Clinkscales. I think I answered that when I spoke with Senator Laxalt about this question. I think that they are scared to come here. I think that they feel if they show up here that, one day down the road, the guy that has
(Continued)

We believe that any review of the record would demonstrate that all witnesses were treated with respect and courtesy by the FTC staff and the Presiding Officer.³⁰ The suggestion of "retaliation" by FTC staff is unfounded. The whole purpose of hearings is to bring forth a full presentation of views so that the Commission can develop a complete record. A witness who presents cogent arguments that a proposal is not in the public interest is valuable and appreciated.

13. The FTC flew Mr. Marlin of NCSC out to San Francisco specifically to question Mr. Clinkscales.³¹

Prior to reading Mr. Clinkscales' testimony staff working on the rule had no knowledge whether NCSC was compensated for Mr. Marlin's trip to San Francisco or not. Staff made no arrangements of any sort to fly Mr. Marlin to San Francisco.

(29 Continued)

the whistle blown on him in such a meeting as this--let's say a man was here today from the National Hearing Aid Society, or someone like that, and he told what happened to the hearing aid industry. One day, the people over at the FTC--and their buddies in other agencies--and there is a buddy system here in Washington--would definitely hear about this. They would get those boys in the hearing aid industry and take them to the cleaners.

"I think, in the best interests of their people, they feel they cannot show up at such hearings." (16-17-EJC).

- 30 The transcript of oral hearings occupies approximately 12,000 pages of the 60,000 page record of this proceeding. Staff stands ready to respond to the requests of any member of this Committee interested in pursuing a review of that record.

- 31 "Senator Thurmond. "Mr. Clinkscales, when did you first find out Mr. Marlin was being flown out to question you?"
(Continued)

David Marlin's trip to San Francisco from August 8 to 10, 1976 was part of NCSC's compensated participation. The purpose of this trip, as set forth in the NCSC voucher, was to confer with NCSC's local counsel and to represent NCSC at the hearings. This expense was considered appropriate by the FTC staff who administered the compensation program (not the staff of the Hearing Aid Rule). A similar trip had been made by NCSC to confer with its Chicago attorneys.

Thus, the FTC staff working on the Hearing Aid Rule Proceeding was neither involved with NCSC's decision to send Mr. Marlin to San Francisco nor with the FTC decision to deem that trip an appropriate expense for compensation purposes. We believe, however, that the funding decision made by the FTC in this matter was an appropriate one.

14. The FTC was unfair to Mr. Clinkscales by failing to furnish him with a copy of the transcript of his testimony which he had requested.³²

31 (Continued)

"Mr. Clinkscales. I first found that out when I arrived in San Francisco, Senator Thurmond." (15-EJC).

"Mr. Newburg-Rinn . . . lost his ace in the hole . . . when he was really going to take care of me with this man he flew out from Washington." (16-EJC).

32 "Senator Thurmond. Did the FTC ever followup by sending you a copy of the transcript of the hearings.

"Mr. Clinkscales. No sir: they never did.

"Senator Thurmond. Did you request that transcript?

"Mr. Clinkscales. I did at the meeting, but I never really wrote them and asked for it." (16-EJC).

Neither the Presiding Officer nor the staff has any recollection of Mr. Clinkscales orally requesting that he be provided with a courtesy copy of his testimony. Nor, as Mr. Clinkscales pointed out, was there any written request. Staff had no knowledge of Mr. Clinkscales' desire for a copy of the transcript, but would have provided him with a copy had he so requested.

The transcript of this hearing was placed in the FTC's Public Records Room as soon as it was received from the reporting contractor and has been available for public inspection and copying since that time.

A final observation

Since NCSC has been the focus of many of Mr. Clinkscales' comments staff believes that the following additional observations are appropriate.

The National Council of Senior Citizens provided competent legal representation for hearing aid consumers, for whom NCSC was the designated "group representative" in the FTC's Hearing Aid Rulemaking Proceeding. NCSC provided this legal representation on each of the 58 days of hearings, in Washington, D.C., Chicago, and San Francisco. Over 200 witnesses testified at these proceedings. The transcript alone totals 12,081 pages.³³

³³ Attached as examples are copies of transcript excerpts covering the examination of three witnesses by NCSC attorneys. Attachment D is Transcript pages 10,559-90, with F. Burns Vick testifying and Peter D. Coppelman representing NCSC. Attachment E is Transcript pages 1958-94 and 2043-56, with John Kojis testifying and David Marlin representing NCSC. Attachment F is Transcript pages 5301-26, 5338-41 and 5360-66, with Betty K. Hamburger testifying and David Marlin representing NCSC.

In addition, NCSC presented both expert³⁴ and consumer³⁵ witnesses at the hearings. Staff offers these documents for the benefit of the Committee so that it will be in a position to evaluate the contribution NCSC made to the Hearing Aid Rulemaking Proceeding.

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- 34 Attachment G is the resume and advance written statement of Stephen Epstein, M.D., an otolaryngologist (R-10-587 to 88, 4784 to 92). Attachment H is his testimony (Tr. 4562-4622). Attachment I is the resume and advance written statements of Paul Ginsberg, Ph.D., an economist (R-10-578 to 81, 427 to 42, 4793 to 95). Attachment J is his testimony (Tr. 4624-90). Attachment K is the resume and advance written statement of Leon A. Pastalan, Ph.D., a gerontologist (R-10-569 to 77, 413 to 18, 4796 to 4800). Attachment L is his testimony (Tr. 4691-4747). Attachment M is the resume and advance written statement of David Resnick, Ph.D., an audiologist (R-10-582 to 86, 493 to 566). Attachment N is his testimony (Tr. 5379-5465).
- 35 Attachment O is the advance written statements of attorney Leonard Finkel and five Boston area hearing aid consumers (R-10-4584 to 4603, 4629 to 37). Attachment P is their testimony (Tr. 4396-4493). Attachment Q is the advance written statements of Attorney Ralph Penalver and four Miami area consumers (R-10-4424 to 81, 4801 to 05). Attachment R is their testimony (Tr. 4837-4985, HX 78). Attachment S is a number of affidavits from hearing aid consumers in the Boston and Miami areas presented by attorneys Finkel and Penalver (R-10-4419 to 23, 4482 to 4506, 4509 to 83, 4604, 4608 to 25, 4638 to 4756). Attachment T is the resume and advance written statement of David Marlin, an attorney with NCSC (R-10-568, 443 to 92). Attachment U is the testimony given by Judith Munger, a NCSC attorney, in his stead (Tr. 4496-4552). Attachment V is a statement obtained by NCSC from J. E. Hodges, staff counsel, State of Florida Department of Health & Rehabilitative Services (R-10-4413 to 18). Attachment W is the resume and advance written statement of Betty K. Hamburger (R-10-589, 338 to 412). Attachment X is her testimony (Tr. 5301-77). NCSC also compiled and submitted for the record all current state laws relating to hearing aid sales. These are not submitted herewith but can be found in the record of this proceeding as document 215-44-10-67. (At record pages R-10-3452 to 3879).

LIST OF
ATTACHMENTS

- A. Tr. 10619-89.
- B. HX 170.
- C. HX 171.¹
- D. Tr. 10,559-90.
- E. Tr. 1958-94, 2043-56.
- F. Tr. 5301-26, 5338-41, 5360-66.
- G. R-10-587 to 88, 4784 to 92.
- H. Tr. 4562-4622.
- I. R-10-578 to 81, 427 to 42, 4793 to 95.
- J. Tr. 4624-90.
- K. R-10-569 to 77, 413 to 18, 4796 to 4800.
- L. Tr. 4691-4747.
- M. R-10-582 to 86, 493 to 566.
- N. Tr. 5379-5465.
- O. R-10-4584 to 4603, 4629 to 37.
- P. Tr. 4395-4493.
- Q. R-10-4424 to 81, 4801 to 05.
- R. Tr. 4837-4985, HX 78.
- S. R-10-4419 to 23, 4482 to 4506, 4509 to 83, 4604, 4608 to 26, 4638 to 4756.
- T. R-10-568, 443 to 92.
- U. Tr. 4496-4552.
- V. R-10-4413 to 18.
- W. R-10-589, 338 to 412.
- X. Tr. 5301-77.

¹ All other exhibits are on file in the subcommittee office.

[Attachment A]

10619

1 PRESIDING OFFICIAL SHEPHERD: Let's not bother
2 with the Xerox this time. We will all follow with his pre-
3 pared text and hopefully we will hook it up as we go along.

4 You may proceed, sir. First state your name and
5 your affiliation and then proceed directly into your state-
6 ment, please.

- -

7
8 CURT C. CLINKSCALES, was thereupon called as a wit-
9 ness for the Commission and testified as follows:

DIRECT EXAMINATION

10
11 THE WITNESS: I am Curt Clinkscales, national dir-
12 ector of the National Alliance of Senior Citizens.

13 The National Alliance of Senior Citizens appreciates
14 the opportunity to appear before the Federal Trade Commission
15 hearing addressing the proposed trade regulation rule gover-
16 ning the hearing aid industry.

17 Our membership is vitally concerned over these pro-
18 posed regulations, and trust our views will not be lost among
19 the thousands of words these hearings have generated as mature
20 Americans are the age segment most severely impacted by their
21 ramifications. It is therefore our duty to present the exper-
22 tise of our experiences and research in this important health
23 area.

24 As consumer and legislative representative for our
25 chapters and members, our research into hearing aid questions

1 was conducted to ascertain the effectiveness of present
2 regulations, the general perceptions of the senior community
3 toward their hearing aid service and the financial impact of
4 these regulations on the senior population. In the course of
5 this research, several important germane points were uncovered,
6 which will be presented in the paper.

7 I should state here that although we have received
8 a myriad of complaints about legal inequities under present
9 Social Security laws, applying directly to seniors, and count-
10 less calls and letters on questions of mishandling of their
11 meager entitlements by government bureaucrats, not to mention
12 other governmental agencies, we have never had the first com-
13 plaint about the sale and service of a hearing aid device by
14 a hearing aid specialist. Therefore, we had no backlog from
15 which to work, and are now convinced no one else did either.

16 We have found a genuine desire among state legisla-
17 tures and hearing aid specialists to require licensing for
18 those dispensing hearing aids with forty-one states already
19 requiring this most beneficial step, and similar legislation
20 in various stages of enactment in the remaining nine states.
21 Such laws offer the consumer the assurance his or her pur-
22 chase will be from a competent, licensed specialist in the
23 hearing field.

24 Licensing program requirements as well as the pen-
25 alties accompanying their misuse offer consumers the best

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1 possible protection from any potential malpractice in this
2 field.

3 The Alliance is most impressed by the work of the
4 Better Hearing Institute, a group dedicated to full awareness
5 among the hearing impaired of the opportunities for hearing
6 restoration, correction or support.

7 To guarantee consumers recourse in the purchase of
8 a hearing aid, the Better Hearing Institute installed a
9 nationwide "800" type WATS phone to offer the consumer a
10 direct contact to resolve his or her problem. Our research
11 clearly demonstrates the vigor with which this group pro-
12 moted the widespread use by hearing aid consumers of this
13 fine service, including articles by such prominent columnists
14 as Sylvia Porter.

15 Still, with a robust public information program,
16 the WATS phone receives an average of only three calls per
17 day, and more than 90 per cent of these are requests for
18 hearing information, not complaints.

19 In a further step, the Institute has invited com-
20 plaints in other mail and person-to-person contacts such as
21 their excellent Speakers' Bureau Program, but the percentage
22 there is even more minute. There are hundreds of information
23 requests handled weekly, but a mere handful of complaints,
24 few of which are directed to the specialists from whom hearing
25 aids were purchased.

1 I would challenge any business to demonstrate a
2 rate of consumer acceptance of their product better than this
3 one, for I seriously doubt many can come close to equaling
4 this record.

5 Seniors are not dissatisfied with their hearing
6 aids or their personal hearing aid specialist, and neither is
7 the younger consumer. I think, gentlemen, that we heard this
8 morning a man who was certainly not dissatisfied with his
9 hearing aid. They know they can pick up a phone anywhere in
10 America, and without incurring expensive long distance charges,
11 can receive reasonable recourse to any complaint they may have.

12 Something strikes me as rather peculiar to understand
13 these statistics and this excellent program, and yet to see a
14 set of regulations promulgated to police an industry and
15 thousands of small businesses which have very effectively pro-
16 vided for direct in-house assurances of product quality and
17 consumer protection.

18 In the view of the National Alliance of Senior Citi-
19 zens, the added financial burdens virtually inherent within
20 this proposed trade regulation Rule (16 CFR 440) would fall
21 directly upon the shoulders of either the senior consumer,
22 or the American taxpayer. We strongly support proper address-
23 sing of consumer interests, but find the attack on the hear-
24 ing aid industry and the hearing aid specialists totally un-
25 warranted from the evidence, and completely reject the

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1 saddling of the American taxpayer and senior persons with the
2 burdens from these unnecessary and ill-advised regulations,
3 especially under the false guise of consumerism.

4 Prior to a review of each of the rule regulations
5 with some of our thoughts pertaining to each, I want to em-
6 phasize that the very existence of this rule impugns the hard-
7 earned, well-deserved high integrity level enjoyed by thou-
8 sands of hearing aid specialists in our nation. It is in-
9 excusable to blight the fine service by these taxpaying,
10 community-minded, solid citizens of each and every community
11 in America by the tone of this rule, so as the first objection
12 to be voiced here by the National Alliance of Senior Citizens
13 if the apriori intonation of a scoundrel out to swindle the
14 unsuspecting. That is false and without foundation.

15 The Buyer's Right to Cancel (Section 440.4) has all
16 the ring of a real and genuine bonanza to the consumer, but
17 thirty days is beyond all reasonableness, even in the event
18 there was a clause to allow for the full depreciation value
19 for the dealer during the 30-day period, which there is not.
20 Who is to bear this loss by the dealer? The obvious answer
21 is the consumer who keeps a purchased hearing aid. This is
22 blatantly anti-consumer, and offers only higher prices for
23 those genuinely in need of hearing assistance through ampli-
24 fication.

25 Ladies and gentlemen, the greatest consumer protec-

1 tion and quality in health related fields is the trust and
2 understanding between the purchaser and the provider of the
3 health care service. This incredibly vitriolic section
4 (440.4) not only invades that trust and mutual understanding,
5 but goes so far as to suggest future lawsuits among these
6 persons depending upon each other for this important service
7 in their lives.

8 The discriminatory nature of this section against
9 the hearing aid specialist becomes readily apparent as hearing
10 aids prescribed by physicians and audiologists (persons with
11 only non-medical degrees) are exempted from its provisions.
12 It would have been understandable had the exemption applied
13 to otolaryngologists and otologists, but to extent it to
14 persons without medical professional training is blatantly
15 discriminatory in every respect.

16 I can think of no greater analogy than to offer an
17 automobile buyer the same deal with a 30-day return period.
18 How many auto manufacturers would ever offer their customers
19 a 30-day guarantee on the product without regard to mileage?
20 None of them, of course, and should the FTC attempt to promul-
21 gate such a ruling on them, even with the obvious deluge of
22 valid consumer complaints available against the chronically
23 inferior workmanship by the automobile producers and workers,
24 you would find the FTC annual budget from the Federal Govern-
25 ment, and I might add your salaries, also, eliminated by Con-

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1 gressional powers with direct voter and financial ties to
2 the auto industry and the United Automobile Workers. Because
3 of this you have selected an industry and workers without
4 that type of political clout, and forced this most unreasonable
5 ruling on them.

6 Section 440.7 makes the use of sales incentive
7 and customer service appear to be evils of profit-seeking
8 predators, instead of valuable assistance to those otherwise
9 deprived of the opportunity to have improved hearing through
10 the hearing aid amplification process. The FTC pays no taxes,
11 but without the taxes paid by persons seeking a reasonable
12 profit for an honest day's work and a reliable product, there
13 would be no tax dollars to fund your agency.

14 Government does much the same type of home and com-
15 munity service when their social workers seek to extend gov-
16 ernmental programs to persons not previously reached. These
17 programs are called "outreach", and while perhaps the tax-
18 payers would save many dollars without them, many persons
19 legally qualified for the programs would go unserved. The
20 Alliance finds this section an unreasonable and altogether
21 unacceptable over-stepping of regulatory authority at the
22 dire expense of many persons needing the services presently
23 provided.

24 In fact a close review of the final profit margins
25 of the specialists in this mode of marketing reveals they

1 yield an extremely low profit, and such restrictions would
2 surely eliminate them from the field, thereby denying the aged,
3 infirm and handicapped in underserved and rural areas the
4 services they so critically require.

5 The language used in Sections 440.8, 440.9 and
6 440.10 again sets the tone of unscrupulousness among an hon-
7 orable profession. The Alliance feels the industry, trade
8 associations and the states can far better police sales
9 methods to guarantee fairness to the purchaser and potential
10 customer than can such arbitrary written regulations.

11 The Alliance seriously questions the rights of the
12 employer to enforce the provisions of Section 440.12 under
13 the terms of conflicting regulations from the National Labor
14 Relations Board, union agreements and other employee rights
15 under state and federal laws. Could the Civil Service under-
16 take such actions as ordered under 440.12(c) without employee
17 recourse? It is highly doubtful, and ensuing legal costs
18 to a dealer would either be borne by the consumer through
19 higher prices or by an employer forced out of business by
20 either court-ordered or NLRB-ordered settlements.

21 While everyone recognizes the value of records
22 maintenance, Section 440.13 mandates a compliance for such
23 retention and would surely force higher costs upon the dealers,
24 and thereby, the consumers. One of the basics of our modern
25 democracy is the right to privacy. But this section would

1 repeal that right for the hearing impaired, and therefore
2 unless amended prior to its effective date, would likely be
3 ruled as unconstitutional by the judiciary.

4 In summation, the Alliance finds these rules with-
5 out merit, and an unwarranted attack upon the hearing aid
6 specialists in America. They would result in the elimina-
7 tion of many tax-paying small businesses, and radically alter
8 the current pricing schedule upward. The gap created by
9 their enforcement would result in government intervention as
10 the provider, an eventuality to be avoided in the interest
11 of accountability to the customer, and the fiscal limita-
12 tions of our taxpaying public.

13 One feature always omitted by those espousing the
14 doctrine of government control and provision of services is
15 that we are ourselves the government. This "government" is
16 limited by the degree we can tax ourselves, and there are
17 limits beyond which our people will not go. Deficits will
18 either be saddled on future generations, or paid through
19 inflation and are no answer. The answer is the free exercise
20 of choice by consumers among the products on sale in the free
21 market.

22 This leads me to one of the key points of our re-
23 search before us today as we have uncovered some startling
24 facts, at least they were startling to us. First, we note a
25 letter from the National Council of Senior Citizens seeking

1 taxpayer funding for their testimony, and much to our amaze-
2 ment, we see that the Bureau of Consumer Protection of the
3 Federal Trade Commission agreed to fund their project to
4 the amazing sum of \$36,000 for staff and to pay witnesses
5 to support their thesis. The Alliance would like to assure
6 the record reflects this fact, and that we were neither paid
7 nor asked to participate here before you today. We would
8 also like to inquire as to how much the industry was paid
9 by the Bureau of Consumer Affairs for its witnesses and
10 testimony, and to ask the same question concerning the dealers'
11 associations.

12 We further found newspaper articles in the "Miami
13 Herald" and the "Miami News" during March, 1976.. While
14 the "Herald" article (March 29, 1976 section D, first page)
15 was quite fairly presented, the "News" article (March 20,
16 1976, page 11A) included the following incredible accusation
17 against the hearing aid specialists in the Miami area:

18 "If you wear a hearing aid, call members of the
19 Council at 577-1991 in Miami. There is a strong chance
20 you were cheated when you bought the hearing aid, and
21 may not know about it."

22 Even more incredible is the following:

23 "The biggest problem the Council faces is that most
24 of the people who were cheated or deceived are not aware
25 of it. For this reason, I encourage anyone in the Miami

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1 area who recently purchased a hearing aid to call the
2 Council and tell them about what the salesman did and
3 said prior to the purchase."

4 The National Alliance of Senior Citizens rejects
5 these specious charges, and believes the very method of
6 statement solicitation prejudiced the witnesses. We cannot
7 imagine the Federal Trade Commission allowing such a blat-
8 antly unfair use of our tax dollars without even a challenge
9 as to their veracity and relative worth in light of their
10 methodology.

11 We are dealing with the livelihood and the repu-
12 tations of thousands of good people here today, and such
13 spurious activities in search of support for the wrong thesis
14 cannot be tolerated.

15 The National Council of Senior Citizens and the
16 National Alliance of Senior Citizens have agreed on certain
17 concepts in the past, one of which is an expression of belief
18 in the competence of seniors to handle their own affairs, and
19 to continue to contribute to our society beyond their working
20 years.

21 With this belief in mind, the Alliance finds the
22 position of the Council that seniors don't know when they have
23 been cheated, or are unwilling to complain when they have been
24 cheated, to be completely contradictory to the aforementioned
25 principles. The Alliances believes seniors are responsible

1 consumers.

2 Noted pollster, Louis Harris, Jr., in association
3 with the National Council on the Aging, Incorporated, has
4 recently published the book, "The Myth and Reality of Aging
5 in America". I would like to offer a few examples from
6 that work which substantiate the Alliance belief in the
7 abilities of the senior American.

8 The self-image of senior 65 and over (page 53)
9 relates that 69 per cent believe they are "very wise from
10 experience." Would these people be easily "cheated without
11 knowing it?" Hardly, and in fact, far fewer times than the
12 less wise and experienced.

13 The total public's view in this study is far out
14 of line on senior activities as evidenced by the data on page
15 59, which states 67 per cent of the total public believes
16 seniors "spend a lot of time watching television", while in
17 fact only 36 per cent of seniors over 65 agreed they did.
18 Public distortion of senior ability to manage their affairs
19 and be productive has led to the view they sit and watch tele-
20 vision, a most damaging image, and one the Council has pro-
21 moted in their tax-funded Miami project.

22 A final series of statistics from page 237 shows
23 the value seniors place on independence as it reviews the
24 public 65 and over who pay for their own clothes, food and
25 rent. 93 per cent pay for all their clothes; 91 per cent pay

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1 for all of their food; 39 per cent pay for all of their rent;
2 but 52 per cent own their homes thereby paying no rent for
3 a total of 91 per cent who take care of their own housing.
4 Are these persons incapable of handling their own affairs and
5 making a valid determination of their own needs? Quite the
6 contrary.

7 The Alliance has carefully delineated our objections
8 to the FTC Proposed Trade Regulation Rule for the Hearing
9 Aid Industry, and has expressed our disapproval of the FTC
10 grant to the National Council of Senior Citizens as well as
11 the Council's outrageous use of those funds.

12 The National Alliance has expressed its view that
13 only through free enterprise, mutual trust and understanding
14 between the hearing aid user and the hearing aid specialist
15 and the vigorous pursuit of fairness by the industry, the
16 specialists and the state legislatures can this vital health
17 service be delivered.

18 The National Alliance of Senior Citizens appre-
19 ciates having the opportunity to express our basic belief in
20 the senior American and his or her ability to make valid
21 value judgments.

22 Thank you for allowing us to be present and to
23 present these views of our membership to this hearing.

24 PRESIDING OFFICIAL SHEPHERD: Thank you, sir. Does
25 that conclude your statement now?

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1 THE WITNESS: Yes, sir.

2 PRESIDING OFFICIAL SHEPHERD: Are you willing to
3 answer questions of counsel?

4 THE WITNESS: From the FTC, yes, sir.

5 PRESIDING OFFICIAL SHEPHERD: From the FTC. Does
6 that exclude--

7 THE WITNESS (interposing): It excludes the National
8 Council of Senior Citizens. I will not answer any questions
9 they may pose to me.

10 PRESIDING OFFICIAL SHEPHERD: Under the circumstances
11 I must advise you that this will not go to the admissibility
12 of your testimony but it will go to the weight of your testi-
13 mony. The weight accorded. Do you understand that, sir?

14 THE WITNESS: I do, indeed, sir; however, I would
15 like to elaborate upon my reasoning in not accepting the
16 National Council of Senior Citizens' cross-examination of
17 my testimony.

18 PRESIDING OFFICIAL SHEPHERD: You may do so.

19 THE WITNESS: The National Council of Senior Citi-
20 zens has asked for public funds to be present here today, to
21 appear before you. The National Alliance of Senior Citizens
22 has not. The National Alliance of Senior Citizens believes
23 that such activity by the National Council of Senior Citi-
24 zens constitutes not a valid consumer senior citizen input
25 but a paid-for-a-purpose input and I refuse to be a party to

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1 any sort of such a put-up job, and that is the words I want
2 to use, because it's exactly what it is. I was neither soli-
3 cited, I haven't even been asked to come here, yet they were
4 paid to. So, I refuse to answer their questions. Not only
5 do I disagree with the findings they represented but also I
6 don't believe their findings to be valid in light of the
7 methodology they used to derive their conclusions.

8 PRESIDING OFFICIAL SHEPHERD: I believe Mr. Waters
9 had his hand up.

10 MR. WATERS: I'm not sure if I understand exactly
11 what the witness, his terms, who he would permit to cross-
12 examine him but I think he said only the National Council of
13 Senior Citizens. Does that mean he will answer questions
14 from the rest of us?

15 THE WITNESS: Yes, sir.

16 MR. WATERS: In that case, Mr. Shepherd, for the
17 record, and this relates to a formal objection we have filed,
18 I would object to a statement that goes to the weight of his
19 testimony in view of the fact that the industry had no op-
20 portunity whatsoever to cross-examine Miss Vega Weimar. There
21 were similar statements made on the record.

22 PRESIDING OFFICIAL SHEPHERD: I guess you weren't
23 there at the time but the same statement was made by the
24 same presiding officer under basically the same circumstances.
25 The witness in that case was advised, and this came about as

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1 I recall in the face of a motion to strike the testimony,
2 that the testimony would not be stricken. It did not go to
3 the admissibility but it would go to the weight. So you will
4 find from that, sir, that there has been and will be equal
5 treatment.

6 MR. WATERS: If I have been confused, I apologize.

7 PRESIDING OFFICIAL SHEPHERD: Mr. Dowling? Mr.
8 Marlin--I beg your pardon, Mr. Dowling, but Mr. Marlin had
9 the next call here.

10 MR. MARLIN: I would like to move, Mr. Shepherd,
11 that Mr. Clinkscales' testimony be stricken and that he not
12 be permitted to testify any further this morning and I would
13 like to tell you why.

14 PRESIDING OFFICIAL SHEPHERD: You may state the
15 reason, sir.

16 MR. MARLIN: I have heard some outrageous charges
17 over the course of my experience as an attorney. I don't
18 think I've ever heard anything more outrageous and more insult-
19 ing to the integrity of the United States Government as some-
20 one to come in here and to suggest that a statute passed by
21 Congress and signed by the President which provides authority
22 to issue compensation to participate in proceedings such as
23 this somehow disqualifies an organization from participation
24 and subjects itself to the kind of savage and totally unjusti-
25 fied comments made by Mr. Clinkscales. So, I would find his

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1 comments not so much directed against the National Council
2 of Senior Citizens, which God knows can withstand that kind
3 of silliness, but is really a direct attack upon this pro-
4 ceeding and an attack upon the authority under which this
5 proceeding has been constituted and I don't think it should
6 be permitted and I don't think his kind of vilification
7 should be permitted to come into the record.

8 Let me add a further thing. The National Council
9 of Senior Citizens is, of course, not the only organization
10 which has been compensated or is eligible for compensation
11 to participate in these hearings. I suspect very strongly
12 that Mr. Clinkscales' understanding of this whole proceeding,
13 which has been under way for more than a year is most meager
14 and desultory. I doubt very much if he even knows that the
15 National Hearing Aid Dealers and the Hearing Aid Society has
16 been compensated for its appearance in these proceedings. I
17 don't know whether he is going to submit to questions from
18 Mr. Waters or not, but I think that is only an indication of
19 the kind of witness that this is and the kind of garbage that
20 he is spewing out and I wish and very strongly urge that his
21 testimony be stricken and he not be permitted to continue.

22 PRESIDING OFFICIAL SHEPHERD: All right, sir. If
23 you have any further comments on that, they will have to be
24 in writing. I don't want to clutter the record up with any-
25 thing further in this regard. If you have a short comment,

1 Mr. Dowling, I will take that.

2 MR. DOWLING: Only in response to Mr. Waters' com-
3 ment that industry had no opportunity to cross-examine Vega
4 Weimar who was a witness before this proceeding in Chicago.
5 Indeed it was in response, or it was in response to a response
6 to an industry question, cross-examination and their ques-
7 tions, that the witness decided that she would hear no more
8 from industry but indeed there was an opportunity for indus-
9 try to ask questions. The reader of the record will have to
10 decide whether that opportunity was properly utilized.

11 PRESIDING OFFICIAL SHEPHERD: Yes. Once again, let
12 the record show here that Mr. Waters was not present at that
13 time; however, there was cross-examination by industry counsel,
14 Mr. Vakerics had examined that particular witness, and second-
15 ly, Mr. Harker was in the process of examining that witness
16 when that witness took offense to the type of examination
17 she was receiving from Mr. Harker and it was because of that
18 that she decided that she had had it and didn't want to an-
19 swer any more questions from Mr. Harker, and I certainly
20 would not insist on it under the circumstances.

21 Mr. Vakerics, do you have a short comment on this,
22 sir?

23 MR. VAKERICS: Very short. One, just for the reader
24 of the record who doesn't have to go back to Chicago, I was
25 able to ask a few questions. I don't believe Mr. Harker, from

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1 the National Hearing Aid Society, was able to ask any, because
2 she just said no. Secondly--

3 PRESIDING OFFICIAL SHEPHERD (interposing): Excuse
4 me. On that point I think as you read the record her objec-
5 tion was to the manner in which she was being examined by Mr.
6 Harker. I'm sure you will find that to be true.

7 MR. VAKERICS: I don't recall. But secondly, I
8 would just wish to point out that in talking about the weight
9 of Mr. Clinkscales' testimony, that we have two Commission
10 staff attorneys here and counsel for ASHA, all of whom sup-
11 port the rule, who are, who the witness has indicated he will
12 submit to cross-examination from. So, I think the fact that
13 the NCSC, which might have supplemental questions, will not
14 be permitted to question, has less than a serious impact upon
15 the credibility of the witness, or should have less than a
16 serious impact upon the weight given to his testimony.

17 PRESIDING OFFICIAL SHEPHERD: Thank you, Mr. Vaker-
18 ics. Mr. Newburg-Rinn, do you have something short on it,
19 sir? We're chewing up the record.

20 MR. NEWBURG-RINN: Very short. I do feel that
21 the fact that a witness makes very grave charges against this
22 proceeding and against one party in this proceeding and then
23 is unwilling to be examined by the National Council does go
24 to the weight to be accorded his testimony. I can't see any
25 other way that it can be considered otherwise.

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1 THE WITNESS: Mr. Shepherd?

2 PRESIDING OFFICIAL SHEPHERD: Yes, sir.

3 THE WITNESS: My judgment on this is that the National
4 Council of Senior Citizens has two attorneys sitting before
5 me. I am neither an attorney, now am I a paid employee of
6 any organization. As such, I feel that to have a paid attorney
7 of an organization which has a philosophy basically contrary
8 to that of the organization which I represent, to have a paid
9 attorney of that nature sitting in questioning on my testi-
10 mony when I was not and my organization was not accorded the
11 same type of front-table cross-examination position is basic-
12 ly against fairness and therefore I refuse to play according
13 to those rules.

14 PRESIDING OFFICIAL SHEPHERD: Now, sir, I would like
15 to ask you. Have you read the Magnuson-Moss Act insofar as
16 it pertains to compensation? Of course, the Magnuson-Moss
17 Act amended the Federal Trade Commission Act and there is a
18 section in there, namely H-1, which deals with compensation.
19 Have you read that section, sir?

20 THE WITNESS: Yes, sir, I am familiar with that
21 section. I have not directly read it. I am familiar with
22 its contents.

23 PRESIDING OFFICIAL SHEPHERD: Were you familiar with
24 it prior to the time of this proceeding?

25 THE WITNESS: Yes, sir, and my statement stands in

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1 that it has witnesses, excuse me, counsel for a supplemental
2 organization supporting the rule presented--excuse me--present
3 to cross-examine a witness, and I just think it is basically
4 unfair. Now, if that is according to the law and is permissible
5 then that is well and good; however, it goes against my basic
6 feeling of fairness.

7 PRESIDING OFFICIAL SHEPHERD: Does the Congressional
8 Act go against your basic feeling of fairness, sir?

9 THE WITNESS: As far as compensation to witnesses
10 is concerned?

11 PRESIDING OFFICIAL SHEPHERD: Yes, sir.

12 THE WITNESS: Yes, sir, it does.

13 PRESIDING OFFICIAL SHEPHERD: Thank you. There is
14 one other matter which would be a little disturbing to the
15 Commission, I believe, and that is the allegation that there
16 was some kind of a put-up job here between the Bureau of Con-
17 sumer Protection and the National Council for the Senior
18 Citizens. Would you make it clear for the record what your
19 allegation is there, sir?

20 THE WITNESS: Yes, sir. It is this. That when the
21 Bureau gives money to an organization and in compensation of
22 witnesses with the prior knowledge of what essentially the
23 thesis of their presentation will be, inasmuch as the proposal
24 for such contains information which directly tells what they
25 are going to say in essence, what they seek to say, not neces-

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1 sarily exactly what they're going to say, but certainly the
2 over-all tone of their testimony, and yet, and provides it
3 freely, and yet when such groups as the dealers' association
4 and people representing free enterprise business are given
5 caveats, such as were given the hearing aid industry before
6 they would receive such adequate compensation, then there
7 appears to be a double standard here. Also, when your or-
8 ganization--excuse me--the FTC, has received my testimony
9 which had to be in, if I'm not mistaken, the 12th of last
10 month, and all of a sudden we have Mr. Marlinpopping up here
11 to cross-examine me from Washington, there is the appearance
12 that they have been given my testimony and flown out here to
13 refute me, and I reject this, sir.

14 MR. MARLIN: Mr. Shepherd?

15 PRESIDING OFFICIAL SHEPHERD: Mr. Marlin, look now--
16 excuse me--but we are not going to carry this any further on
17 our transcript. I will allow a very short statement and any
18 other comments that any other counsel have concerning this
19 matter will have to be in writing and submitted to me. A
20 short statement, sir.

21 MR. MARLIN: I would be glad to step back and have
22 Mr. Coppleman do the cross-examination if Mr. Clinkscales
23 feels that my appearance this morning is somehow indicative
24 of some kind of a further plot. Mr. Coppleman has been at-
25 tending these proceedings since they opened in San Francisco,

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1 and is perfectly competent, if that would meet Mr. Clink-
2 scales' objection.

3 PRESIDING OFFICIAL SHEPHERD: Does that meet your
4 objection, sir?

5 THE WITNESS: No, sir. I was answering your ques-
6 tion to me.

7 PRESIDING OFFICIAL SHEPHERD: It does not meet his
8 objection. That settles that.

9 MR. COPPLEMAN: I would just like to make a brief
10 statement.

11 PRESIDING OFFICIAL SHEPHERD: Very brief.

12 MR. COPPLEMAN: My statement is that this is the
13 only witness who has directly attacked the National Council
14 of Senior Citizens in his testimony. Talk about not playing
15 by rules, here the witness has made the attack and then stuck
16 out his tongue and hidden behind his privilege not to testify.
17 I personally am leaving these proceedings right now. I have
18 no desire to hear anything further from this witness.

19 THE WITNESS: Is that part of the record?

20 MR. COPPLEMAN: It sure is.

21 PRESIDING OFFICIAL SHEPHERD: It most assuredly is.

22 THE WITNESS: Then the gentleman did not hear a
23 thing I said in my objection.

24 PRESIDING OFFICIAL SHEPHERD: Mr. Newburg-Rimm,
25 would you proceed with your examination, please.

CROSS-EXAMINATION

1
2 By Mr. Newburg-Rinn:

3 Q. Mr. Clinkscales, in your position with the National
4 Alliance of Senior Citizens, is it a full-time position?

5 A. Yes, sir, it is.

6 Q. Now, what is the Senior Conference on Energy?

7 A. I regret that my secretary inadvertantly put my letter
8 of transmittal to the Presiding Officer on Senior Conference
9 on Energy stationary. The Senior Conference on Energy was
10 a conference that the National Alliance of Senior Citizens
11 sponsored at New Jersey to look into the problems of
12 energy and the view that senior citizens have about energy
13 matters. We held a very successful conference. The confer-
14 ence reflected what Congressman James Mann, better than any
15 person that I know could put it into words and he said, "Like
16 the old man who planted the tree, and the traveler came by.
17 It was an apple tree that wouldn't bear fruit for many, many
18 years, and the traveler said, 'old man why do you plant that
19 tree? You will get no fruit from it', and the old man said,
20 'Like my father before me and his father before him I plant
21 that tree so that my children and grandchildren might take
22 from its fruit'." And that conference was held in the inter-
23 est of the future of energy in our country.

24 MR. NEWBURG-RINN: Mr. Shepherd, I thought that I
25 had asked a very simple question and I got an answer that

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1 related to a lot of things that didn't relate to my question.
2 If I'm going to be able to get to my question, I would like
3 to make my questions brief, but I would ask that you give
4 your normal instructions to witnesses about answering.

5 PRESIDING OFFICIAL SHEPHERD: All right. You ask
6 your questions as succinctly as possible and we will ask the
7 witness to answer them as succinctly as possible in view of
8 our time limitations. Please proceed.

9 By Mr. Newburg-Rinn:

10 Q. Now, is this position as executive director, national
11 director, of the National Alliance, is that a paid position?

12 A. It is not. No, sir.

13 Q. You are full-time without any employment other than this?

14 A. I have no other employment, that is correct.

15 Q. Where were you employed at the time that the National
16 Alliance began?

17 A. Well, the National Alliance really began, I was not
18 employed at that time.

19 Q. You worked on Capitol Hill?

20 A. Yes, I have.

21 Q. When was that?

22 A. I worked on Capitol Hill for a brief stint last summer
23 for three months for Congressman Tom Hagedorn. I was his
24 legislative assistant.

25 Q. How many dues-paying members does the National Alliance

1 have?

2 A. Approximately 20,000.

3 Q. On page one of your statement, you state that "our mem-
4 bership is vitally concerned over these proposed regulations",
5 and on page 10, you state that the views expressed are those
6 of your membership. I was wondering how you went about as-
7 certaining the views of your membership on the subject of
8 hearing aids?

9 A. I went about the process of determining, number one,
10 what our membership felt about the hearing aids that they had,
11 because I felt that that is a true consumer input.

12 Q. How did you go about obtaining what they felt--

13 A. (Interposing) I'm going to tell you. Through the
14 process of a newsletter that we publish--not our newspaper,
15 that goes to our members monthly--and in May I went out and
16 asked them what they thought about their hearing aids and I
17 did not get a big response from our membership. I believe
18 there were 17,000 mailed. I believe I probably had about 400
19 responses one way or the other--and incidentally, when I
20 say one way or the other, I mean "I have had a hearing aid",
21 or "I have had a problem", I mean "I have had a friend re-
22 lated with hearing aids", and that's how we determined what
23 our membership thought about their service and what they
24 thought of their hearing aid specialist.

25 Q. Do you recall what the specific question or text, or do

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1 you have a copy of that newsletter, sir, that we might--

2 A. (Interposing) I don't have it with me but I do cer-
3 tainly have it.

4 Q. I wonder if you could furnish that to Mr. Shepherd at
5 a later time, as voluntary?

6 A. I understand it is voluntary. I heard the statement of
7 Mr. Shepherd, rather--thank you, Mr. Shepherd, I will submit
8 it.

9 Q. Now, what got you interested in doing the research that
10 you described in the third paragraph of your statement?

11 A. Well, number one, it is not just getting interested in
12 it. It is the fact of my job, a part of my job is to repre-
13 sent our membership in areas that there are potential ramifi-
14 cations for their interest. Now, I am not, I don't sit here
15 and pretend to tell you that 20,000 people expect me, Curt
16 Clinkscales, to be their voice in Washington, because they
17 may very well differ with me. We have an example on our
18 board of directors. We have a member from South Carolina
19 who is a big Jimmie Carter supporter, for example, and we
20 have a Ronald Reagan supporter and we have a big President
21 Ford supporter, and many others of the same nature. These
22 people have different views, but it is our job to do our best
23 to present--they know where we stand essentially on philoso-
24 phical or for free enterprise, and therefore it is our job to
25 present the best view that we can ascertain for their best

1 interest in that light.

2 Q. So, you--

3 A. (Interposing) So that's where the idea came from.

4 Q. (Continuing) So, in terms of your job you participate
5 in all proceedings that have an impact on the elderly, then?

6 A. No, I do not. I do as best I can with the limited staff
7 that we have. Everyone is a volunteer and gentlemen, it's
8 not very easy. You have paid staff and under the FTC rules
9 whenever you want to expand your budget you'd have to expand
10 the number of people you have working. You see, you have a
11 lot of people you can assign things to. We don't happen to
12 have it, and as a consequence, no I don't get involved in
13 everything but we try to get involved in things where we feel
14 we can help to present a better view on things.

15 Q. Did you testify at our hearing on the funeral home law?

16 A. No, I did not.

17 Q. Why did you decide the hearing aids rather than funeral
18 homes, because both would have an impact on the elderly con-
19 sumer, I would presume.

20 A. You are so correct. I would answer that in this respect.
21 And it is a very difficult question, Mr. Newburg-Rimm. Death
22 is a subject that is really hard. You and I could face it
23 tomorrow, but seniors have to face it a little more with a
24 real-world attitude than we do, because we could have an
25 accident, but it is not something that we have to necessarily

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1 plan. It is a very, very difficult subject and I know you
2 found it that way, your organization did, when you went into
3 it. And I didn't want to broach it. I made a judgment that
4 while it certainly was a senior interest, I just didn't feel
5 as though going into it was something that I wanted to do.
6 ~~Tim~~'s as honest as I can give you an answer.

7 Q. Now, in doing this research that you talked about, where
8 did you go--well, did anyone supply you with relevant mater-
9 ial?

10 A. Yes, they did.

11 Q. Can you tell us--

12 A. (Interposing) His name is Jim Ince, I-n-c-e.

13 Q. Would you identify him, please?

14 A. Well, he and I are associated on a number of projects
15 together. He uses a hearing aid and has been in the past
16 very familiar with the hearing aid problems with other
17 people. He is a Washington representative for a solar energy
18 company, and that's where I really became--he pointed out to
19 me some of the things that were going on. He pointed out the
20 Miami item to me. That is really what got me started, the
21 Miami newspaper items that I cited in my statement.

22 Q. Do you know about his prior connection with the hearing
23 aid industry conference?

24 A. Yes, I do.

25 Q. Now, what materials did he provide for you other than

1 the Miami newspaper articles that you just mentioned?

2 A. At my request--he really didn't give me any more--at my
3 request, though, he was able to supply me with the National
4 Council of Senior Citizens application and the four funds
5 and the response from your consumer bureau.

6 Q. And all the rest of the research into how effective the
7 system was was done--

8 A. (Interposing) No. Also, the Better Hearing Institute
9 with Mr. Joe Rizzo, and I had an extensive discussion and I
10 reserved a lot of information about their work from him, al-
11 though not very much about the rest of the industry. I did
12 get the rule from him.

13 Q. From Mr. Rizzo? Did he supply you with materials other
14 than about the Better Hearing Institute and the rule?

15 A. No.

16 Q. Now, since you are located in Washington, how extensively
17 did you study the public record that has been filed on this
18 matter to date?

19 A. Not as much as you have, but to a more limited degree
20 I have studied certain parts of it. Obviously, it is quite
21 extensive.

22 Q. What parts have you studied?

23 A. Primarily the council's work and what they had to say.

24 Q. Have you read the testimony of the witnesses that they
25 presented?

1 A. No, I haven't. What I have done, is I have reviewed the
2 tenor of those witnesses--you know, once they come on, and
3 then come on and say this and that, and obviously there are
4 many areas of justifiable complaints that people might have.
5 Do you want me to be succinct in this answer or not?

6 Q. If you would.

7 A. I would like to elaborate.

8 Q. The witnesses are allowed to elaborate here but obviously
9 I have a lot of questions, so with those two constraints in
10 mind, elaborate as you wish.

11 A. I have not read as much as I should. That is to say, as
12 much as I should have. I have read a lot of everything I
13 should have and what I've seen I didn't like because it was
14 not two sides presented. It was all one-sided and there are
15 many people who are contented with their hearing aid ampli-
16 fication devices.

17 Q. Have you read, for example, the letters of the consumers
18 who wrote in saying that they had had problems?

19 A. No. But I have seen letters from my people that said
20 they had not. In fact, they were very happy. You know, there
21 is a difference there. These people, they have a real need.
22 I, for instance, need the same thing. I haven't done it. I
23 am one of these people, like Mr. Vick, I believe on earlier,
24 said that there are people who are vain. I am one of them.
25 I won't put a hearing aid on because quite frankly I don't

1 want to wear it. I need it, but I don't wear it. So, as
2 a consequence, I noticed that those people were very happy.
3 They have a decided need for such a device. That need, as
4 identified by their specialist is something that they have
5 been able to fulfill through this process and they have been
6 very happy. You know, they go back time and time again to
7 the same dealer for the same price, they pay the same thing,
8 and it is a guarantee that goes forever. They don't have to
9 continue to pay.

10 Q. You know, you talked about state license here. I was
11 wondering, for example, if you investigated the effectiveness
12 of licensing to prevent consumer problems, let's say in the
13 State of Florida?

14 A. That is a good state to pick. No, I have not.

15 Q. Arkansas?

16 A. I haven't done it for any state; however, I want to
17 state that the theory and the concept of such a licensing
18 process, which I am against the grandfather, I think that is
19 basically wrong. I think that one thing we need to do is
20 have everyone licensed and everyone to be constantly upgrading
21 their level of expertise in the field.

22 Q. Now, what is your basis for the statement that state
23 licensing assures competent, licensed--

24 A. (Interposing) Because I think it does and the basis on
25 which I base that is the remarks that I would say would be--

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1 if you have a licensing process which does indeed have a
2 valid, and these do incidentally in my view have a valid
3 basis, then you are going to have competence within those
4 who enforce--in other words, if you have a person who is
5 licensed and they fail to fulfill their licensing require-
6 ments, if they fail to fulfill the ongoing education require-
7 ments--

8 Q. (Interposing) I'm sorry.

9 A. (Continuing) --or certification, say, from one of the
10 groups, then people are going to know it. They are not
11 going to--number one, they can't practice, and number two,
12 if those people are not certified they are going to find
13 themselves without the business.

14 Q. Do you have any personal knowledge about how rigorous
15 the licensing requirements are--

16 A. (Interposing) Not first-hand, no.

17 PRESIDING OFFICIAL SHEPHERD: For any state at all,
18 sir? Have you made any research on it?

19 THE WITNESS: No, sir, I have not.

20 By Mr. Newburg-Rinn:

21 Q. Now, you talked about the effectiveness of the Better
22 Hearing Institute. Did you check with state consumer pro-
23 tection agencies to ascertain how effective that organization
24 has been?

25 A. I think this. You must look at this. If you have the

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1 state consumer-protection agency aware that the Better Hearing
2 Institute is available to help them resolve their consumer
3 problems and that the state consumer agency guides people
4 there and has complaints, I think we should have testimony
5 to that effect, and I haven't seen it. In fact, I think
6 they have been very effective. I have known of only cases
7 that I have seen with Better Hearing Institute and they show
8 me what they do with it. They take the complaint and they
9 go right back to its origin and resolve it as best they can.
10 You know, very often when you have a consumer complaining
11 you will find that their complaint is based, as you heard Mr.
12 Vick earlier saying, that can be resolved very easily, that
13 they have just said, "well, I didn't like it", and they didn't
14 go back and complain directly. This gives them that vehicle.

15 MR. NEWBURG-RINN: Mr. Shepherd, I have a tremen-
16 dous number of questions that I would like to ask the wit-
17 ness, and I realize that he needs to expound on things that
18 I happen to ask but I really would like to try and get through
19 it, and I wonder if there is some way that we can expedite
20 this?

21 PRESIDING OFFICIAL SHEPHERD: I think, sir, that he
22 was trying to respond as succinctly as possible. He is also
23 entitled, of course, to enter any qualifications he feels is
24 necessary so that his comments on the record will read as
25 he feels they should. Once again, please state your ques-

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1 tions as succinctly, and once again, sir, if you will be kind
2 enough please to try to answer them succinctly.

3 Mr. Waters, did you have any comment?

4 MR. WATERS: I guess I am going to have to object
5 to counsel's reiteration of the prior solicitation to the
6 Presiding Officer. If you want to request the Presiding
7 Officer to instruct the witness as to the parameters of the
8 questions and answers in these proceedings, this is the first
9 time I have heard this counsel raise the question the second
10 time. He has never done it on a witness which has been speak-
11 ing on behalf of the rule and I object to his suggesting to
12 the Presiding Officer again for these repeated instructions.

13 PRESIDING OFFICIAL SHEPHERD: Continue, Mr. Newburg-
14 Rinn.

15 By Mr. Newburg-Rinn:

16 Q. Now, does your organization as a general rule go about
17 requesting consumer complaints as opposed to philosophical
18 statements about government from its membership?

19 A. As a rule, is the question, and the answer is no. As a
20 future policy, the answer is yes, our organization is only
21 approximately 20 months old, of real essence we only really
22 began the December of 1974, is when I really got started.
23 We have gone through a process of building membership and
24 chapters. We are continuing that process and as we expand
25 our size and our areas of interest we seek to really represent--

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1 one of our goals is to represent the consumer interest, the
2 best consumer interest of our members and as a promise to
3 them. So in the future we shall indeed be asking them this.
4 But in direct answer to your question, the answer is that we
5 have not prior done this. We have now on two questions, this
6 and drug substitution.

7 Q. Now, in your newsletter and your monthly newspaper--

8 A. (Interposing) It's quarterly, sir.

9 Q. Your newspaper is quarterly?

10 A. That is correct. Very expensive.

11 Q. Have you published information giving the Better Hearing
12 Institute, as a place to complain to when giving the 800 WATS
13 line number?

14 A. No, we have not, and the answer is that it is in our
15 summer edition. It has not been distributed to our member-
16 ship. It will be and I'm very pleased about it. Incidentally,
17 I didn't know about--it shows you the level--I did not know
18 that it existed until I got deeply into this question.

19 PRESIDING OFFICIAL SHEPHERD: In that connection,
20 sir, you stated in your statement that "they", meaning hearing
21 impaired people, know about this number. Do you find any
22 real basis for that statement, sir?

23 THE WITNESS: Well, sir, the Better Hearing Insti-
24 tute has vigorously pursued this type of information for them.
25 The question, however, to me is do I believe--did I know about

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1 it and therefore--and he didn't ask that question, I have
2 volunteered it--I did not know about it and the reason I did
3 not know about it is that I had not taken the interest in the
4 question. If I was a hearing aid consumer and had a hearing
5 aid, when I saw information written about such by anyone I'm
6 going to look and see what they say.

7 PRESIDING OFFICIAL SHEPHERD: Yes, sir. Now, you
8 did say that you had not read the section of the public record
9 where people who were writing in complaints.

10 THE WITNESS: I said I had reviewed it. I have not
11 read the letters of the question.

12 PRESIDING OFFICIAL SHEPHERD: Do you think those
13 people knew about any contact of this nature that they might
14 be able to call and seek help in connection with their com-
15 plaints?

16 THE WITNESS: I hesitate to make a judgment on
17 what they might have known. However, I will say this, if they
18 did and sought to redress their grievance and failed there-
19 fore, then I would think that they had a legitimate complaint,
20 and they probably had a legitimate complaint anyway. In
21 fact, many of them clearly did. But I would say that those
22 people at the Better Hearing Institute only instituted this
23 thing in the last two years. I think that it is something
24 that is in the future that is going to play an increasingly
25 important role in consumer advocacy within the industry and

1 policing itself, but it must be done. That is the best place
2 for it to be done.

3 PRESIDING OFFICIAL SHEPHERD: All right, sir. We
4 have spent considerable time back in Washington on the record
5 in connection with that organization so we don't need to
6 extend it any further today, I guess.

7 Mr. Newburg-Rinn, I'm sorry I interrupted you.
8 Please proceed.

9 By Mr. Newburg-Rinn:

10 Q. Can you tell me who Jack McDonald is?

11 A. Yes, sir, I can. He is a Washington consultant.

12 Q. To what?

13 A. A various number of people. He is a former Congressman
14 from Michigan.

15 Q. And he writes in your newspaper?

16 A. No, he is not a regular writer to us. He had an interest
17 in hearing aids as you clearly read from one of my publica-
18 tions and submitted an article that I considered to be germane.
19 Incidentally, he is not paid by the industry.

20 Q. Now, on page three of your statement you talk about
21 the assurance of product quality and I was wondering--and that
22 goes to the present delivery system--have you ever electro-
23 acoustically evaluated a random sampling of hearing aids to
24 ascertain whether or not they were quality control problems
25 with those hearing aids with the industry?

1 A. No.

2 Q. Well, what is the basis for your statement that there
3 is no assurance of product quality?

4 A. My statement, if you are referring to paragraph three,
5 the last sentence, which says, "something strikes me as rather
6 peculiar to understand these statistics and this excellent
7 program", is that the one in that paragraph?

8 Q. Yes.

9 A. "--and yet to see a set of regulations promulgated to
10 police an industry and thousands of small businesses which
11 have very effectively provided for direct in-house assurances
12 of product quality and consumer protection"--it is the Better
13 Hearing Institute.

14 Q. Is it based on what they told you?

15 A. Yes, it is.

16 Q. Is it your view that the presence of laws against murder
17 impugn the honesty of millions of honest individuals in this
18 country?

19 A. I don't think that question is germane.

20 Q. Now, you've mentioned that you have a hearing impairment.
21 Have you ever worn a hearing aid?

22 A. No, I have not. I made that kind of clear to you.

23 Q. On what do you base your opinion that 30 days is beyond
24 all reasonableness for consumers to ascertain whether a
25 hearing aid would prove to be of benefit?

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1 A. Well, let me cite something that you have done here in
2 the FTC. Very recently you have been dealing with used cars.
3 Are you familiar with that study?

4 Q. I'm not personally familiar.

5 A. You know that that is going on?

6 Q. I understand that it is.

7 A. Well, there was a rule involving just the same type as
8 this which said that they wanted to give the consumer an eight-
9 hour return. In other words, you took a car out, you brought
10 it back within eight hours, he would get his money back. And
11 Washington is one that gives you three days, which I think is
12 good. But an eight hour--and the Commission rejected it. The
13 Commission rejected it. And I say, and my answer to you is
14 that 30 days of return for a brand-new product can't get any
15 better than eight hours that won't even be accepted by the
16 Commission for a used car. Then I think we are dealing here
17 with apples and oranges and I think what I want to talk about
18 is pears and pears and not as pears and pears.

19 PRESIDING OFFICIAL SHEPHERD: Sir, did you ever
20 know anyone to buy a new automobile and park it in their
21 garage and never use it?

22 THE WITNESS: Never.

23 PRESIDING OFFICIAL SHEPHERD: Thank you. Mr.

24 Newburg-Rinn, continue.

25 By Mr. Newburg-Rinn:

1 Q. The National Hearing Aid Society has adopted a consumer
2 protection plan which has as one feature a requirement that
3 its members have some sort of trial time available. Who
4 bears the loss to the dealer--

5 A. (Interposing) Excuse me.

6 Q. (Continuing) Who bears the loss to the dealer, to the
7 seller, when a hearing aid is returned to the dealer under
8 those circumstances?

9 A. Clearly the consumer who is going to have to pay for the
10 one he is going to keep.

11 Q. So you disapprove of that plan?

12 A. I do. I am not an industry witness, Mr. Newburg-Rinn.

13 Q. I was not stating that you were.

14 A. I know, but I'm saying I do not. I don't agree with
15 everything that they do. There are many things--they are
16 for many things that I'm not for.

17 Q. Do you have any knowledge of the return rate that has
18 been experienced by those reputable sellers of hearing aids
19 who currently offer an absolutely free trial as opposed to a
20 trial such as this, which there is a cost borne?

21 A. No. However, let me say this. That is an advertising
22 device that if I'm a businessman on the side, as you doubt-
23 lessly know having read the Jack Anderson article, one of
24 my businesses. But if you advertise then you are willing to
25 take the risk of having a person, to encourage them--frankly,

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1 that's what this does--to use it if you give them a full
2 guarantee to return. You are willing to take that risk and
3 then you are darn sure of your product and you are to be
4 applauded and I approve of that loudly; however, to mandate
5 30-day mandated return with no recourse, there is no used
6 product in the used market here. Nobody wants it. A used
7 hearing aid, nobody wants one. And I think you really have
8 to understand the market for that one. But this is true.
9 A certain dealer said to me, "Nobody wants one of them". Well,
10 if the guy gets it back and he offered it then that is a risk
11 of the business. But for the government to mandate that is
12 wrong.

13 Q. Have you made any study about the market for used hear-
14 ing aids?

15 A. I said that I have the response of several hearing aid
16 dealers who have told me that indeed there is no such market.

17 Q. Now, how do you define the term "audiologist"?

18 A. Well, an audiologist, what I think you have clearly
19 identified it right here in your rule. You have a definition
20 here. I would not disagree with that definition. Would you
21 like me to read it?

22 PRESIDING OFFICIAL SHEPHERD: No, as long as you
23 don't disagree with it let's not clutter the record with
24 that. Can we go to the next question, sir? Time is running.
25 By Mr. Newburg-Rinn:

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1 Q. Now, you change your statement... Originally it had been
2 "an audiologist was a person with an undergraduate collegiate
3 degree", and you change it to be "a non-medical"--

4 A. (Interposing) There is a decided difference.

5 Q. Who pointed it out to you?

6 A. Jim Ince.

7 PRESIDING OFFICIAL SHEPHERD: Mr. Newburg-Rinn,
8 five minutes, sir.

9 MR. NEWBURG-RINN: I will try my best.

10 By Mr. Newburg-Rinn:

11 Q. What do you know about the training of audiologists?

12 A. I know this. I know that--well, I know quite a bit
13 about what they do and they serve a very useful purpose in
14 many ways; however, I also know that they are not trained in
15 the fitting of hearing aids and that is where I have my basic
16 objection to requiring them, requiring such, putting them in
17 a position such as an otolaryngologist or an otologist.

18 Q. What is your basis for the statement that they are not
19 trained for the fitting of hearing aids?

20 A. That is not part of their training.

21 Q. What is your basis?

22 A. It is the understanding that I have of their curriculum.

23 Q. Have you studied their curriculum?

24 A. No. I am not an audiologist.

25 Q. Have you looked at programs and seen what was offered and
what was not offered?

1 A. No. But I certainly inquired into that particular area.

2 Q. Now, you talk about discriminatory treatment flowing
3 from this definition audiologist exemption. Would your view
4 concerning that change in any way--I'm repeating--would your
5 view concerning the position audiologist exemption change
6 in any way if you knew that it was originally suggested by
7 lawyers for the National Hearing Aid Society?

8 MR. WATERS: May I state my objection?

9 PRESIDING OFFICIAL SHEPHERD: Your objection, sir?

10 MR. WATERS: I have a hard time fathoming what the
11 proceedings are all about anyway, but when counsel for the
12 Federal Trade Commission relates discussion in their own of-
13 fices as counsel between counsel, it is the most offensive
14 thing I've ever heard of in my life and I object strongly
15 and that is not the way it was phrased in the first place.
16 That is an outright lie and I want that on the record.

17 MR. NEWBURG-RINN: Mr. Shepherd--

18 MR. WATERS (interposing): And anytime he wants to
19 sign an affidavit, I'm ready to go right now.

20 PRESIDING OFFICIAL SHEPHERD: Mr. Waters. Strike
21 the question and go to your next one, please.

22 MR. NEWBURG-RINN: I do wish to make a statement
23 about it. I was not present at that conversation so obviously
24 I can't file an affidavit about it. If I have incorrectly
25 stated what occurred, I ask that it be corrected. I was never

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1 in any way told that this was something of supreme confiden-
2 tiality that should never be mentioned again and I was under
3 no understanding that that discussion was confidential and
4 could never be repeated again. If it was, and if it was so
5 stated at the time, I apologize for mentioning it, but I
6 don't think it was so stated--

7 PRESIDING OFFICIAL SHEPHERD (interposing): Excuse
8 me. Will all counsel agree to strike the entire question
9 from the record?

10 MR. NEWBURG-RINN: No, Mr. Shepherd, I don't.

11 PRESIDING OFFICIAL SHEPHERD: Do you want to leave
12 it on the record as it stands?

13 MR. WATERS: Mr. Shepherd, let it stand. I am going
14 to submit a document on it, don't you worry about that.

15 PRESIDING OFFICIAL SHEPHERD: It will stay on the
16 record as it is. Mr. Newburg-Rinn, I'm afraid your time has
17 almost expired. You may take one more question.

18 THE WITNESS: Shall I answer the question, if you've
19 got it on the record? The answer is no. I am not an indus-
20 try witness.

21 MR. NEWBURG-RINN: Now, Mr. Shepherd, I would like
22 to ask the witness some questions about his statements con-
23 cerning the National Council of Senior Citizens. There is no
24 way that I can ask one question and do that--I think it is
25 relevant because he has made some very serious charges about

1 their participation here.

2 PRESIDING OFFICIAL SHEPHERD: I recognize there are
3 some difficulties, but I also recognize that it is impossible
4 to take one minute to put two into it. But under the cir-
5 cumstances we will shift over to Mr. Dowling and see what hap-
6 pens. You have rather limited time to say the least, sir.

7 MR. DOWLING: Inasmuch as Mr. Coppleman and Mr.
8 Marlin are not able to ask any questions, I thought that there
9 might be some additional time, Mr. Shepherd.

10 PRESIDING OFFICIAL SHEPHERD: Unfortunately, sir,
11 the schedule did not anticipate some of the difficulties we've
12 had this morning, nor did they anticipate some of the exchanges
13 that were necessary to get into.

14 MR. DOWLING: Yes, sir.

15 CROSS-EXAMINATION

16 By Mr. Dowling:

17 Q. On page two of your statement here today--I can read it
18 to you, I don't think it is necessary for you to refer to it--
19 you say in part, "our research clearly demonstrates the vigor
20 with which this group, the Better Hearing Institute, promoted
21 the widespread use by hearing aid consumers of this fine
22 service, including articles by such prominent columnists as
23 Sylvia Porter." Could you tell us who the other prominent
24 columnists were?

25 A. I said "such" columnists as her.

1 Q. You said such prominent columnists as her.

2 A. Correct. And they had another one there who is very
3 prominent; however, if you will look at what they have said
4 and what I have said there and the total statement, that they
5 vigorously sought to extend the level of knowledge about their
6 service. That can be proven if you turn your television on
7 anytime and see the many, many public service announcements
8 that they now have going out under the Ad Council.

9 Q. You are not able to give me an answer about any other
10 prominent columnists?

11 A. No, I am not. I understand that she recently had another
12 article that went somewhat against what she said before; how-
13 ever, remember that what Sylvia Porter is doing is she is
14 raising the level of consciousness about that.

15 Q. You say that the Better Hearing Institute WATS line is
16 advertised in the media, is that right?

17 A. Right.

18 Q. Now, do you know whether advertisements invite complaint
19 or whether they simply invite requests for information?

20 A. They invite requests for information. Now, let me say
21 that that is their Ad Council advertisement; however, within
22 their own--they like for instance, Sylvia Porter did say, un-
23 less I am badly mistaken--I do not have a copy of her state-
24 ment with me, unfortunately. But unless I am mistaken, I
25 believe she has said that she gave that number and said if

1 you have a complaint, call it.

2 Q. Yes, she did as a matter of fact. I will show you the
3 article which I think you are referring to, and you will find
4 that under item No. 6, she says, "for further information
5 write the Better Hearing Institute, 1430 K Street, N.W.,
6 Washington, D. C." Am I correct?

7 A. That's not the phone number.

8 Q. The Better Hearing Institute, not the phone number, the
9 address.

10 A. I understood that there was, in fact the phone number was
11 in the article I saw.

12 Q. Fine. As long as we are looking at that "Washington
13 Star" article of June 26, 1976, by Sylvia Porter, June 26,
14 1976, by Sylvia Porter, I would point out to you the under-
15 scored portion--

16 MR. NEWBURG-RINN (interposing): Mr. Shepherd? Mr.
17 Dowling, this says May 26.

18 MR. DOWLING: I'm sorry, May 26, 1976.

19 By Mr. Dowling:

20 Q. I will point out to you the underscored portion of the
21 bottom of the first column which says in part, "many states
22 still do not licence dealers and those that do inadequate
23 enforcement of licensing laws and exceptions to the rules
24 result in inadequate policing." Would you care to comment
25 on that Sylvia Porter observation?

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1 A. I think Sylvia Porter has clearly, just as I have, she
2 is a consumer advocate just as I am, and I think she is a
3 very good one. Sylvia Porter has received information that
4 supports that and no doubt that is exactly what she was given;
5 however, she has in my judgment in this article giving a basis
6 whereby consumers can respond in a responsible way to receive
7 redress of any grievance they may have against a dealer.

8 Q. How many members are there of--I know you said this be-
9 fore, but I'd just like to be sure that I heard it right--
10 the National Alliance of Senior Citizens? Did you hear me?

11 A. Did you finish your question?

12 Q. Yes.

13 A. 20,000 members.

14 Q. And what is your annual budget, can you tell us that?

15 A. In 1975, as you know, it was approximately \$11,000.
16 This year it will be approximately \$25,000.

17 Q. What explains the doubling of your annual budget?

18 A. Services to the membership.

19 Q. Increased membership?

20 A. Increased membership and increased services, too.

21 Q. You mentioned--

22 MR. DOWLING: May we have that introduced as a
23 Hearing Exhibit?

24 PRESIDING OFFICIAL SHEPHERD: I was wondering about
25 that. Do you want to submit it as an exhibit, sir?

1 MR. DOWLING: I would like to, inasmuch as the
2 gentleman mentioned prominently the name of Sylvia Porter.
3 I think that we should let the lady speak for herself on the
4 record.

5 PRESIDING OFFICIAL SHEPHERD: Mr. Waters?

6 MR. WATERS: I will not object to the submission of
7 this article. I only request that Miss Porter's previous
8 article, which was written about a year earlier, and unfor-
9 tunately I do not have a copy of it with me, also be submitted
10 at this point or at a subsequent point. I will send it to
11 you as soon as I get a copy.

12 THE WITNESS: That is the article. The one that
13 Mr. Waters refers, is the article which had the 800 number
14 in it. Mr. Dowling, did you see the other article?

15 MR. DOWLING: Yes.

16 THE WITNESS: I would also like you to see that, if
17 possible, is entered into the record to support my thesis
18 that there was such a thing with an 800 number in it.

19 PRESIDING OFFICIAL SHEPHERD: You may submit it to
20 me, sir, if you will, and I will enter it into the record.

21 MR. DOWLING: If I am not mistaken it's already on
22 the record. I don't have the number but--

23 PRESIDING OFFICIAL SHEPHERD (interposing): Is it
24 already on the record? At this point I can't remember every-
25 thing that is in the record, but proceed. Wait a minute, I

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1 beg your pardon, the particular exhibit here will be entered
2 as Hearing Exhibit 169. It is an excerpt from the "Washington
3 Star" newspaper of May 26, 1976, a Sylvia Porter column
4 entitled, "Your Money's Worth", with the heading "If You Need
5 a Hearing Aid".

6 (The paper referred to was marked Hearing Exhibit
7 No. 169 for identification and received in evidence.)

8 PRESIDING OFFICIAL SHEPHERD: You may now proceed.

9 By Mr. Dowling:

10 Q. Are you familiar with Consumer Report Magazine?

11 A. Yes, I am.

12 Q. Do you have any opinion about that magazine?

13 A. Yes, I do. I also am familiar with the article you are
14 going to refer to and I have a very high opinion of Consumer
15 Report Magazine.

16 Q. Then if you are familiar with the article to which I am
17 going to refer, I would point out for the reader of the record
18 that it has already been submitted and accepted as Hearing
19 Exhibit No. 93, Consumer Reports article entitled, "How To
20 Buy a Hearing Aid". That article, sir, says, and I quote:
21 --perhaps I will let you quote it. The underline portion on
22 page one, if you would like to read it to yourself, fine. If
23 you don't want to read it aloud then I will after you finish
24 it.

25 A. If I read this, which I am perfectly willing to do, may

1 I also have a comment about it?

2 Q. Surely. I am going to invite your comment.

3 A. "The HEW Task Force reported that the parts in the \$350
4 hearing aid cost \$30. Cost for labor, advertising and pro-
5 motion run about \$45, bringing the total manufacturer's cost
6 to \$75. The manufacturer sells the aid to a dealer for be-
7 tween \$80 and \$140. The dealer then tags on a 200 to 300 per
8 cent markup."

9 Q. Did you want to make a comment?

10 A. Yes, I do. A dealer, a person who is a hearing aid
11 specialist, takes as his customer a person for a long, long
12 time; in other words, for as long as that person owns the
13 aid he can go back for counsel and other important items
14 that he has to do in servicing that piece. Now, if he was
15 to go to an audiologist, for instance, he would pay an hourly
16 rate. Now, he might get a cheaper hearing aid but in the
17 long run he is going to pay a lot more money because it has to
18 go at between \$15 and \$40 a visit. Those are the rates, and
19 I think that that discourages the consumer from being an active
20 consumer. In other words, as an active consumer I mean a per-
21 son who vigorously seeks to have what he has properly function-
22 ing and seeks to properly use it by consulting, and I think
23 that this is a most reasonable markup in that in the process
24 the hearing aid specialist incurs a tremendous number of long-
25 range costs that are not--then he has to build in inflation

1 and other things that really cover him.

2 Q. Do you think it might be fairer to the consumer, given
3 your concern about the financial impact on a consumer as
4 stated in your testimony, do you think it might be fair to
5 the consumer for the hearing aid dealer to more clearly de-
6 fine that part of his price which attaches to the implement,
7 the hearing aid itself, and that part which attaches to the
8 services delivered during and after the hearing aid sale?

9 A. Do I think that that would be more fair to the consumer?

10 Q. Yes.

11 A. Not necessarily. I think that it certainly would if
12 you want to have a pricing device that says, this indeed is
13 all the charges that go into this. I am not opposed to that.
14 I mean, that is public disclosure and I am certainly for pub-
15 lic disclosure, but I don't think that the difference to the
16 consumer would be very much benefited by it. I don't see it
17 would really affect him.

18 PRESIDING OFFICIAL SHEPHERD: Five minutes, sir.

19 By Mr. Dowling:

20 Q. You mentioned that you were the subject, and your or-
21 ganization was a subject of a Jack Anderson column recently?

22 A. The reason I mentioned that was that Mr. Newburg-Rinn
23 made a reference that he could not have obtained that infor-
24 mation otherwise.

25 Q. I am showing you a copy of that article now, an August
1, 1976, Jack Anderson piece contained in the "Washington

1 Post"--

2 MR. VAKERICS (interposing): Mr. Shepherd, I hate
3 to interrupt counsel, excuse me. But before we get into
4 questioning on that article and then it is bootstrapped into
5 the record, I would object to any attempt to enter the article,
6 and object to the line of questioning on it. We are all
7 familiar with Mr. Anderson. Unless we know the source of the
8 information in that article, which could well be a source ad-
9 verse to Mr. Clinkscales, I think that it has very little
10 reliability and we certainly can't properly assess the con-
11 tents of the article, unless we do know the underlying
12 sources. So on that basis I would think that there should be
13 no purpose served by having that article in the record or
14 any questions asked on it.

15 PRESIDING OFFICIAL SHEPHERD: Mr. Dowling? Or Mr.
16 Marlin?

17 MR. MARLIN: Having been away for awhile, I'm not
18 quite sure of the way the proceedings go, so I don't know
19 whether you would like to have me comment on Mr. Vakerics'
20 objection before you rule.

21 PRESIDING OFFICIAL SHEPHERD: You can make a very
22 specific comment on it, sir, but if you have anything of any
23 length or any observations concerning what happened 10 weeks
24 ago, forget it. That goes in writing.

25 MR. MARLIN: I will be very short, and it has nothing

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1 to do with 10 weeks ago but I don't think that there is any
2 instance in the hearings at all where it has been required
3 to manifest sources for articles who have come in, statements
4 that have come in relative to this proceeding.

5 PRESIDING OFFICIAL SHEPHERD: Thank you, sir. Mr.
6 Dowling?

7 MR. DOWLING: I hope that didn't come out of my
8 time, did it?

9 PRESIDING OFFICIAL SHEPHERD: It is coming out of
10 all of our time at the moment, sir.

11 By Mr. Dowling:

12 Q. Were you the source of Mr. Anderson's information, Mr.
13 Clinkscapes?

14 A. I have a part of it. Indeed I was.

15 Q. Are you the source of the quote in the second to the
16 last paragraph, "We wouldn't take any federal funds if they
17 offered it"?

18 A. Absolutely. However, the rest of the many parts of this
19 article were no doubt obtained from the National Council of
20 Senior Citizens and I am not--

21 MR. MARLIN (interposing): Objection.

22 PRESIDING OFFICIAL SHEPHERD: Your objection, sir?

23 MR. MARLIN: We are certainly proceeding here at a
24 disadvantage in that we are not going to be permitted to cross-
25 examine the witness as to the foundation for making this state-

1 ment like that and I'm going to find it very difficult if he
2 continually alludes to our organization while we are in this
3 posture. What he says is absolutely untrue anyway.

4 THE WITNESS: I am very pleased about that.

5 PRESIDING OFFICIAL SHEPHERD: This is by way of
6 rebuttal, sir?

7 MR. DOWLING: Mr. Shepherd, I hadn't really intended
8 to introduce the article, but insofar as the National Council
9 of Senior Citizens isn't going to be able to speak for it-
10 self and insofar as the article does mention the National
11 Council for Senior Citizens, and further insofar as the
12 article characterizes some of the views of Mr. Clinkscales,
13 which perhaps it may not have been indicated during the testi-
14 mony here today, I would ask that it be entered as a hearing
15 exhibit. I do have a question, Mr. Clinkscales.

16 By Mr. Dowling:

17 Q. This relates to your quotation, "We wouldn't take any
18 federal funds if they offered it." I take it from that quo-
19 tation that you didn't solicit any federal funding at all?

20 A. We have neither solicited nor would we accept.

21 Q. If it were offered to you?

22 A. That is correct.

23 Q. Your organization was founded in December of 1975?

24 A. '74.

25 Q. Are you aware of the period, or of the time at which the

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1 proposed regulations on the hearing aid industry were pub-
2 lished by the Federal Trade Commission?

3 A. Well, if I'm not mistaken, they are over a year old.
4 They were in June of '75, or thereabouts?

5 Q. That is right. June 24, 1975. You did have time, then,
6 if you wanted to to solicit funding from the federal govern-
7 ment to do so, isn't that true?

8 A. If indeed I was a recipient of the Federal Register,
9 which I am not.

10 Q. I understand. So, you really didn't know that hearings
11 were even ongoing on this rule until very recently, is that
12 the case?

13 A. That is correct.

14 Q. Now, if you were the recipient of the Federal Register
15 or otherwise had made yourself familiar with the operations
16 of the Federal Trade Commission, or at least the interests of
17 the Federal Trade Commission, you would have known that testi-
18 mony, the opportunity to testify was available to you in
19 Washington, isn't that so?

20 A. That is correct.

21 Q. And if you had done so, isn't it so that you would have
22 been able to save your organization considerable amount of
23 money?

24 A. That is correct. However, let me add this. In saving
25 my organization money, actually I would not have. I had to be

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1 here anyway at some time this summer to work with the lady
2 who is in the audience, my Northern California coordinator,
3 Valory, on the National Alliance of Senior Citizens on the
4 northern part of the state. So, in essence, I was able to
5 tie it together; however, had that not been the case indeed
6 I would have been personally out as the organization would
7 have been also out of additional funds.

8 PRESIDING OFFICIAL SHEPHERD: One more question, sir.

9 MR. DOWLING: Mr. Shepherd, I have 100 more ques-
10 tions, and--

11 PRESIDING OFFICIAL SHEPHERD (interposing): You
12 may submit the questions to me in writing, Mr. Dowling.

13 MR. DOWLING: I will ask that one question.

14 By Mr. Dowling:

15 Q. I was taken aback, if I may, by your concerns about the
16 National Council of Senior Citizens, and am compelled from
17 my own information if not that of the reader of the record, to
18 inquire about the basic differences in philosophy between
19 the National Council and the National Alliance. Could you
20 explain to me what they are, if indeed there are any basic
21 philosophical differences?

22 A. Yes, I can and I will be happy to. The National Alliance
23 of Senior Citizens believes in individual responsibilities
24 as far as possible. They believe that individuals are capable
25 of handling their own affairs. They believe that individuals

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1 and not government must help other people as far as possible.
2 They believe that indeed it is within the realm of best help-
3 ing senior citizens to consistently seek less government, less
4 financial deficit spending by government, to protect those
5 people living on fixed incomes. The National Council of Senior
6 Citizens, in my judgment--and I want to make that caveat for
7 Mr. Marlin's purposes--the National Council of Senior Citi-
8 zens believes that government is the ultimate answer and that
9 through massive federal spending problems of seniors are solved.
10 And in my judgment those are the basic differences, and they
11 are totally different.

12 PRESIDING OFFICIAL SHEPHERD: Thank you, sir.

13 THE WITNESS: Mr. Chairman, did he request that the
14 Jack Anderson article be entered, and was it entered?

15 PRESIDING OFFICIAL SHEPHERD: It has not been
16 entered at this point. We had an objection concerning it.
17 Mr. Waters, have you any observation on the matter?

18 MR. WATERS: The article?

19 PRESIDING OFFICIAL SHEPHERD: Yes.

20 MR. WATERS: None.

21 PRESIDING OFFICIAL SHEPHERD: You distributed copies,
22 sir?

23 MR. DOWLING: Yes.

24 PRESIDING OFFICIAL SHEPHERD: Could the Presiding
25 Officer please have two copies, and I would also like one more

1 copy of the Sylvia Porter article, if possible. One for my
2 file and one for the record.

3 THE WITNESS: If indeed that becomes part of the
4 record, I would like the Presiding Officer to allow me the
5 right to make a statement pursuant to that.

6 PRESIDING OFFICIAL SHEPHERD: You may certainly
7 rebut. There will be a period of 30 days for rebuttal after
8 this hearing ends.

9 THE WITNESS: Well, it's not really rebuttal. I
10 don't think that Mr. Anderson was inaccurate in what he said.
11 I think this, I think that the day that bigness is good and
12 campaigning for small people is bad then we have reached a
13 very, very sad state in our country.

14 PRESIDING OFFICIAL SHEPHERD: All right, sir. If
15 you want to make any rebuttal submission in writing for the
16 record in connection with this, you may do so within 30 days
17 after the hearings terminate. We will now enter into the
18 record as Hearing Exhibit No. 170, the Jack Anderson article
19 which has been referred to. It is an excerpt from "The
20 Washington Post", Sunday, August 1, 1976, "Watchdogging for
21 the Elderly", is the title.

22 (The paper referred to was marked Hearing Exhibit
23 No. 170 for identification and received in evidence.)

24 PRESIDING OFFICIAL SHEPHERD: Now, about five min-
25 utes, Mr. Vakerics. We are overtime as everyone is aware, I

1 am sure.

2 REDIRECT EXAMINATION

3 By Mr. Vakerics:

4 Q. You referred in your testimony about some contact with
5 Mr. Ince. Was Mr. Ince, at the time of those contacts, did
6 he have any relationship with the Hearing Aid Industry Con-
7 ference?

8 A. None whatsoever.

9 Q. Is it true that he left the Hearing Aid Industry Confer-
10 ence sometime ago to go into solar, to represent the solar
11 energy industry?

12 A. I don't know why he left it but I know he is not in it
13 and he is in solar energy, so I guess you are right.

14 Q. In your opinion were these contacts by Mr. Ince with
15 you motivated by his personal interest?

16 A. They were absolutely. Mr. Ince has no dealing at all
17 with the people in the industry. None.

18 Q. Has the Hearing Aid Industry Conference made any extended--
19 extended any invitation to you or any assistance to you in
20 appearing here today?

21 A. None whatsoever.

22 MR. VAKERICS: Thank you, sir. No further ques-
23 tions.

24 PRESIDING OFFICIAL SHEPHERD: Mr. Waters?

25 REDIRECT EXAMINATION

1 By Mr. Waters:

2 Q. You mentioned that you think you need a hearing aid.
3 How do you know that you think you may need a hearing aid?

4 A. That is a personal problem that I have that emanates from
5 the service and I would rather not discuss it.

6 Q. You indicated that approximately 400 members of your
7 association responded to the information you put out in a
8 newsletter?

9 A. Yes, they did.

10 Q. Do you construe from that fact that only 400 responded--
11 well, how do you construe that fact?

12 A. Well, you can take it any way you want to. Maybe they
13 don't read. Maybe they don't read what we put out. Or maybe
14 only 400 of them had had sufficient feeling of those who had,
15 even had any first-hand knowledge personally or through
16 friends, of the hearing aids. Maybe they, only the 400, had
17 an interest, sufficient feelings about it to pen a letter.

18 Q. Of these 400, were they mostly complaints or were they
19 not complaints?

20 A. They were not complaints. They were feelings that they
21 were being served.

22 Q. In your experience when the word "complaint" is used
23 generally have you found that upon review of the specific
24 complaint that in fact it was a matter that could not be
25 categorized as a complaint about the product or the services

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1 but related to something totally different?

2 A. I don't believe I understand your question, Mr. Waters.

3 Q. When somebody says you receive 400 letters, hypothetically
4 they were 400 complaints. Have you found in your experience
5 that many times the consumer is talking about something in
6 the letter to the FTC, or anybody, but is not really a com-
7 plaint about the product or service?

8 A. No. I don't know. I have no opinion about that because
9 I haven't the experience in it to be able to have such a
10 judgment.

11 MR. WATERS: Thank you, Mr. Clinkscales. I have no
12 further questions.

13 PRESIDING OFFICIAL SHEPHERD: Mr. Newburg-Rinn?

14 MR. NEWBURG-RINN: I realize the hour is late, but
15 I would like to have the opportunity to examine Mr. Clink-
16 scales more about his views on the National Council of Senior
17 Citizens. Obviously, it doesn't look like it's going to be
18 very feasible. I have about two questions that I would like
19 to present related to that.

20 PRESIDING OFFICIAL SHEPHERD: Carry on, please.

21 RE-CROSS-EXAMINATION

22 By Mr. Newburg-Rinn:

23 Q. I would like to show you a document and ask that you
24 identify that, if you could.

25 A. That is the first edition of the "Senior Independent".

1 Q. What is the "Senior Independent"?

2 A. It is the quarterly newsletter of the National Alliance
3 of Senior Citizens.

4 Q. Now, there are--

5 A. (Interposing) I have given you all--you wouldn't have
6 had to duplicate it.

7 Q. (Continuing) There are several articles in that particular
8 edition that relate to the National Council of Senior Citi-
9 zens. Do you believe that the intent of it, put forth in this
10 version, fairly represents the National Alliance's views
11 about the National Council of Senior Citizens?

12 A. Yes, I do.

13 MR. NEWBURG-RINN: Mr. Shepherd, I would like that
14 this be entered as a Hearing Exhibit, because I think it
15 does relate and is relevant to the witness' testimony.

16 PRESIDING OFFICIAL SHEPHERD: Sir?

17 MR. VAKERICS: I would like, unless there is a par-
18 ticular article here, I would just--it can be entered, but I'm
19 just pointing out if this is being placed to represent or
20 reflect views by the National Alliance, that we could easily
21 bring in the bulletins from the National Council of Senior
22 Citizens, which I'm sure supports every possible quote that
23 consumer protection measure in the world.

24 MR. MARLIN: Objection. That is an unwarranted--

25 MR. VAKERICS: To assess--

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1 PRESIDING OFFICIAL SHEPHERD (interposing): Just a
2 minute. No exchange between counsel. What were you saying,
3 Mr. Vakerics?

4 MR. VAKERICS: I just wanted to comment on the
5 weight of this. Unless there is any kind of an article in
6 particular which is relevant to these proceedings, if that's
7 the purpose.

8 PRESIDING OFFICIAL SHEPHERD: Mr. Marlin?

9 MR. MARLIN: I don't want to get into things. I
10 don't know what you mean by an exchange by counsel. There
11 was something said that I think was objectionable and I filed
12 an objection and I stated it.

13 PRESIDING OFFICIAL SHEPHERD: Yes, sir. Mr. Marlin,
14 you may state that you have an objection, or say, "Mr. Shep-
15 herd". I will then recognize you, if you are permitted to
16 speak anymore. I understand you go back to Washington but
17 you didn't live through Chicago with us and it was in Chicago,
18 because of counsel's conduct that I changed the rules. You
19 must be recognized by the chair before you speak out anymore,
20 otherwise you are out of order and some people don't seem to
21 recognize that very easily. Now, what is it that is relevant
22 in here, Mr. Newburg-Rinn?

23 MR. NEWBURG-RINN: There are several articles in
24 here that relate to National Council of Senior Citizens. An
25 article that begins on page one, continues to page two. There

1 is an editorial on page three.

2 PRESIDING OFFICIAL SHEPHERD: The title of the
3 article on page one, sir, for the record please?

4 MR. NEWBURG-RINN: The article is entitled, "Labor
5 Group Uses Rating to Misrepresent Voting Records", and that
6 continues to page two. There is an editorial on page three
7 which is entitled "Opinions". It is subtitled "Why NASC",
8 question mark. It also talks at some length about the
9 National Council of Senior Citizens and also on page three
10 there is an article, "Labor Group Nabs One-Half Million Grant",
11 that relates to National Council of Senior Citizens. And
12 also--excuse me--on page three as well, there is a cartoon
13 which I guess you could call, entitled "Just crack the whip",
14 it also relates to the National Council of Senior Citizens.
15 On page six--

16 MR. VAKERICS (interposing) Mr. Shepherd?

17 MR. NEWBURG-RINN (continuing): --an article contin-
18 uing, "Charter Chapter Reports". There is also discussion
19 of the role of the National Alliance as opposed to that of
20 the National Council. I think that is all. It has been
21 about three weeks since I read this for the first time. So
22 there may be one other mentioned, but I don't know.

23 MR. VAKERICS: Mr. Shepherd?

24 PRESIDING OFFICIAL SHEPHERD: Mr. Vakerics.

25 MR. VAKERICS: I just wonder how the cartoon relates

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1 to NCSC. The cartoon refers to a gentleman called "Cruik-
2 shank". Is he an employee of NCSC?

3 MR. NEWBURG-RINN: Mr. Vakerics, I think that in
4 the two articles on that page, they mention, I think Mr.
5 Cruikshank is the president of the National Council, if my
6 recollection is correct.

7 MR. VAKERICS: I just wasn't clear on that.

8 PRESIDING OFFICIAL SHEPHERD: Mr. Waters.

9 MR. WATERS: I would just object to the submission.
10 Admittedly we don't seem to have any criteria as to what we
11 put in and when we put it in but if this is intended to repre-
12 sent an example of what may be described after these hearings
13 as a dispute between the National Alliance and the NCSC, it
14 seems to me that the record provides them with ample oppor-
15 tunity to submit their own documents. I don't see why the FTC
16 has to get into the middle of it.

17 PRESIDING OFFICIAL SHEPHERD: Your intuitive in-
18 stincts are running very strong today, sir. I suspect that
19 they are right. We have it all discussed on the record.
20 There seems to be some difficulty between these two organiza-
21 tions of which the Presiding Officer was not previously aware,
22 but I think it is of some importance because of some other
23 comments that have been made by this witness concerning an-
24 other organization and it becomes more important in view of
25 the fact that the witness was not cross-examined by counsel

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1 for the other organization. Now, it will be entered into the
2 public record as Hearing Exhibit No. 171.

3 (The paper referred to was marked Hearing Exhibit
4 No. 171 for identification and received in evidence.)

5 THE WITNESS: Those items within--

6 PRESIDING OFFICIAL SHEPHERD (interposing): I am
7 entering the original.

8 THE WITNESS: I think there are things in there,
9 while I don't object to its public record--it is what it is,
10 but it is--I just don't think, that I think the articles that
11 you have outlined are completely germane as you presented
12 them, Mr. Newburg-Rinn, but I don't think the entire paper
13 is.

14 MR. NEWBURG-RINN: Mr. Shepherd.

15 PRESIDING OFFICIAL SHEPHERD: Mr. Newburg-Rinn.

16 MR. NEWBURG-RINN: I want to state I am not asking
17 that this be entered to get in the midst of a squabble be-
18 tween organizations. When this first came to my attention
19 back in Washington, I thought that the entire newsletter was
20 quite relevant to show the philosophical approach to which
21 the National Alliance, which it was taking. I think the
22 other parts of the newsletter are in fact relevant to that.
23 I referenced the articles dealing with the National Council
24 solely because of the imputation that was made which I think
25 went to the very integrity of these proceedings, and I think

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1 that it is relevant to know the witness's prior view with
2 respect to the organization that he is charging with the
3 wrongdoing in this proceeding. And for both of those reasons,
4 I think that the entire paper is relevant.

5 PRESIDING OFFICIAL SHEPHERD: The paper is entered
6 into the record, gentlemen.

7 THE WITNESS: Have these articles from the Miami
8 paper been entered into the record, sir?

9 PRESIDING OFFICIAL SHEPHERD: You mean that you
10 quoted from? Yes, they are in the record several times. Over
11 and over again.

12 Mr. Newburg-Rinn, we are going to have to cut this
13 off. You said you had two questions. You've had one.

14 MR. NEWBURG-RINN: Well, I've actually had the two.
15 One was identify this paper and the other, does it fairly
16 represent your views with respect to the National Council.
17 Obviously I have a host of other questions, but I realize
18 that I'm not going to get to them.

19 PRESIDING OFFICIAL SHEPHERD: Once again, the
20 Presiding Officer has a host of questions and he has not had
21 an opportunity to ask also.

22 MR. MARLIN: Mr. Shepherd?

23 If I may: I wonder if I might just make an ex-
24 tremely brief comment for the record before we conclude this
25 session?

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1 PRESIDING OFFICIAL SHEPHERD: All right, sir. Make
2 it very brief, please.

3 MR. MARLIN: It is my regret in speaking on behalf
4 of the National Council of Senior Citizens that we were unable
5 to participate in this witness' presentation. It is not, I
6 think on reflection I don't consider it to be that critical,
7 because what really is at stake here are the proposed rules
8 and whether they are, should be passed at all and if so, re-
9 fined or what impact there should be by the Federal Trade
10 Commission on the sale of hearing aids, and I don't in my
11 judgment feel that the testimony that we have missed out on
12 contributed substantially to the elucidation of that issue.
13 But I just did want to say that it is regretful that we were
14 unable to participate toward some organizational attacks that
15 the witness, in what is now an exhibit, I think is unfortunate
16 and not germane to the proceedings, only except as they indi-
17 cate perhaps motivation for Mr. Clinkscales' testimony.

18 PRESIDING OFFICIAL SHEPHERD: Thank you, sir.

19 Due to time limitations, I will have to terminate
20 this witness' testimony. Mr. Newburg-Rinn, do you have a prob-
21 lem?

22 MR. NEWBURG-RINN: There is one thing I forgot to
23 clear up with Mr. Clinkacales. You had stated that you be-
24 lieved I read the Anderson article. I haven't to this date
25 read it. I just wanted you to know that I knew that it existed

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1 and was told of it Friday but I have not had a chance to
2 read it as it was just introduced.

3 THE WITNESS: Well, the reason that I made that
4 statement was that you made a statement that I can't recall
5 at the moment, but we have no secrets in our organization
6 and anything that Mr. Anderson ascertained was public infor-
7 mation and I certainly made it so because I feel it is im-
8 portant that the public know the whole truth. I hope that
9 all people will be willing to give that.

10 PRESIDING OFFICIAL SHEPHERD: Thank you, sir, for
11 coming to advise the Commission. We appreciate your efforts.

12 (Witness excused.)

13 PRESIDING OFFICIAL SHEPHERD: We will take a break
14 for lunch and be back in one hour and that should be ap-
15 proximately seven minutes after two.

16 (Whereupon, at 1:07 p.m., a recess was taken until
17 2:07 p.m., this day.)
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25

[Attachment B]

[FROM THE WASHINGTON POST, AUGUST 1, 1976]

By Jack Anderson

WATCHDOGGING FOR THE ELDERLY

In back of Needle & Thimble, a small Georgetown tailor shop, is the tiny one-room Washington headquarters of the National Alliance of Senior Citizens.

Both the tailor shop and the senior citizens' organization are operated by Curt C. Clinkscales III, a 29-year-old, befreckled redhead. His years in Washington have taken some of the magnolia out of his South Carolina accent. But his experiences with raw politics haven't eroded his easy, "down home" approach.

Clinkscales claims to speak for 20,000 elderly, elusive Americans. In their behalf, he rates members of Congress and passes out Golden Age Hall of Fame awards. His operation is a political side-show worth passing notice.

The retired generation is more legitimately represented by the National Council of Senior Citizens, which keeps a stern eye on Congress. Members who vote against the welfare of the elderly are spotted by the National Council, which spreads the message to three million faithful followers.

This has caused trouble at the ballot box for the likes of Sens. James Allen (D-Ala.), Carl Curtis (R-Neb.), Roman Hruska (R-Neb.), and Jesse Helms (R-N.C.), who consistently vote against programs that would benefit the elderly. Several arch conservative congressmen, such as Larry McDonald (D-Ga.), Sam Steiger (R-Ariz.), and Steve Symms (R-Idaho), have also riled the senior citizens with their negative votes.

Then along came Clinkscales in 1974 with much clanking of the crusader's armor. He pronounced the National Council "a labor organization through and through" and formed the rival National Alliance.

The National Council carefully rates legislators by their voting records. Taken into account is their support of such key issues as old-age programs, tax reductions, emergency housing, consumer protection and mass transportation.

"The best way to counter a rating," Clinkscales confided, "is with another rating." Accordingly, he devised a rating system that makes the Scrooges of Congress look good.

He gives favorable ratings to congressmen who vote against bailing out New York City, breaking up the oil companies and abortion. He favors federal spending, nonetheless, to build more highways.

Yet, New York City, if it should go bankrupt, couldn't pay old-age pensions. The question of abortion is no longer a personal problem for the nation's grandmothers. And the older people get, the less driving they do on the highways.

Thus the aforementioned members of Congress, heretofore condemned for their callousness toward the aged, were now cited as champions of the elderly. The new honors were bestowed upon them in the name of the National Alliance of Senior Citizens, which some elderly voters might confuse with the National Council of Senior Citizens.

Rep. Steiger was so pleased that he penned a flowery letter on his congressional stationery, soliciting funds and members for the new National Alliance.

And in Marietta, Ga., Rep. McDonald has benefitted from newspaper ads to announce his 100 per cent National Alliance rating, his Golden Age Award and his induction into the Hall of Fame.

This does not surprise Clinkscales.

"Members are perfectly free to use the award in their campaign if they wish," he said. Indeed, the National Alliance is endorsing a few favorites, in the name of the elderly, for election in November.

It has given its blessing, for example, to Sen. James Buckley, the New York Republican-Conservative. Yet the National Council reports that, out of 30 key votes affecting the elderly, Buckley voted favorably only once.

Clinkscales and company have also endorsed Reps. Tom Beville (D-Ala.), Goodloe Byron (D-Md.), Charles Grassley (R-Iowa), and Virginia Smith (R-Neb.). Rep. McDonald, for all his ersatz honors, won't get an endorsement, Clinkscales said.

He told us the National Alliance scraped by on an \$11,000 budget last year and will spend about \$25,000 this election year. The money comes from donations and dues, he said. "We wouldn't take any federal funds if they offered it!"

Until the National Alliance treasury grows enough to pay others to work in the back of the tailor shop, Clinkscales will carry most of the burden himself, answering the phones, compiling voting records, minding the store.

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(Letter referred to on p. 62.)

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

March 1, 1976

Mr. William R. Hutton
Executive Director
National Council of
Senior Citizens, Inc.
1511 K Street, N.W.
Washington, D.C. 20005

Dear Mr. Hutton:

The Bureau has received your request for compensation to represent the interests of elderly consumers in the trade regulation rulemaking proceeding on the hearing aid industry.

Based on your communication of January 30, 1976, and pursuant to §1.17 of the Commission's Rules of Practice, I have approved your application for reimbursement of the reasonable costs of participation by the National Council of Senior Citizens in this proceeding. I have determined that the National Council of Senior Citizens has or represents an interest which would not otherwise be adequately represented in this rulemaking proceeding, representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and that the National Council of Senior Citizens would be unable effectively to participate in this proceeding because it cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions.

The Federal Trade Commission will reimburse your organization for allowable costs as defined in the attached budget. The amount claimed for actual reimbursement will be subject to final audit for reasonableness and conformance to federal regulations by representatives of the Federal Trade Commission and the General Accounting Office.

Approval of your request is contingent upon the submission of satisfactory resumes for the expert witnesses and the attorneys you propose to utilize in the proceeding. This material is needed to determine the appropriate rate of compensation for your expert witnesses and attorneys. Approval of attorney compensation at the rate of \$30 per hour for collection of affidavits in Boston and Miami is also contingent on adequate substantiation that such a rate is necessary to retain attorneys for that purpose.

I have been advised by the Presiding Officer that your application inadvertently underestimated the length of time likely to be required for the Washington hearings. Accordingly, pursuant to his recommendation, I have authorized an additional 40 hours of participation by Mr. Marlin in those hearings. Of course, should the hearings require fewer hours than expected, your claim for reimbursement should be adjusted accordingly.

Sincerely,

Joan Z. Bernstein
Joan Z. Bernstein
Acting Director

Attachment

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

March 23, 1976

Mr. William R. Hutton
Executive Director
National Council of
Senior Citizens, Inc.
1511 K Street, N.W.
Washington, D.C. 20005

Dear Mr. Hutton:

This is in reference to my letter to you of March 1, 1976 authorizing compensation to your organization for participation in the Commission's rulemaking proceeding on the hearing aid industry.

On reexamining the letter it occurred to me that one point might be somewhat ambiguous, and needs to be made clear. Pursuant to the Commission's rules, payment is authorized only for the actual cost of participation to your organization, up to the maximum set forth in your approved budget. The figure set forth in that budget for rates of compensation for attorneys are maximums. If your actual costs, including salary, benefits and overhead attributable to that person are less, only the lesser amount can be paid by the Commission.

Sincerely yours,

Jean Z. Bernstein
Jean Z. Bernstein
Acting Director

(Letter referred to on p. 63.)

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580BUREAU OF
CONSUMER PROTECTION

JUL 20 1976

Anthony Di Rocco, Executive Secretary
National Hearing Aid Society
20361 Middlebelt
Livonia, Michigan 48152

Re: Proposed Hearing Aid Industry Rule

Dear Mr. Di Rocco:

This is in response to your April 12, 1976 application for compensation for your participation in the proposed Hearing Aid Industry Rule. Your application was delivered by N.H.A.S. to the Presiding Officer on April 20, 1976.

Pursuant to Section 1.17 of the Commission's Rules of Practice, I have determined that the National Hearing Aid Society meets the criteria established by Section 18(h) of the Federal Trade Commission Act, and have approved your application for reimbursement in part of the reasonable costs of participation in this proceeding.]

When an interested person seeks compensation to introduce information into the rulemaking record, the statutory criteria require certain findings based upon the whole rulemaking record as it presently exists and upon what we can responsibly expect to occur at the hearings. I must determine, considering the whole record and the expected representation at the hearings, that the interest for which you speak will be inadequately represented. In particular, I must decide that production of the further information you propose to supply will be a substantial contribution to a fair determination of the rule or any of its major issues.

I have decided not to approve that part of your application which requests \$30,000 for a contracted survey.]

As you may be aware from the staff report and subsequent written submissions on this rule, the present record contains considerable information submitted by hearing aid dealers. In addition, the Presiding Officer has informed me that he will not admit the survey to the record if the survey results are delayed beyond the closing of the record.

The Federal Trade Commission will reimburse your organization for allowable costs as defined in the attached budget. The amounts claimed for actual reimbursement will be subject to final audit for reasonableness and conformance to Federal regulations by the Federal Trade Commission and the General Accounting Office.

You will note that the amount authorized for attorneys has been revised to reflect standard rates paid under this program. Those rates are under review, and if they are revised upward, consideration will be given to making the new rates retroactive.

This authorization also excludes any time which was expended prior to the filing of your application. As you know, Rule 1.17 prohibits compensation for such expenses. The matter of compensation for the expenses of preparing an application is presently also under review and if the rule is amended to allow such expenses, consideration will be given to making that change retroactive, as well.

You should keep in mind that, pursuant to the Commission's rules, payment is authorized only for the actual cost of participation to your organization up to the maximum set forth in your approved budget. The figures set forth in that budget for rates of compensation are maximums. If your actual costs, including salary, benefits and overhead attributable to any person are less, only the lesser amount can be paid by the Commission.

Sincerely,

Margery Waxman Smith
Margery Waxman Smith
Acting Director

Enclosure

Anthony Di Rocco

Attachment

National Hearing Aid Society

Budget*

For Participation in hearings,
Hearing Aid Industry proposed ruleLegal Expenses**: Preparation, Participation, Rebuttal

Senior Attorney (Mr. Waters)

350 hrs @ \$27/hr \$9450

Assisting Attorney (Mr. Harker)

450 hrs @ \$21/hr \$9450

Research Assistant

100 hrs @ \$9/hr \$ 900

Secretarial Assistance

150 hrs @ \$6/hr \$ 900

Copying, xeroxing, and transcripts \$6000

Travel and Per Diem for AttorneysTravel: 1 coach fare, Washington, D.C.
to Chicago and return. \$ 1361 coach fare, Washington, D.C.
to San Francisco and return \$ 368

Per Diem: 40 days @ \$35/day \$1400

ConsultantEconometrician, preparation &
representation assistance to
attorneys for post-hearing comment.
6 days @ \$145/day \$ 870

WitnessesTravel and per diem

3 otolaryngologists and clinical
audiologists:

- | | |
|---|--------|
| (1) travel | \$1000 |
| (coach fare <u>or</u> \$.15/mile) | |
| (2) per diem - Total 3 days of per diem
for 6 people @ \$35/day/person | \$ 630 |

6 hearing aid wearers (consumers)

- | | |
|---|--------|
| (1) travel | \$1000 |
| (coach fare <u>or</u> \$.15/mile) | |
| (2) per diem - Total of 3 days'
per diem, 6 people @ \$35/day/person | \$ 630 |

6 hearing aid dealers

- | | |
|---|--------|
| (1) travel | \$1000 |
| (coach fare <u>or</u> \$.15/mile) | |
| (2) per diem ¹ / _{total of 3 days'}
per diem, 6 people @ \$35/day/person | \$ 630 |

TOTAL.....	\$34,364
------------	----------

*The total allowable amount below must be reduced by the total amount of member contributions you will have received between April 20th, 1976 - the filing date - and the time you submit your reimbursement claim. An affidavit attesting to the number of contributions you will have received during this time must accompany your claim.

**\$27/hr is the hourly billable rate allowed for an attorney with at least 10 years' experience. \$21/hr is the hourly billable rate allowed for an attorney with 5 to 10 years' experience. You must supply the attorneys' resumes, as well as the resume of the research assistant, when you submit your justification for reimbursement. The attorneys may not bill you at hourly rates in excess of these.

(Letter referred to on p. 63.)



national council of senior citizens, inc.
 1511 K Street, N.W. • Washington, D.C. 20005 • Telephone: (Area Code 202) 783-6850

President
 Nelson H. Cruikshank
 Washington, D. C.

Executive Director and
 Director of Information
 William R. Hutton
 Washington, D. C.

March 15, 1976

Mr. Martin Shepherd
 Presiding Officer
 Hearing Aid Rule
 Federal Trade Commission
 Indiana Building, Room 520
 633 Indiana Avenue, N.W.
 Washington, D.C. 20580

Re: Supplemental Application for Compensation
for Representation in Proceedings on
Regulations for Hearing Aid Industry

Dear Mr. Shepherd:

This is an application by the National Council of Senior Citizens for \$8100 to permit its participation in the Commission's rulemaking proceeding regarding regulations for the hearing aid industry. NCSC has previously been granted funds for presentation of expert and consumer witnesses and representation at four weeks of hearings in Washington, D.C. This supplemental application requests additional funds to permit NCSC's representation at the fifth week of the Washington, D.C. hearings and at the hearings to be held in Chicago, Illinois and San Francisco, California. This application is filed pursuant to the Commission's

Rules and Procedures, 16 CFR Sec. 1.17.

1. NCSC Interest in the Rulemaking Proceeding

As set forth in more detail in the prior application of NCSC, NCSC is a large, national, non-profit, non-partisan organization. Since the early sixties, NCSC has been a vigorous advocate for the interests of the elderly in a wide range of important areas such as health care, Social Security, housing, transportation, consumer protection, and employment.

Since more than half of the 14.5 million Americans with some form of hearing disorder are over 60 years of age¹, NCSC has an obvious interest in the pending proceeding. More than 28% of persons age 65 and older suffer from hearing impairment.² Moreover, the median income for elderly people (living alone or with non-relatives) is a mere \$2,725,³ out of which they must spend on the average three times as much for health care as younger people. The elderly and thus NCSC have a very substantial stake in reforming the nation's hearing aid delivery system. NCSC through its legal component, Legal Research and Services for the Elderly, has for many years sought to improve hearing aid health services. A detailed account of the activities of Legal Research and Services for the Elderly in the area of hearing aid health care is included in NCSC's prior application.

2. Why Representation of the NCSC Interest Is Necessary for a Fair Determination of the Proceeding as a Whole

The hearing aid industry represents over \$150 million a year at the retail level alone.⁴ The industry is well-organized and

sophisticated in lobbying and advocacy. In both the Chicago and San Francisco hearings, the dealers and manufacturers will be represented and will present witnesses. Unless NCSC participates in the Chicago and San Francisco hearings, the interests of consumers and of the elderly will be unrepresented in the face of extensive industry participation.

3. Why the NCSC Interest Could Not Otherwise Be Adequately Represented in this Proceeding

As set forth in greater detail in NCSC's prior application for funds, NCSC represents the elderly hearing aid consumer and, as a national organization with strong local roots, is uniquely qualified to do so. NCSC has extensive experience in the area of law and aging in general and specifically in the area of hearing aid law reform. Unless NCSC participates in the Chicago and San Francisco proceedings, the perspective of the elderly hearing aid consumer will be totally unrepresented and the perspective of all hearing aid consumers will be inadequately represented. As set forth below in detail, NCSC does not have adequate resources for the costs of representation in Chicago and San Francisco or the costs of representation at the additional week of D.C. hearings. The approval of this application is necessary to NCSC's participation in those proceedings.

4. Why NCSC Will Be Unable to Participate Effectively without Financial Assistance

NCSC proposes to have both cross-examination on designated issues of fact and assistance in the preparation of post-record

comments done by Chicago and San Francisco attorneys with extensive legislative and litigative experience. In Chicago, NCSC will be represented by Howard Eglit, who is currently on the faculty of Chicago-Kent Law School and a past Legal Director of the Illinois American Civil Liberties Union. Mr. Eglit has been a staff counsel of the House Judiciary Committee and a legislative assistant to the late Rep. William F. Ryan. In San Francisco, NCSC will be represented by Fred J. Hiestand and Peter D. Coppelman. Mr. Hiestand was on the staff of California Rural Legal Assistance (CRLA) from 1968 to 1972. For the years 1970-1972, he was counsel for the Senior Citizens Project of CRLA. Since 1973 he has been in private practice and a consultant to the California legislative committee on medical malpractice. Peter Coppelman has been the Directing Attorney of the CRLA office of the National Senior Citizens Law Center and for two years prior to that was director of the CRLA Senior Citizens Project. As itemized below, the total cost of NCSC representation in Chicago and San Francisco will be \$8100.

As compared with the economic stake of hearing aid consumers in these proceedings, this figure is miniscule. Sales of unnecessary and inappropriate hearing aids cost consumers many millions of dollars each year. The economic stake of NCSC as an advocate for the elderly and for other hearing-impaired consumers is thus very great.

Neither individual consumers nor NCSC are able to bear the costs of representation in the Chicago and San Francisco proceedings. The economic plight of the elderly is desperate. In 1973, the average

income of older persons living alone or with non-relatives was less than \$2,725; and half of the families headed by an older person had incomes of less than \$6,426.

NCSC is also unable to afford the cost of participation in the rulemaking proceedings. Because of the severely limited incomes of its elderly members, NCSC dues are kept at only \$3.50 for individual members. A \$10.00 fee is charged local clubs which want to affiliate with NCSC. Although NCSC does receive some contributions from individuals and groups, these contributions are necessary to sustain its current activities. There is no provision in NCSC's budget for the costs of representation at the Washington, D.C., Chicago, and San Francisco hearings, nor are there extra funds which can be used for this purpose.

5. Statement of Anticipated Expenses

(1) Fees for NCSC's legal project staff

Howard Eglit

(160 hours at \$21 per hour)

120 hours to attend the hearings in Chicago for purposes of cross-examination	\$2550
---	--------

40 hours for preparation for cross-examination including reading written submissions and research and for assisting in preparation of post-record comments	\$ 850
--	--------

Fred Hiestand and Peter Coppelman

120 hours to attend the hearings in San Francisco for purposes of cross-examination	\$2550
---	--------

40 hours for preparation for cross-examination and assisting in preparation of post-record comments	\$ 850
---	--------

Costs of telephone calls, mailing, and Xeroxing \$ 300
involved in coordination of NCSC representation
in D.C., Chicago, and San Francisco

(2) David Marlin, Director of LRSE

40 hours at \$27 per hour for representation \$1080
at D.C. hearings for one week

Total Reimbursement Sought \$8100

6. Statement of NCSC's Financial Status

A non-profit organization, NCSC receives only one-half of its operating expenses from membership dues, relying for the remainder primarily on benefactors and government sponsored programs. Although NCSC has experienced a slow, steady growth since its founding in 1961 in both its membership and public recognition as the leading advocate for the elderly, it has only recently been able to realize a modest excess of cash receipts over current expenditures. These assets are currently being pledged as collateral for non-profit sponsors of low-income housing for the elderly or reserved as an endowment to ensure against the vagaries of federal funding and to assure the continued existence of the organization.

NCSC will be happy to provide any further information necessary to the Commission in regard to this application.

Sincerely,

William R. Hutton
William R. Hutton
Executive Director

WRH/rn

FOOTNOTES

1. Staff Study of the State Licensing Laws and Training Requirements for Hearing Aid Dealers, Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, October 1975, p. (iii).
2. A Report on Hearing Aid Health Care, prepared by the Department of Health, Education and Welfare, Intra-departmental Task Force on Hearing Aids, 1975, preface.
3. Developments in Aging: 1974 and January-April 1975, A Report of the Special Committee on Aging, United States Senate, p. xviii.
4. Op. Cit., State Licensing Laws and Training Requirements for Hearing Aid Dealers, p. 1.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

April 23, 1976

Mr. William R. Hutton
Executive Director
National Council of
Senior Citizens, Inc.
1511 K Street, N.W.
Washington, D.C. 20005

Dear Mr. Hutton:

The Bureau has received your supplemental request for compensation to represent the interests of elderly consumers in the trade regulation rulemaking proceeding on the hearing aid industry.

Based on your communication of March 15, 1976, as a supplement to your earlier application of January 30, 1976, I have approved an additional \$8100 in compensation as set out in the attached budget. This additional amount is supplementary to the amount approved in my letter of March 1, 1976, and is approved pursuant to the determinations and subject to the conditions contained in that letter.

This approval is contingent upon your furnishing this office with a statement of the years of legal experience of Messrs. Eglit, Hiestand, and Coppelman, so that we can determine the appropriate maximum rate of compensation for them.

Although copying, mailing and telephone costs have ordinarily been treated as part of attorneys' overhead under this program, I am satisfied that the costs of coordinating hearing participation in three cities are extraordinary and should be compensated.

Additionally, as with your earlier application, payment is authorized only for the actual cost of participation to your organization, up to the maximum set forth in the approved budget. The figures set out in that budget for rates of compensation are maximums. If your actual costs, including salary, benefits, and overhead attributable to any person or less, only the lesser amount can be paid by the Commission.

Sincerely yours,

Joan Z. Bernstein

Joan Z. Bernstein
Acting Director

Attachment

William R. Hutton

Attachment

National Council of Senior Citizens -- Proposed Trade
Regulation Rule on the Hearing Aid Industry -- Supplemental
Budget

- | | |
|---|---------------|
| 1. Chicago hearings -- Howard Eglit, Esq.
(40 hours preparation, 120 hours in
hearings at \$21/hr.) | \$3360 |
| 2. San Francisco hearings -- Fred Hiestand, Esq.,
and Peter Coppelman, Esq. (40 hours
preparation, 120 hours in hearings at \$21/hr.) | 3360 |
| 3. Coordination of National Council
representation in hearings -- telephone, mailing
and copying costs | 300 |
| 4. Washington hearings -- David Marlin, Esq.
(40 hours in hearings at \$27/hr.) | 1080 |
| | <u>\$8100</u> |

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

April 23, 1976

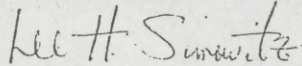
Mr. David H. Marlin
Director
Legal Research and Services
for the Elderly
1511 K Street, N.W.
Washington, D.C. 20005

Dear Mr. Marlin:

Thank you for your letter of March 15, 1976, and the enclosed resumes of the expert witnesses you have retained for the hearing aid proceeding.

The qualifications of the witnesses are acceptable to this office, and our previous approval of compensation for their participation is confirmed. Please keep in mind that we have also requested substantiation for the \$30 per hour rate for attorney's fees in Miami and Boston. I would also appreciate confirmation of the years of experience of the other staff attorney from Legal Research and Services for the Elderly who is participating in the proceeding to substantiate the rate of \$21 an hour for him or her.

Sincerely,



Lee H. Simowitz
Assistant to the Director

(Letter referred to on p. 64.)



NATIONAL HEARING AID SOCIETY

20361 MIDDLEBELT • LIVONIA, MICHIGAN 48152 • TELEPHONE: (313) 478-2610

Received By Spec. Mess. Apr. 20, 1976.

April 12, 1976 *JMS*

G. Martin Shepherd, Esquire
Presiding Officer
Trade Regulation Rule on
Hearing Aids
Federal Trade Commission
Washington, D. C. 20580

*Pub. Rec'd
2-15-44-1-*

Dear Mr. Shepherd:

Re: Application for Compensation for Representation
in Proceedings on Regulation for the Hearing
Aid Industry

This is an application by the National Hearing Aid Society ("NHAS") for \$60,249 to permit continued participation in the FTC's pending rulemaking proceeding concerning the hearing aid industry. This application is filed pursuant to Section 57(h)(1) of the Federal Trade Commission Act and Section 1.17 of the FTC's Rules of Practice.

I. NHAS Represents an Interest (i) Which Would Not
Otherwise be Adequately Represented in This Proceeding,
and (ii) Which is Necessary for a Fair Determination
of the Rulemaking Proceeding Taken as a Whole.

A. The NHAS Interest.

While the FTC, the FDA, Congressional committees, state legislatures and consumer groups are spending millions of dollars trying to prove that some hearing aid dealers are or have been engaged in selling abuses, NHAS has worked vigorously to build an ever improving force of competent and reliable dealers to provide assistance for the hearing handicapped. The NHAS membership, however, is comprised almost entirely of small independent businessmen. As noted in more detail hereinafter, membership dues have been increased in each of the past three years. Special assessments also have been made to maintain as a viable organization the only effective, progressive national organization of hearing aid dealers. The massive commitments placed upon NHAS by the never ending hearings and proceedings have taxed NHAS and its membership to the limit. It cannot survive at this pace. This may satisfy the few who oppose this industry, but the public interest will suffer as a result.

Executive Secretary: ANTHONY DECCO

OFFICERS AND GOVERNORS

President:
MARVIN H. PIGZ
Colorado Springs, Colo.

Vice-President:
ROBERT W. LEE
Overland Park, Kansas

Secretary-Treasurer:
A. E. LEONARDI
Fl. Myers, Fla.

Legal Counsel:
RICHARD A. KITCH
Detroit, Michigan

GOVERNORS:

Canada:
A. E. SHOK
Winnipeg, Manitoba

Northwest Coast:
DONALD F. GAILLOWAY
Recluse, New York

Central East Coast:
ALAN B. ROTH
Jersey City, New Jersey

Southeast:
A. E. LEONARDI
Fl. Myers, Fla.

Central East:
RAYMOND J. RICH
Cleveland, Ohio

Southwest:
MARYLENE F. REMLEY
Phoenix, Arizona

Central:
DORWAYNE TREMMEL
Marshfield, Wisconsin

Northwest:
ROBERT W. LEE
Overland Park, Kansas

Pacific:
THORNTON K. SHAW
Seattle, Washington

Governor-at-Large:
JOSEPH C. LUCKE
Miami, Florida

The financial hardship imposed by these prolonged proceedings against hearing aid dealers is exacerbated by the fact that the Presiding Officer has recently recommended substantial funding for the National Council of Senior Citizens, an organization with an adversarial interest which is clearly antagonistic to hearing aid dealers in this proceeding. It would be unfair for the Commission to discriminate against hearing aid dealers by only funding a group which only intends to offer evidence in support of the rule in a proceeding in which the Commission itself is supposed to be representing the consumer.

Fundamental due process requires that the group against whom massive regulation is being proposed must be given a full opportunity to participate and respond to allegations made against them. The simple right to appear and listen, and have one representative speak or submit comments, is inadequate. Attorneys must be present to cross-examine, research is required, and witnesses must be made available--all at great cost.

The FTC recently authorized \$36,006 to the National Council of Senior Citizens to participate and represent consumers in this rulemaking proceeding (with a \$10,000 additional sum pending, we understand). As Presiding Officer, you have designated six groups, in addition to the FTC staff, as "interested persons," two of which represent consumer organizations. The FTC staff also represents consumers--obviously they do not represent the industry they propose to dismantle. Clinical audiologists also are represented by the attorney for the American Speech and Hearing Association ("ASHA"). ASHA has made its position clear many times over--they see no substantive role for the hearing aid dealer in the hearing health care team.

The remaining groups include the medical profession, the hearing aid manufacturers and the hearing aid dealers. Of this group, clearly the medical profession does not, and is not expected to, represent the interest of the dealers. The manufacturers, hopefully, are concerned about the plight of the dealers, but simple economics suggests that manufacturers will find adequate distributional outlets for their products, regardless of what happens to the economic viability of dealers if this rule is promulgated in its present form. In particular, the

right to cancel would directly and seriously harm hearing aid dealers. As such, the interests of the dealers are not represented by the manufacturers.

This leaves NHAS. The FTC cannot expect dealers to try and come forward individually and adequately represent an entire industry which varies from state to state. The problems, for example, of dealers in rural states like Kansas and Iowa differ from those of dealers in New York. More importantly, hearing aid dealers are predominantly highly competitive small proprietorships, distributed throughout the nation. The average hearing aid dealer is a small businessman with an annual income of approximately \$15,000. Without assistance such a "cottage industry" cannot effectively represent its interest against the forces of the Federal Government in a protracted proceeding.

Full and complete representation by NHAS, therefore, is necessary if the FTC really wants a fair determination of the issues raised by its proposed rule. Admittedly NHAS opposes this rule, as well as the procedures currently being utilized in connection with its promulgation. Nothing in the FTC Act or Rules of Practice, however, suggests that an interested person must support the FTC to qualify for compensation.

In this regard, the National Hearing Aid Society submits that its petition should be granted for the reason that hearing aid dealers possess compelling interests in the outcome of the proceeding. On the one hand hearing aid dealers stand to suffer direct and severe adverse effects if the proposed rule is adopted. Hearing aid dealers as a group, unlike the National Council of Senior Citizens, possess a legal interest which is threatened with destruction or injury by the proposed rule.

Secondly, the concerns of hearing aid dealers as a group are close to the center of all factual controversy surrounding the proposed rule. The Federal Trade Commission recognizes the importance of adjudication-type procedures in order to assure an adequate record on factual issues. The effective exercise of such rights entails greater expense than stating on the record basic views of a party, which may be done by interested persons whose interests are not so directly threatened or which lie further from the center of controversy.

Similarly, unlike hearing aid dealers, neither ASHA nor the medical profession stands to suffer injury to a legal interest if the rule is adopted. Rather they stand only to gain by the proposed rule. Thus, their need for effective representation is substantially less than hearing aid dealers, and their interest in the proceeding is qualitatively different from that of NHAS.

Most importantly, however, NHAS believes that its position with respect to the proposed rule is firmly grounded in the public interest. NHAS does not oppose lightly Federal Government action which is intended to benefit the consumer. NHAS members, however, have invested their lives and their livelihood in service to the hearing impaired and cannot support regulations which are not based on accurate information. A rule based on misinformation cannot serve the public interest.

The Presiding Officer and the Commission should also consider the important contribution to the public interest which would be achieved by effective representation of hearing aid dealers in this proceeding. Major provisions of the proposed rule, particularly the right to cancel, constitute novel, if not revolutionary, approaches by the Commission to consumer protection. Similarly, aspects of the proposed rule, particularly the ad substantiation standards and the right to cancel, constitute an effort to set standards in the area of the delivery and use of health care devices and services and in the area of pre-market testing. The Commission has never regulated in these delicate areas of the public interest before. At the same time, such sweeping new authority is proposed for application primarily against hearing aid dealers, a small industry comprised of thousands of sole proprietorships. Therefore, it is of great public importance, as well as of interest to NHAS, for the Presiding Officer and the Commission to assure that hearing aid dealers as a group are able fully to demonstrate the practical, legal and policy implications of this proposed new approach. Because others who may possess expertise in the delivery of health care services are not threatened with direct injury to their legal interests but rather stand to profit by the rule, the representation of the public's interest in the maintenance of a viable hearing aid delivery system is left largely to hearing aid dealers.

NHAS members are more experienced in hearing aids and with hearing impaired persons than any other group of people in this country, including the medical profession and clinical audiology. NHAS is also concerned with the continuous advances in knowledge and training of its members and the elimination of those few whose primary goal is not service to the hearing impaired.

NHAS continuously has sought to improve the standards of care in the hearing health delivery system. While many have criticized state licensing laws for not going far enough, no one seriously questions the importance of adequate licensing of hearing aid dealers. NHAS was a leader in the development and recommendation of such laws--a notable example of its constructive efforts to make high standards of professional conduct universal. At present 41 states have enacted licensing laws, all of which prohibit certain acts, provide standards of entry into the occupation, provide recourse to the public and penalties for violations. Even before the FTC promulgated its trade regulation rule, the National Hearing Aid Society announced a Four-Point Consumer Protection Program which in many respects goes beyond the protection afforded by the FTC's proposed rule. The plan includes: (1) prior medical clearance for first-time purchasers of hearing aids, (2) trial rental-purchase option, (3) consumer complaint grievance procedures, and (4) continuing and expanded educational opportunities for industry members and prospective applicants for the industry. Only the consumer grievance procedures have yet to be fully implemented. NHAS has appointed Mr. Vincent Giglia, President of the Philadelphia Hearing Aid Guild, as director of this program. The Philadelphia Guild has developed a successful local grievance procedure. NHAS has determined that implementation of this Philadelphia program on a national scale is the most immediately available program.

In sum, NHAS' interest in the proposed rule is direct, immediate, and commensurate with the public interest.

B. Representation of NHAS is Necessary for a Fair Determination of the Rulemaking Proceeding Taken as a Whole.

Despite the overwhelming number of investigations of the hearing aid industry at the federal, state and local levels, the hearing aid industry represents only \$150 million

a year at the retail level. If such sales were attributable to a single company, that company would not even make Fortune's top 500 (Fortune, May 1975). In the past few years there have been continuing and increasingly vociferous allegations with respect to unethical practices and misconduct by the hearing aid industry. These allegations have never been subjected to the test of cross-examination or trial.

No other group in the country is more directly affected by such allegations and by the Commission's proposed trade regulation rule. The thousands of hearing aid dealers stand to lose their businesses and reputations if such allegations are permitted to go unchallenged by reason of the inability of hearing aid dealers as a group to fully participate in this rulemaking proceeding and contest the proposed rule. The FTC has made allegations and provided the first forum within which hearing aid dealers are given limited rights to meet these allegations head on. It would be a miscarriage of justice were hearing aid dealers as a group foreclosed from fully participating in these extensive rulemaking proceedings as a result of inadequate financial support. The fact that NHAS has been the forefront of consumer protection and service to the elderly is ignored. For example, while very few complaints have ever been evidenced in any state or federal agency, two consumer groups have sought to represent the interests of consumers allegedly subjected to abuses. Even these groups must advertise and solicit complaints. NHAS is the only interested person in this proceeding representing the overwhelming number of consumers who are satisfied with their hearing aid dealers and whose interest in an efficient, competitive hearing aid delivery system is now threatened. The FDA received over 7,000 letters from consumers endorsing the present hearing aid delivery system. The FTC, while declining to index such letters, also has received several thousand letters favorable to the hearing aid dealers. With the compensation herein requested, NHAS would seek to place special emphasis on the actual needs of the hearing aid user through testimony of consumer witnesses.

NHAS is also the only interested person in this proceeding attempting to proffer evidence as to the substantial adverse economic impact which the proposed rule would impose. In most cases, before promulgating harsh industry-wide regulations federal agencies attempt to assess and

quantify the economic effects of such regulation. Here the Commission is proposing sweeping new controls, including price fixing in a highly competitive business, with no comprehensive economic evaluation of the impact of such regulations on the consumer or on the delivery of health care services.

NHAS is the one interested person herein with both the economic incentive and the public concern to undertake such an analysis, yet it lacks the funds necessary to do so.

II. NHAS is Unable to Effectively Participate in This Proceeding Because of the Costs Involved.

The full participation of NHAS, as the representative of some 3,600 retail dealers, is indispensable to a fair hearing and a fair determination of the allegations contained in this trade regulation rule. NHAS' Code of Ethics and Four-Point Consumer Protection Program demonstrate its interest and concern for hearing aid users. More importantly, NHAS members are the only body of individuals that have actual experience with all persons affected by this trade regulation rule, including the medical doctor, the clinical audiologist, and the hearing aid user.

NHAS offers a national, state and local perspective which the Commission, in the public interest, should fully understand. NHAS has dealt directly with HEW, the FTC, the VA and the Congress in conjunction with their evaluation of hearing aids and the hearing aid delivery system. Its state chapters are familiar with the various requirements of state legislation affecting the hearing aid delivery system, and its members reflect the entire spectre of the American environment--from the urban metropolitan centers to the rural communities throughout the United States. NHAS also is in possession of relevant facts, documents and experience with respect to the issues the Commission is attempting to address in this proposed trade regulation rule.

It is clear that no other group--whether consumer, manufacturer, medical, clinical audiologist or, indeed, the FTC itself--can make a contribution equal to that of NHAS. As detailed below, since competing demands have forced NHAS to the brink of financial exhaustion, continued participation in this proceeding in a manner which is conducive to developing a full and adequate record is becoming impossible.

Effective representation in the hearings requires testimony from several diverse kinds of witnesses, expert and lay, ranging from medical doctors to consumers, including clinical audiologists, hearing aid dealers, representatives of consumer advocate groups, the Better Business Bureau and state licensing board participants. Contacting these individuals, discussing with them the proposed rule and gathering and presenting information on the role of the hearing aid dealer and the assistance he provides to hearing impaired persons is quite expansive. Once the search for such witnesses is conducted and individuals are found who are willing to testify, additional time and expense is required to assist in the preparation of testimony, arrange for schedules and travel to the hearing, and pay for such travel and lodging during the course of the hearing.

Obviously, no one can withstand the financial strength of a federal agency once that agency determines to commit the weight of its authority and the funds from its budget to dismember an industry. As previously noted, the hearing aid industry is small in and of itself, but individual dealers as a business generally make less than the FTC attorneys in charge of this investigation. In contrast, we have been advised that the resource commitment by the FTC's Bureau of Consumer Protection in this hearing aid trade regulation rule is surpassed by no other program or litigation. While NHAS and the FTC may have different concepts as to what is fair, it is clear that NHAS cannot match the resource commitment of the FTC. Indeed, it is now faced with the decision to terminate active participation in the rulemaking proceeding or face financial exhaustion. This latter alternative, of course, will not work to anyone's benefit--certainly not the consumer--and presumably not even the Federal Trade Commission. Without NHAS to assume the role of leadership among the hearing aid dealers, the industry will fragment and consumers will suffer irreparable harm.

NHAS would contemplate use of the funds in the following respects:

1. Representation by attorneys. NHAS will use a portion of the funds to defray legal expenses in connection with its participation in the trade regulation rule proceedings. There is no substitute for legal representation in these proceedings. Counsel would assist in preparation of testimony by NHAS witnesses, as well as conduct cross-examination on designated issues of fact. NHAS currently

is employing the services of Timothy J. Waters, a member of the law firm of Peabody, Rivlin, Lambert & Meyers in Washington, D. C. Mr. Waters spent a number of years at the FTC, including in the Office of the General Counsel, as Assistant to the Director of the Bureau of Competition, as an Attorney-Adviser to Chairman Miles W. Kirkpatrick, and as Assistant to the Chairman under Kirkpatrick. Mr. Waters is substantially familiar with FTC rulemaking proceedings and has been actively involved with FTC proceedings since leaving the Commission in February 1973. Mr. Waters has indicated that, if the fact of his previous representation of NHAS in connection with this proceeding in any way biases or prejudices consideration of this application, he will withdraw as counsel to NHAS.

In addition, attorneys and paralegals would assist in analysis and review of the written comments, testimony and post-record written comments to permit NHAS to respond to the Presiding Officer's initial findings of fact and summary of the record and to the staff report and recommendations which arise from the hearings.

2. Economic impact. NHAS would contract with an economist and an accounting firm to submit an expert presentation with respect to the economic impact of the proposed rule, particularly as it affects hearing aid dealers' costs of doing business, the economic impact to the consumer and the effect on the hearing aid delivery system. Preliminary discussions in this regard have been undertaken with Alexander Grant and Company and with Dr. William McElroy, an econometrician at Georgetown University. The lack of funds has to date prevented NHAS from obtaining such expert analysis.

3. Audiologists. NHAS would anticipate requesting a number of clinical audiologists to appear and testify. Most of these witnesses would not charge fees for their testimony but would require reimbursement for out-of-pocket expenses in conjunction with their appearance. Testimony by clinical audiologists is a critical issue in this proceeding. There is substantial conflict among clinical audiologists with respect to the issues raised by this proceeding, and a full discussion of these conflicts is required if the Commission is going to make a fair and adequate determination with respect to their position. At present NHAS has requested Herbert Rickenberg of Newark, New Jersey, Richard Iliff of Overland Park, Kansas, and Jan Williams, all Certified Clinical Audiologists, to testify.

4. Medical testimony. Another area which has received inadequate analysis thus far is the position of medical doctors, particularly otologists who are specialists in hearing health care. Again, NHAS does not contemplate payment of fees to these individuals, but out-of-pocket expenses and travel costs must be reimbursed. At present, Drs. Robert I. Oberhand, Richard M. Carter, James M. Anthony, Sam Houston Sanders, and John W. Heisse, all otolaryngologists, have agreed to testify.

5. Consumer witnesses. Inadequate concern is being placed upon the needs of the consumer in this trade regulation rule proceeding. The personal commitment, motivation and psychological barriers of consumers to make the necessary decision to purchase a hearing aid must be fully expressed to the Commission. The importance of such testimony can only be appreciated through presentation of witnesses--written comments do not suffice in conveying the very real need consumers place upon their hearing aid dealer. In some instances, affidavits will be obtained where consumers are unable to personally appear and testify.

6. Other witnesses. Assuming available funds, NHAS also would seek to produce individual members of various state licensing boards who could personally testify with respect to the effectiveness of such boards and their experiences in connection therewith. Representatives of local and state and/or national Better Business Bureaus or other complaint handling or receiving organizations also would be contacted and requested to appear and testify with respect to the absence of the alleged substantial complaints in this industry.

III. Statement of Financial Position.

A. Statement of Financial Condition.

In view of the overwhelming commitments placed upon NHAS in the past few years, both with respect to its ongoing business affairs on behalf of its members (i.e., trade publications, seminars, etc.) and the never-ceasing series of hearings by the federal and state governments, NHAS has been forced to increase its dues in each of the past three years, as well as make special assessment of its membership in an effort to defray continuing expenses and remain solvent. There simply is no provision in NHAS'

budget for the cost of representation in the FTC's rule-making proceeding, particularly when it is anticipated that there will be no less than 60 days of hearings. NHAS will continue to make payments to defray all of the costs itemized below, but without the financial support of such compensation it will not be in a position to freely participate in the FTC proceeding.

B. Statement of Anticipated Expenses.

The following is an estimate of the costs involved in preparing and presenting the proposed testimony, participating in the examination of witnesses, collecting the necessary additional information on hearing aid wearers, and preparing post-hearing comments:

1. Expert witnesses.

(a) Fees for an econometrician to prepare and present testimony and assist attorneys in preparation of post-hearing comments (6 days at \$145 per day). \$ 870

(b)(1) Fees for economic survey of hearing aid dealers and evaluation of the economic impact on dealers and consumers of the right to cancel and fixed cancellation charge, including evaluation of the market for "used" hearing aids. Provision of expert witness for testimony on results of economic survey. \$30,000

(b)(2) Travel and lodging expenses for presentation of results of economic survey of impact of rule on dealers and consumers. \$ 250

(c) Travel and lodging expenses for otolaryngologists. (approx.) \$ 1,000

(d) Travel and lodging expenses for clinical audiologists. (approx.) \$ 600

2. Information on consumer needs and experiences.

(a) Travel and lodging expenses for consumers (hearing aid wearers representing the variety of socioeconomic and medical experiences). (approx.) \$ 2,000

(b) Travel and lodging expenses for hearing aid dealers who represent the average hearing aid dealer as to training and experience, and hearing aid dealers whose clientele represents the variety of socio-economic and medical groups from which hearing aid wearers are derived.
(approx.) \$ 2,000

(c) Travel and lodging expenses for members of hearing aid licensing boards.
(approx.) \$ 400

3... Legal expenses (Items 3, 4 and 5). \$31,129

(a) Fees for NHAS legal counsel:

(1) Timothy J. Waters, Partner: Peabody, Rivlin, Lambert & Meyers (\$27 per hour).

(2) Timothy L. Harker, Associate: Peabody, Rivlin, Lambert & Meyers (former Assistant General Counsel, EPA) (\$25 per hour).

(b) Fees broken down as follows:

(1) 100 hours of additional preparation in Washington, D. C. office prior to the hearings in Washington, Chicago and San Francisco:

50 hours Mr. Harker \$1,250
50 hours Mr. Waters \$1,350

(2) 12 weeks of hearings in Washington, D. C., Chicago, and San Francisco, with 10 hours of a lawyer's time utilized during each hearing day for direct testimony and cross-examination and for preparation for next day's hearings:

Total 600 hours:

250 hours Mr. Waters' time to supervise the NHAS effort; prepare testimony and cross-examination of witnesses: \$ 6,750

350 hours Mr. Harker's time to prepare testimony and cross-examination: \$ 8,750

(3) 125 hours of post-hearing time to prepare rebuttal submissions, review hearing record and prepare written submissions to the Presiding Officer and to the Commission in support of the position of hearing aid dealers and wearers:

75 hours Mr. Harker	\$ 1,875
50 hours Mr. Waters	\$ 1,350

4. Legal assistant, secretarial and copying.

(a) 100 hours of research assistant time at \$10 per hour.	\$ 1,000
(b) Secretarial -- 150 hours at \$6 per hour.	\$ 900
(c) Copying.	(estimate) \$ 1,500
Transcript of hearing.	(estimate) \$ 4,500

5. Travel and lodging for attorneys.

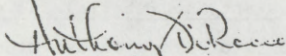
(a) (1) One attorney in Chicago for 20 days (\$35 per day).	\$ 700
(a) (2) Round-trip air fare (coach) from Washington, D. C. to Chicago.	\$ 136
(b) (1) One attorney in San Francisco for 20 days (\$35 per day).	\$ 700
(b) (2) Round-trip air fare (coach) from Washington, D. C. to San Francisco.	\$ 368

IV. Summary re Funding Petition.

The interests of hearing aid dealers stand to be seriously injured by the proposed trade regulation rule for the hearing aid industry. Such injury would constitute a disservice to an effective hearing aid delivery system and, ultimately, to the hearing impaired. Hearing aid dealers can muster substantial information and testimony which is necessary if the interests of the hearing aid wearers and of hearing aid dealers are to be effectively represented in this proceeding. Clearly, NHAS, on behalf of thousands of hearing

aid dealers who competently service hundreds of thousands of hearing aid wearers, should be permitted to continue to represent these important interests. NHAS, the only representative of such interests, has been strained to its financial limit and can continue adequate representation only if its petition herein is granted.

Respectfully submitted,


Anthony DiRocco
Executive Secretary

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

JUL 20 1976

Anthony Di Rocco, Executive Secretary
National Hearing Aid Society
20361 Middlebelt
Livonia, Michigan 48152

Re: Proposed Hearing Aid Industry Rule

Dear Mr. Di Rocco:

This is in response to your April 12, 1976 application for compensation for your participation in the proposed Hearing Aid Industry Rule. Your application was delivered by N.H.A.S. to the Presiding Officer on April 20, 1976.

Pursuant to Section 1.17 of the Commission's Rules of Practice, I have determined that the National Hearing Aid Society meets the criteria established by Section 18(h) of the Federal Trade Commission Act, and have approved your application for reimbursement in part of the reasonable costs of participation in this proceeding.

When an interested person seeks compensation to introduce information into the rulemaking record, the statutory criteria require certain findings based upon the whole rulemaking record as it presently exists and upon what we can responsibly expect to occur at the hearings. I must determine, considering the whole record and the expected representation at the hearings, that the interest for which you speak will be inadequately represented. In particular, I must decide that production of the further information you propose to supply will be a substantial contribution to a fair determination of the rule or any of its major issues.

[I have decided not to approve that part of your application which requests \$30,000 for a contracted survey.

As you may be aware from the staff report and subsequent written submissions on this rule, the present record contains considerable information submitted by hearing aid dealers. In addition, the Presiding Officer has informed me that he will not admit the survey to the record if the survey results are delayed beyond the closing of the record.

The Federal Trade Commission will reimburse your organization for allowable costs as defined in the attached budget. The amounts claimed for actual reimbursement will be subject to final audit for reasonableness and conformance to Federal regulations by the Federal Trade Commission and the General Accounting Office.

You will note that the amount authorized for attorneys has been revised to reflect standard rates paid under this program. Those rates are under review, and if they are revised upward, consideration will be given to making the new rates retroactive.

This authorization also excludes any time which was expended prior to the filing of your application. As you know, Rule 1.17 prohibits compensation for such expenses. The matter of compensation for the expenses of preparing an application is presently also under review and if the rule is amended to allow such expenses, consideration will be given to making that change retroactive, as well.

You should keep in mind that, pursuant to the Commission's rules, payment is authorized only for the actual cost of participation to your organization up to the maximum set forth in your approved budget. The figures set forth in that budget for rates of compensation are maximums. If your actual costs, including salary, benefits and overhead attributable to any person are less, only the lesser amount can be paid by the Commission.

Sincerely,

Margery Waxman Smith
Margery Waxman Smith
Acting Director

Enclosure

Anthony Di Rocco

Attachment

National Hearing Aid Society

Budget*

For Participation in hearings,
Hearing Aid Industry proposed ruleLegal Expenses**: Preparation, Participation, Rebuttal

Senior Attorney (Mr. Waters)

350 hrs @ \$27/hr \$9450

Assisting Attorney (Mr. Harker)

450 hrs @ \$21/hr \$9450

Research Assistant

100 hrs @ \$9/hr \$ 900

Secretarial Assistance

150 hrs @ \$6/hr \$ 900

Copying, xeroxing, and transcripts \$6000

Travel and Per Diem for AttorneysTravel: 1 coach fare, Washington, D.C.
to Chicago and return . \$ 1361 coach fare, Washington, D.C.
to San Francisco and return \$ 368

Per Diem: 40 days @ \$35/day \$1400

ConsultantEconometrician, preparation &
representation assistance to
attorneys for post-hearing comment.
6 days @ \$145/day \$ 870

WitnessesTravel and per diem

3 otolaryngologists and clinical audiologists:

- | | |
|---|--------|
| (1) travel | \$1000 |
| (coach fare <u>or</u> \$.15/mile) | |
| (2) per diem - Total 3 days of per diem | |
| for 6 people @ \$35/day/person | \$ 630 |

6 hearing aid wearers (consumers)

- | | |
|--------------------------------------|--------|
| (1) travel | \$1000 |
| (coach fare <u>or</u> \$.15/mile) | |
| (2) per diem - Total of 3 days' | |
| per diem, 6 people @ \$35/day/person | \$ 630 |

6 hearing aid dealers

- | | |
|--------------------------------------|--------|
| (1) travel | \$1000 |
| (coach fare <u>or</u> \$.15/mile) | |
| (2) per diem - total of 3 days' | |
| per diem, 6 people @ \$35/day/person | \$ 630 |

TOTAL.....	\$34,364
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*The total allowable amount below must be reduced by the total amount of member contributions you will have received between April 20th, 1976 - the filing date - and the time you submit your reimbursement claim. An affidavit attesting to the number of contributions you will have received during this time must accompany your claim.

**\$27/hr is the hourly billable rate allowed for an attorney with at least 10 years' experience. \$21/hr is the hourly billable rate allowed for an attorney with 5 to 10 years' experience. You must supply the attorneys' resumes, as well as the resume of the research assistant, when you submit your justification for reimbursement. The attorneys may not bill you at hourly rates in excess of these.

(Letter referred to on p. 64.)

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580BUREAU OF
CONSUMER PROTECTIONAnthony Di Rocco
Executive Secretary
National Hearing Aid Society
20361 Middlebelt
Livonia, Michigan 48152

28 OCT 1976

Dear Mr. DiRocco:

This is in response to your letter of August 4, 1976, in which you protested my making the maximum budget of \$34,464 for your participation in the Hearing Aid rulemaking proceedings conditional on two factors. I am sorry for the delay in answering your letter. It was filed with your application before I was able to read and respond to it.

Your first concern was that "the total allowable amount must be reduced by the total amount of NHAS contributions." You add that "this decision apparently is premised on the mistaken assumption that the special assessment forwarded to each of our members in 1976 was simply to cover legal fees and other expenses in connection with our participation in the FTC's rulemaking proceeding."

Actually the footnote attached to your budget to which you refer states, "The total allowable amount below must be reduced by the total amount of member contributions you will have received between April 20th, 1976 - the filing date - and the time you submit your reimbursement claim..." It is true that I assumed that the special assessment poll you sent to your members on April 14th, 1976, and which you enclosed with your application, was solely for costs of participating at the FTC rulemaking proceeding. I enclose a copy of that assessment poll for your reference.

When the Presiding Officer, Mr. Shepherd, wrote you on April 26, 1976, he asked you for the results of this poll. Such information would have aided in determining "feasibility of contributions to the costs of participation by individual representatives of the (NHAS) interest." See Rules § 1.17 (C) (4) (iii).

The applicable statute provides that compensation can be awarded to those satisfying other criteria who are unable effectively to participate in a rulemaking proceeding because of inability to afford costs of making oral presentations, conducting cross-examination, and making rebuttal submissions. To the extent that you are able to afford such costs, I cannot, of course, find that you would meet that criterion. Therefore, as I understood that you had been polling your membership for your participation costs incurred in this proceeding, I asked that you subtract those contributions from the maximum amount you would otherwise bill the compensation fund. Before I can reconsider this decision, I need some additional information.

You must verify the amount you received in response to the April 14th, 1976 poll for \$100 contributions. Enclose any follow-up letters to your membership regarding this poll. Finally, detail how you allocated these particular contributions to purposes other than these proceedings.

Atty's fees Your second concern was that your attorneys "not bill NHAS at an hourly rate in excess of those identified in the budget (\$27 and \$21 per hour respectively)." You further state that "this proviso effectively precludes any organization from retaining outside counsel in connection with its participation in an FTC rulemaking proceeding. We know of no firm in the country that can sustain their overhead and maintain their firm on a \$27 hourly rate."

1 First, I want to let you know that these rates, based on government comparability rates for years of legal experience, are consistent with the rates we have determined to award each successful applicant for outside counsel. Of the nearly \$700,000 already obligated to these applicants, a sizeable portion has gone to outside counsel at the rates identical to those awarded to NHAS. The National Council for Senior Citizens, for example, hired counsel at \$21 or \$27 per hour, based on those same comparability rates, to represent its interests in this rulemaking proceeding.

2 Second, NHAS had already retained the firm of Peabody, Lambert & Meyers at \$75 per hour to represent its interest in this proceeding some time before it applied to the FTC for compensation. Therefore, I determined it was necessary to point out to you, in the approved budget, that your paying legal counsel at rates exceeding our allowable rates would violate the standard applied to, and used by, all other successful applicants.

Please let your attorneys know, however, that they may bill separately for secretarial help at \$6 per hour, and also for paralegal help. Customarily private attorneys' hourly rates include these expenses.

I hope that I have answered the questions you raised and that you understand my willingness to reconsider my proviso that your approved budget be considered in light of the response to your April 14, 1976 membership poll.

Sincerely,

Margey Waxman Smith
Margey Waxman Smith
Acting Director

Enclosure: Membership Poll

(Letter referred to on p. 67.)

April 26, 1976

Anthony DiRocco
Executive Secretary
National Hearing Aid Society
20361 Middlebelt
Livonia, Michigan 48152

Re: Request for Compensation --- Proposed
Trade Regulation Rule for the Hearing
Aid Industry.

Dear Mr. DiRocco:

This responds to your letter dated April 12, 1976, which was placed on my desk by special messenger on April 20, 1976. The letter constitutes your association's "Application for Compensation for Representation" in the above-noted proceeding. I am anxious to give this matter prompt consideration, but I must advise that your letter does not provide sufficient information on which a favorable recommendation could be based.

Unfortunately, your request comes at a late date in this proceeding and it takes time to review and process such matters. Also, application must be filed prior to the time when the costs for which compensation is sought are incurred. Nevertheless, for your careful review, there is enclosed an excerpt of the relevant portion of the Commission's Procedures and Rules of Practice (see Section 1.17). As you will note, the Commission is authorized to provide compensation for certain costs of participation to any person who has or represents an interest which would not otherwise be adequately represented. This first requirement will be difficult to reconcile with your request since, in my best professional judgment, your association's interest has had what must be considered amongst the finest representation available through its counsel, Timothy J. Waters, Esq., of the law firm of Peabody, Rivlin, Lambert & Meyers. In addition, the public record shows that individual dealers have presented voluminous comments.

In addition, a showing must be made that those who are compensated could not otherwise afford to pay the costs of making oral presentations, conducting cross-examination, and making rebuttal submissions. Verification of the assertion

that your association will need financial assistance in order to continue to participate is obviously necessary. Accordingly, it is requested that you advise in detail of the association's complete financial status including, but not limited to, all details relating to all reserves, assets, income, potential income, and actual and scheduled outlays for the last (1975) and current (1976) years. Also, please advise whether your association is nonprofit, and what salaries and other compensations are paid to its officers (in particular) and employees (in general).

Please carefully consider and advise in detail with regard to all of the considerations noted under Subsections 1.17(c) (3), (4), and (6). Please give particular attention to the feasibility of contributions to the costs of participation by individual representatives of the interest. In this regard, advise in detail of any efforts made to solicit contributions from any and all members and nonmembers (including dealers and others who share your interests, i.e., manufacturers) and the results thereof. (Please document.) Also, what other means of financing might be available?

Mr. DiRocco, I want to be quite candid with you. The most difficult obstacle to overcome before a favorable recommendation can be made on your application for compensation is, in my opinion, the presumption that a large number of small businessmen should be capable of supporting your program to prevent approval of the proposed Rule if they felt the effort was truly in their best interests.

Upon receipt of the above-requested information, I will process this matter as rapidly as your response and my current strenuous workload permit.

Sincerely,

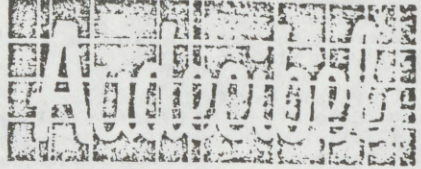
G. Martin Shepherd
Presiding Officer

Enclosure

cc: Timothy J. Waters, Esq.

CP:GMS:sms

(Article referred to on p. 15, 20, and 65.)

AN OFFICIAL PUBLICATION OF THE
NATIONAL HEARING AID SOCIETYHearing Health Care Menaced

FTC Dirty Tricks Block Chances for Fair Hearings

INDIGNATION FOLLOWED shock as the FTC's schemes to compel approval of their proposed rules for the hearing aid industry were uncovered. News that the FTC is paying the National Council of Senior Citizens nearly \$35,000 for cooperating with their schemes is the latest in a long series of disclosures of FTC maneuvers to impose these harsh rules at any cost. Their efforts to discredit the hearing aid industry in order to justify the rules have included initiation of phony surveys designed to deceive and trap hearing aid specialists, defacing public records to protect the identity of accomplices, and expenditure of huge amounts of money to conduct an "investigation", which they claimed they had already made before the rules were even proposed.

Some observers claim that these are last-ditch desperate ploys of the FTC to quiet Congressional critics who have accused them of ineffectiveness in consumer affairs. Others say the FTC is using the hearing aid industry to set precedents for imposing severe new regulation on the rest of the business community.

Many leading authorities in hearing health care are vigorously opposing the FTC's proposed hearing aid regulations as overly restrictive, an impediment to the flow of services to the hearing impaired, and a hazard to good hearing health care. Chances for a fair hearing of these views seem slim however, as evidence accumulates about FTC dirty tricks, attempted cover-up, and bull headed bias.

How the FTC is Concocting Evidence

IN THEIR STATEMENT printed in the Federal Register, June 24, 1975, the FTC claimed their harsh proposed rules for the hearing aid industry were based on "information compiled by the Commission's staff during an extensive investigation of the hearing aid industry," and claimed to have documents to prove that the hearing aid field was abusing consumers. Examination of their files left this claim unsupported.

Instead, the files poured out a story of a long chain of surreptitious activity on the part of FTC to concoct the evidence which they claimed they al-

ready had. Then, to cover their tracks, they defaced records to hide the identity of their accomplices. However, enough names were missed by the razor blade to show that various members of the American Speech and Hearing Association were heavily involved.

U.S. Department of Justice Investigating ASHA

The business practices of the American Speech and Hearing Association are currently under investigation by the Antitrust Division of the U.S. Department of Justice. The National Hearing Aid Society filed a brief with the FTC outlining the procedure by which a limited number of clinical audiologists seek to unlawfully eliminate the hearing aid specialist as a competitive threat to their own monopoly on the sale of hearing aids in the United States. This showed that a concerted, well-planned, nationwide program of disparagement of hearing aid specialists occurred, contrary to FTC regulations which consider disparagement of a competitor as unfair competition.

Yet, such disparagement of hearing aid specialists by clinical audiologists was evidently encouraged by the FTC.

Volunteers Coached in Deception

One of the early documents uncovered showed how volunteers were instructed to pretend a hearing loss, in order to deceive a hearing aid specialist. This script said, "The majority of dealers have neither the training or the proper equipment to adequately test a client's hearing. Most dealers sell hearing aids primarily to make money, thus, they are highly motivated to sell . . . We need a team of ten volunteers for this

study. You will first be tested by an audiologist. Later, you will make two comparative visits to hearing aid dealers and data will be evaluated from there . . . As far as you and the dealer are concerned, you are there for your own benefit and not as a participant in a survey. When asked about your hearing you might say 'it isn't as you feel it should be,' or 'others have been complaining that you don't hear them,' or 'you play the TV too loudly,' or 'you don't hear the phone ring or a knock at the door and you are concerned about this.' "

Records show that the FTC placed phone call after phone call to get this survey underway.

The National Hearing Aid Society has photocopies of handwritten notes obtained from the FTC, recording telephone contacts about the survey. The following are typical. "(Name deleted) (9/25/75, 5:51 p.m.) agenda — test subj. w/normal hrg. to all (deleted) dealers? — he will ck w/his people and get back to me." Or "(name deleted) (9/27/75, 5:27 p.m.) — agenda — test subjects (w/normal hrg.) to all (deleted) h.a. dealers — busy, will call me tomorrow." (9/30/75, 11:18 a.m.) — he will think on this and get back to me." Or, (name deleted) (10/6/75, 5:30 p.m.) no answer, agenda-test subjects w/normal hrg. to all dealers in (deleted) area. (10/7/75, 11:05 a.m.) lft. msg. to call me collect . . . (10/7/75, 1:45 p.m.) — he will do such a study."

The quantity of such memos indicates that the FTC was making a headlong effort to find people to participate. When NHAS protested, an FTC memo initialed by Steven D. Newburg-Rinn and dated 11/24/75 said the survey was being discontinued since industry knowledge

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6
UNITED STATES GOVERNMENT

Memorandum

TO : Hearing Aid File

DATE: December 8, 1975

FROM : William J. Baer

SUBJECT: Discontinuance of Survey of Hearing
Aid Retailers

[REDACTED] indicated that he was unable to obtain the cooperation of students. He and they felt that there was an element of sneakiness in the activity and they preferred not to engage in the testing. He agreed to discontinue his efforts.



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

about it would "invalidate the survey results." He claimed that they had called all persons who had been contacted initially to ask them to discontinue their efforts.

However, the FTC files tell another story. They show that the survey had NOT been discontinued at the time Mr. Newburg-Rinn wrote the memo, and was very much alive even in December. One senior citizens group, which is being paid \$34,926, actually conducted such surveys, and is being prominently featured at hearings. However, many of the fake "surveys" failed because FTC contacts had difficulty in getting volunteers, who recognized its illegality and immorality.

A memo dated December 8, 1975, said, "Finally, (name deleted) indi-

cated that he had made a very limited effort to obtain cooperation and had not had much success. He indicated a willingness to redouble his efforts to obtain volunteers to participate in the test, but agreed to hold off on any such renewed effort until hearing from us again." Another memo bearing the December 8th date shows that the FTC was maintaining continuing contact with persons who were conducting surveys. "(Name deleted) of Idaho indicated that she had laid the groundwork for her survey — a survey that would encompass the Ames and the Des Moines, Iowa area, as well as the Western Illinois area. She plans to obtain ten volunteers, test them for acceptable hearing, and have them visit the dealers in the Des

SPRING, 1976

57

*agenda
 of test subj. w/ normal
 hrg. to off. [unclear]
 - he will deal w/ this people and
 get back to me.*

(9/22/76 5:51 p.m.)

Moines/Amnes/Western Illinois areas. She was strongly interested in continuing her efforts. I informed her that, while we discouraged such efforts because of the fear of survey bias, she was free if she wished to continue her efforts. And, I requested that she keep in contact with us on her plans. She recommended that we contact (Name deleted) who had supervised an earlier PIRG survey ..." (Misspellings same as in original).

NHAS asked the FTC to supply the names and addresses of those contacted. On January 19, 1976, Charles A. Tobin, Secretary of the Federal Trade Commission, notified NHAS legal counsel that the "names and addresses of persons contacted in connection with the survey would continue to be withheld because their release would constitute an unwarranted invasion of personal privacy or would reveal the identity of confidential sources." Mr. Tobin also said that other information, which is relevant to the FTC's hearings on the proposed rules, would be withheld "because they are investigatory records, compiled for law enforcement purposes." NHAS legal counsel appealed this decision on February 18, 1976, fully document-

ing the illegality of failure to disclose such pertinent information. Denial of these important facts circumvents the intentions of the Freedom of Information Act, which was designed to prevent exactly this kind of abuse of power.

Many other records have been similarly defaced. In at least one case when the author of a letter said something complimentary about the hearing aid industry, that was marked for deletion, so that only disparaging comments would remain.

Volunteers Refuse Because of "Sneakiness"

The record does show that the integrity of the American people acted as a control on this monstrous project of the FTC. "(Name deleted) indicated that he was unable to obtain the cooperation of students. He and they felt that there was an element of sneakiness in the activity and they preferred not to engage in the testing. He agreed to discontinue his efforts." "The possibility of conducting the survey was discussed with the Department Chairman and University Attorney. They were skeptical of the survey because being a State university they could upset the State legislature. The situation was too touchy."

[(9/12/75 5:08 p.m.)
 agenda: send text subjects
 w/ normal hrg. to all
 [speakers
 - he will do this & get back
 to me.

"(Name deleted) had yet to begin any survey activities. He indicated that a law suit by Sears against a TV recorder in the area who tried a similar tactic with automobile repair, had frightened most of his potential volunteers. He expressed reluctance to continue, I advised him to hold off on any further activities until he hears from us again."

"Telephone conversation with (name deleted.) The local Department of Justice and consumer protection people were contacted to help set up survey. During meetings concerning the survey, implications of entrapment were discussed and it was agreed that the survey should not be conducted."

Clinical Audiologists Involved

Clinical audiologists were prominent among those few names which got overlooked for eradication. Memos showed that a person whose name had been deleted recommended to the FTC that they contact a named member of the Northern California PIRG, or, if not available, a certified member of ASHA associated with the San Francisco Hearing Society. This

memo once again emphasizes the "hand in glove" relationship between ASHA members and the Public Interest Research Groups. PIRG has played a major role in degrading hearing aid specialists by distortions and falsehoods and clinical audiologists are known to have advised with some of their studies. Another memo reflects this alliance again. "(Name deleted) indicated that she had layed the groundwork for her survey . . . She recommended that we contact (a named person of Logan, Utah) who had supervised an earlier PIRG survey."

Another memo, signed by this person, shows that she was indeed contacted, and supplied useful information. Her letter dated October 16, 1975, bearing the letterhead of Utah State University, Department of Sociology, says, "Dear Mr. Hatchl, I still have not received the materials I needed from Iowa to prepare a full comment for you. By now, it may be too late; I hope not. Enclosed are the names of people who might help you. I hope to have a complete comment to you just as soon as I get the original survey forms." She enclosed a list of

7 (10/1/75 5:30 p.m.)
 agents
 - Not subjects w/ normal
 hrg. to all members in
 area.

(10/7/75 11:00 a.m.) - lgt. msg. to all re
 collect

(10/7/75 1:15 p.m.)
 - he will do a such a study

people who might help. Names of four clinical audiologists, who are members of ASHA, were on her list.

ASHA shrugs off the hearing aid industry's claims of conspiracy by clinical audiologists to eliminate hearing aid specialists as "time-worn." However, to date, the National Hearing Aid Society has received no denial from ASHA that such a conspiracy is underway.

It would be hard to attribute the strange occurrences to coincidence. A clinical audiologist who is a member of ASHA, was a paid consultant to the FTC. The FTC subsequently wrote severe rules for the hearing aid industry, which one consumer writer said would place it in a "straitjacket." The FTC initiated phony surveys, and apparently sought cooperation from clinical audiologists and others to implement them.

Now, one group which actually conducted such surveys is being paid

handsomely to testify at the FTC hearings. The National Council of Senior Citizens (NCSC) conducted their surveys in two cities — Long Beach, California and Washington, D.C., following the methods suggested by FTC, and previously used by consumer groups which used clinical audiologists as "advisors."

These "surveys" were submitted to the FTC on December 3, 1975, ten days after Steven Newburg-Rinn wrote National Hearing Aid Society attorneys that the surveys had been discontinued through fear of "survey bias." Now the FTC plans to capitalize on the surveys, no matter how biased, by paying the NCSC to present findings at the FTC hearings.

"Cover Story" Used to Deceive

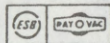
A memorandum by Russell Hatch, FTC agent, dated October 20, 1975, recorded a telephone conversation about the Long Beach study. Although memo which is in the FTC



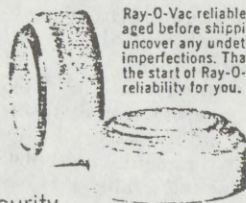
Listen!! I hear the ice cream man, grandpa!...GRANDPA?...

You can help when impaired hearing keeps a grandfather on the outside of life's sweeter moments. When you fit a tiny hearing aid comfortably and naturally, and recommend the reliable battery that works tirelessly in obscurity, he's "back in the family." "Alive" to a grandson's piping voice and youthful exuberance, so that the ice cream wagon will never pass unheard.

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files included the names of the participants, they have been deleted here for publication purposes. "Ms. A and Ms. B discussed the results of the survey of Long Beach hearing aid dealers they conducted over a period of four consecutive days in October, 1975 at my suggestion. The survey was supervised by Ms. A. Ms. B was the test subject. She was the first tested by an audiology clinic and found to have normal hearing. This confirmed her own and Ms. A's opinion of her hearing. Ms. B then visiting all 14 of the hearing aid dealers in Long Beach, to determine whether they would recommend that she buy a hearing aid. Her 'cover story' was that while she didn't think she had a hearing problem her husband did" (Emphasis added.)

A summary of the Long Beach survey, which Ms. A transmitted to the FTC approximately December 3, 1975, said "Over a four day period 10/14 - 10/17/75, I visited 14 hearing aid centers in the City of Long Beach and asked to be tested claiming that *although I did not personally feel I had a hearing problem, my daughter and grandchildren often commented that I was not hearing normal conversations.*" (Emphasis added.)

The survey methods of the Washington, D.C. study were also described. Here, they claim that persons were instructed not to give any misleading information. But, in view of previous discussion of "cover stories" and evidence of "scripts" to coach volunteers in deception, that is questionable.

"The NCSC survey of hearing aid dealers was conducted during the summer of 1975. For the final survey results, eight volunteers, five men and three women ranging in age from 19 to 72, participated as potential

'customers.' In all, they made a total of fifteen inquiries to the eight hearing aid dealers located in the District of Columbia. Every dealer but one was contacted at least twice. Prior to visiting the hearing aid dealers, the volunteers were given informational materials to read, and were instructed not to give any misleading information."

FTC Grants NCSC \$34,926!

Now, the FTC is rewarding the NCSC handsomely for their cooperation, with a fat grant of \$34,926. This will pay legal fees, buy witnesses, and provide for newspaper advertising to try to locate elderly people dissatisfied with their hearing aids. Although the NCSC originally applied for only \$10,100, the FTC eventually tripled that amount. The NCSC made their position clear. Their application for the money talks about "reforming" the hearing aid industry and cites their "insight into the prevalence of selling abuses by hearing aid dealers." Their original application said they planned to pay a clinical audiologist \$145.00 a day to testify about "the advisability of requiring disclosure of the existence and role of clinical audiologists in the *diagnosing and treatment* of hearing impairments prior to hearing aid sale and the advisability of *requiring* an audiological evaluation prior to hearing aid sale." This is the ASHA party line, which would create jobs for clinical audiologists. With this concept, they can intrude both into the medical profession in "diagnosis" and "treatment" and into the hearing aid field, with involvement in every hearing aid sale. The FTC could have saved the fees this clinical audiologist is charging, because some might have been willing to pay the

FTC for the opportunity. (For a complete report on ASHA intrusions into medical practice, see *Audacibel*, Winter, 1976, and this issue.)

Here's a complete listing of the NCSC anticipated expenditures, as it appeared on their second application:

a. Expert Witnesses

(1) Fees for the National Council's legal project staff	
David Marlin, Director of LRSE (180 hours at \$27 per hour)	
120 hours to attend the hearing in the District of Columbia, present testimony and cross-examine other witnesses	\$3,240
60 hours to supervise the NCSC effort, prepare testimony and prepare to cross-examine other witnesses	\$1,620
Staff Attorney, LRSE (375 hours at \$21 per hour)	\$4,860
100 hours to assist in preparation of the testimony and the cross-examination and attend part of the hearings	\$2,100
100 hours to analyze state hearing aid laws and practices to show need for federal regulations	\$2,100
75 hours to coordinate and assist in preparation of the testimony of other witnesses	\$1,575
100 hours to prepare post-record written comments	\$2,100
Legal Research Assistant, LRSE (100 hours at \$10 per hour)	\$1,000
Secretary (150 hours at \$6 per hour)	\$900
(2) Fee for gerontologist to prepare and present testimony (3 days at \$145 per day)	\$1,900
(3) Fee for economist to prepare and present testimony, and assist attorneys in presentation of post-record comments (5 days at \$145 per day)	\$435
(4) Fee for audiologist to prepare and present testimony, and assist attorneys in preparation of post-record comments (3 days at \$145 per day)	\$725
(5) Fee for otolaryngologist to prepare and present testimony, and assist attorneys in preparation of post-record comments (3 days at \$145 per day)	\$435
(6) Fee for state legislative advocate to prepare and present testimony (3 days at \$145 per day)	\$435
	\$2,465

b. Information on Consumer Experiences

(1) Collection of Affidavits

(a) Fees for one attorney in Boston and one in Miami to prepare 45 consumer affidavits (5 hours for each affidavit; 225 in each city - 450 hours at \$30 per hour)	\$13,500	
(b) Cost of typing consumer affidavits (45 hours of secretarial time at \$6 per hour)	\$270	
(c) Travel for NCSC staff attorney to each city to review and collect affidavits.		
Travel	\$276	
D.C. - Boston - D.C.		
D.C. - Miami - D.C.		
Expenses	\$60	
(2 days at \$30 per day)		
(d) Cost of newspaper advertisement and other use of media	\$150	\$14,256
(2) Presentation of 10 consumer Witnesses		
(a) Fee for attorney assistance in preparation for testimony and cross-examination (3 hours of attorney time for each witness - 30 hours at \$27 per hour)	\$810	
(b) Travel		
5 witnesses Boston - D.C. - Boston (\$102 per round trip)	\$510	
5 witnesses Miami - D.C. - Miami (\$174 per round trip)	\$870	
(c) Expenses		
One day each at \$30 per day	\$300	\$2,490
(3) Collection of Nursing Home Information		
(a) Fee for attorney to visit one nursing home in Boston and one in Miami (10 hours each at \$27 per hour)	\$540	
(b) Fee for attorney to prepare information gathered in nursing home (10 hours each at \$27 per hour)	\$540	\$1,050
		\$34,926

Total Reimbursement Sought

The FTC hearings, which are supposed to be a "fair and impartial" review of the facts, have taken on the aura of a prosecution or an inquisition. Having prejudged the hearing aid industry as guilty of enormous consumer abuse, they have used any means, fair or foul, to make the evidence fit their prejudices.

Despite NHAS appeals for relief,

the staff stoutly defends their actions. In a letter from an Acting Director of the FTC, dated March 2, 1976, she said, "I do not believe . . . that you have in *any way* demonstrated wrongdoing on the staff's part." (Emphasis added.)

How can they ignore the evidence contained in their own files? How immoral and illegal must actions be to establish that "wrongdoing" has occurred? ■

AUDECIBEL

Supplemental Material Submitted by Mr. Lee



NATIONAL HEARING AID SOCIETY

20361 MIDDLEBELT • LIVONIA, MICHIGAN 48152 • TELEPHONE: (313) 478-2610

September 8, 1977

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Cala, Springs, Colo.

Subcommittee on Administrative
Practices and Procedures
Committee on the Judiciary
162 Russell Building
United States Senate
Washington, D.C. 20510

Attn: Ms. Betty Davis, Chief Clerk

Dear Ms. Davis:

We have reviewed the testimony given before the Subcommittee by Margery Waxman Smith and other staff members of the Federal Trade Commission on June 21, 1977. We find certain statements made with reference to our application for funding to be inconsistent with the facts as we know them.

On page 66 Ms. Smith testified that we failed to advise the Commission that the proceeds of our special assessment were intended for Society activities other than participation in the FTC rulemaking proceeding. In order that your record reflect, as accurately as possible, the true facts in our frustrating experience with the FTC staff, I am enclosing a Xerox copy of all the correspondence between the Society and the Commission relating to our application for funds. You will note in our letter of August 4, 1976 addressed to Ms. Smith we went into great detail concerning the many demands on our limited financial resources.

On June 8, 1977 we received a request from the Administrative Conference of the United States to respond to a series of questions on our experiences with the FTC relating to our application for funding. We are attaching a copy of the letter we received and a copy of our reply. All of this material is pertinent to the treatment we received from the FTC on our application for funding.

We very much appreciate your prompt response to our request for a copy of the transcript for June 21, 1977. I trust the attached material will serve a productive purpose and thank you for the opportunity to supply it.

Sincerely yours,

Robert W. Lee
Director of Governmental Relations

RWL:rl

Enc: per attached list.

List of attachments to September 8, 1977 letter to the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, United States Senate.

1. Letter of April 12, 1976 to G. Martin Shepherd from Anthony DiRocco.
2. Letter of April 26, 1976 to Anthony DiRocco from G. Martin Shepherd.
3. Letter of May 4, 1976 to G. Martin Shepherd from Anthony DiRocco.
4. Letter of July 20, 1976 to Anthony DiRocco from Margery Waxman Smith.
5. Letter of August 4, 1976 to Margery Waxman Smith from Anthony DiRocco.
6. Letter of October 29, 1976 to Anthony DiRocco from Margery Waxman Smith.
7. Letter of January 25, 1977 to Margery Waxman Smith from Anthony DiRocco, and the reply dated February 18, 1977.
8. Letter of June 8, 1977 to Anthony DiRocco from Jamie Bennett, and the reply dated August 22, 1977.

(Attachment 1)



NATIONAL HEARING AID SOCIETY

20361 MIDDLEBELT • LIVONIA, MICHIGAN 48152 • TELEPHONE: (313) 478-2610

April 12, 1976

Executive Secretary:
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JOSEPH C. LUCKE
Miami, Florida

G. Martin Shepherd, Esquire
Presiding Officer
Trade Regulation Rule on
Hearing Aids
Federal Trade Commission
Washington, D. C. 20580

Dear Mr. Shepherd:

Re: Application for Compensation for Representation
in Proceedings on Regulation for the Hearing
Aid Industry

This is an application by the National Hearing Aid Society ("NHAS") for \$68,249 to permit continued participation in the FTC's pending rulemaking proceeding concerning the hearing aid industry. This application is filed pursuant to Section 57(h)(1) of the Federal Trade Commission Act and Section 1.17 of the FTC's Rules of Practice.

I. NHAS Represents an Interest (i) Which Would Not Otherwise be Adequately Represented in This Proceeding, and (ii) Which is Necessary for a Fair Determination of the Rulemaking Proceeding Taken as a Whole.

A. The NHAS Interest.

While the FTC, the FDA, Congressional committees, state legislatures and consumer groups are spending millions of dollars trying to prove that some hearing aid dealers are or have been engaged in selling abuses, NHAS has worked vigorously to build an ever improving force of competent and reliable dealers to provide assistance for the hearing handicapped. The NHAS membership, however, is comprised almost entirely of small independent businessmen. As noted in more detail hereinafter, membership dues have been increased in each of the past three years. Special assessments also have been made to maintain as a viable organization the only effective, progressive national organization of hearing aid dealers. The massive commitments placed upon NHAS by the never ending hearings and proceedings have taxed NHAS and its membership to the limit. It cannot survive at this pace. This may satisfy the few who oppose this industry, but the public interest will suffer as a result.

The financial hardship imposed by these prolonged proceedings against hearing aid dealers is exacerbated by the fact that the Presiding Officer has recently recommended substantial funding for the National Council of Senior Citizens, an organization with an adversarial interest which is clearly antagonistic to hearing aid dealers in this proceeding. It would be unfair for the Commission to discriminate against hearing aid dealers by only funding a group which only intends to offer evidence in support of the rule in a proceeding in which the Commission itself is supposed to be representing the consumer.

Fundamental due process requires that the group against whom massive regulation is being proposed must be given a full opportunity to participate and respond to allegations made against them. The simple right to appear and listen, and have one representative speak or submit comments, is inadequate. Attorneys must be present to cross-examine, research is required, and witnesses must be made available--all at great cost.

The FTC recently authorized \$36,006 to the National Council of Senior Citizens to participate and represent consumers in this rulemaking proceeding (with a \$10,000 additional sum pending, we understand). As Presiding Officer, you have designated six groups, in addition to the FTC staff, as "interested persons," two of which represent consumer organizations. The FTC staff also represents consumers--obviously they do not represent the industry they propose to dismantle. Clinical audiologists also are represented by the attorney for the American Speech and Hearing Association ("ASHA"). ASHA has made its position clear many times over--they see no substantive role for the hearing aid dealer in the hearing health care team.

The remaining groups include the medical profession, the hearing aid manufacturers and the hearing aid dealers. Of this group, clearly the medical profession does not, and is not expected to, represent the interest of the dealers. The manufacturers, hopefully, are concerned about the plight of the dealers, but simple economics suggests that manufacturers will find adequate distributional outlets for their products, regardless of what happens to the economic viability of dealers if this rule is promulgated in its present form. In particular, the

right to cancel would directly and seriously harm hearing aid dealers. As such, the interests of the dealers are not represented by the manufacturers.

This leaves NHAS. The FTC cannot expect dealers to try and come forward individually and adequately represent an entire industry which varies from state to state. The problems, for example, of dealers in rural states like Kansas and Iowa differ from those of dealers in New York. More importantly, hearing aid dealers are predominantly highly competitive small proprietorships, distributed throughout the nation. The average hearing aid dealer is a small businessman with an annual income of approximately \$15,000. Without assistance such a "cottage industry" cannot effectively represent its interest against the forces of the Federal Government in a protracted proceeding.

Full and complete representation by NHAS, therefore, is necessary if the FTC really wants a fair determination of the issues raised by its proposed rule. Admittedly NHAS opposes this rule, as well as the procedures currently being utilized in connection with its promulgation. Nothing in the FTC Act or Rules of Practice, however, suggests that an interested person must support the FTC to qualify for compensation.

In this regard, the National Hearing Aid Society submits that its petition should be granted for the reason that hearing aid dealers possess compelling interests in the outcome of the proceeding. On the one hand hearing aid dealers stand to suffer direct and severe adverse effects if the proposed rule is adopted. Hearing aid dealers as a group, unlike the National Council of Senior Citizens, possess a legal interest which is threatened with destruction or injury by the proposed rule.

Secondly, the concerns of hearing aid dealers as a group are close to the center of all factual controversy surrounding the proposed rule. The Federal Trade Commission Act, as amended, recognizes the importance of adjudication-type procedures in order to assure an adequate record on factual issues. The effective exercise of such rights entails greater expense than stating on the record basic views of a party, which may be done by interested persons whose interests are not so directly threatened or which lie further from the center of controversy.

Similarly, unlike hearing aid dealers, neither ASHA nor the medical profession stands to suffer injury to a legal interest if the rule is adopted. Rather they stand only to gain by the proposed rule. Thus, their need for effective representation is substantially less than hearing aid dealers, and their interest in the proceeding is qualitatively different from that of NHAS.

Most importantly, however, NHAS believes that its position with respect to the proposed rule is firmly grounded in the public interest. NHAS does not oppose lightly Federal Government action which is intended to benefit the consumer. NHAS members, however, have invested their lives and their livelihood in service to the hearing impaired and cannot support regulations which are not based on accurate information. A rule based on misinformation cannot serve the public interest.

The Presiding Officer and the Commission should also consider the important contribution to the public interest which would be achieved by effective representation of hearing aid dealers in this proceeding. Major provisions of the proposed rule, particularly the right to cancel, constitute novel, if not revolutionary, approaches by the Commission to consumer protection. Similarly, aspects of the proposed rule, particularly the ad substantiation standards and the right to cancel, constitute an effort to set standards in the area of the delivery and use of health care devices and services and in the area of pre-market testing. The Commission has never regulated in these delicate areas of the public interest before. At the same time, such sweeping new authority is proposed for application primarily against hearing aid dealers, a small industry comprised of thousands of sole proprietorships. Therefore, it is of great public importance, as well as of interest to NHAS, for the Presiding Officer and the Commission to assure that hearing aid dealers as a group are able fully to demonstrate the practical, legal and policy implications of this proposed new approach. Because others who may possess expertise in the delivery of health care services are not threatened with direct injury to their legal interests but rather stand to profit by the rule, the representation of the public's interest in the maintenance of a viable hearing aid delivery system is left largely to hearing aid dealers.

NHAS members are more experienced in hearing aids and with hearing impaired persons than any other group of people in this country, including the medical profession and clinical audiology. NHAS is also concerned with the continuous advances in knowledge and training of its members and the elimination of those few whose primary goal is not service to the hearing impaired.

NHAS continuously has sought to improve the standards of care in the hearing health delivery system. While many have criticized state licensing laws for not going far enough, no one seriously questions the importance of adequate licensing of hearing aid dealers. NHAS was a leader in the development and recommendation of such laws-- a notable example of its constructive efforts to make high standards of professional conduct universal. At present 41 states have enacted licensing laws, all of which prohibit certain acts, provide standards of entry into the occupation, provide recourse to the public and penalties for violations. Even before the FTC promulgated its trade regulation rule, the National Hearing Aid Society announced a Four-Point Consumer Protection Program which in many respects goes beyond the protection afforded by the FTC's proposed rule. The plan includes: (1) prior medical clearance for first-time purchasers of hearing aids, (2) trial rental-purchase option, (3) consumer complaint grievance procedures, and (4) continuing and expanded educational opportunities for industry members and prospective applicants for the industry. Only the consumer grievance procedures have yet to be fully implemented. NHAS has appointed Mr. Vincent Giglia, President of the Philadelphia Hearing Aid Guild, as director of this program. The Philadelphia Guild has developed a successful local grievance procedure. NHAS has determined that implementation of this Philadelphia program on a national scale is the most immediately available program.

In sum, NHAS' interest in the proposed rule is direct, immediate, and commensurate with the public interest.

B. Representation of NHAS is Necessary for a Fair Determination of the Rulemaking Proceeding Taken as a Whole.

Despite the overwhelming number of investigations of the hearing aid industry at the federal, state and local levels, the hearing aid industry represents only \$150 million

a year at the retail level. If such sales were attributable to a single company, that company would not even make Fortune's top 500 (Fortune, May 1975). In the past few years there have been continuing and increasingly vociferous allegations with respect to unethical practices and misconduct by the hearing aid industry. These allegations have never been subjected to the test of cross-examination or trial.

No other group in the country is more directly affected by such allegations and by the Commission's proposed trade regulation rule. The thousands of hearing aid dealers stand to lose their businesses and reputations if such allegations are permitted to go unchallenged by reason of the inability of hearing aid dealers as a group to fully participate in this rulemaking proceeding and contest the proposed rule. The FTC has made allegations and provided the first forum within which hearing aid dealers are given limited rights to meet these allegations head on. It would be a miscarriage of justice were hearing aid dealers as a group foreclosed from fully participating in these extensive rulemaking proceedings as a result of inadequate financial support. The fact that NHAS has been the forefront of consumer protection and service to the elderly is ignored. For example, while very few complaints have ever been evidenced in any state or federal agency, two consumer groups have sought to represent the interests of consumers allegedly subjected to abuses. Even these groups must advertise and solicit complaints. NHAS is the only interested person in this proceeding representing the overwhelming number of consumers who are satisfied with their hearing aid dealers and whose interest in an efficient, competitive hearing aid delivery system is now threatened. The FDA received over 7,000 letters from consumers endorsing the present hearing aid delivery system. The FTC, while declining to index such letters, also has received several thousand letters favorable to the hearing aid dealers. With the compensation herein requested, NHAS would seek to place special emphasis on the actual needs of the hearing aid user through testimony of consumer witnesses.

NHAS is also the only interested person in this proceeding attempting to proffer evidence as to the substantial adverse economic impact which the proposed rule would impose. In most cases, before promulgating harsh industry-wide regulations federal agencies attempt to assess and

quantify the economic effects of such regulation. Here the Commission is proposing sweeping new controls, including price fixing in a highly competitive business, with no comprehensive economic evaluation of the impact of such regulations on the consumer or on the delivery of health care services.

NHAS is the one interested person herein with both the economic incentive and the public concern to undertake such an analysis, yet it lacks the funds necessary to do so.

II: NHAS is Unable to Effectively Participate in This Proceeding Because of the Costs Involved.

The full participation of NHAS, as the representative of some 3,600 retail dealers, is indispensable to a fair hearing and a fair determination of the allegations contained in this trade regulation rule. NHAS' Code of Ethics and Four-Point Consumer Protection Program demonstrate its interest and concern for hearing aid users. More importantly, NHAS members are the only body of individuals that have actual experience with all persons affected by this trade regulation rule, including the medical doctor, the clinical audiologist, and the hearing aid user.

NHAS offers a national, state and local perspective which the Commission, in the public interest, should fully understand. NHAS has dealt directly with HEW, the FTC, the VA and the Congress in conjunction with their evaluation of hearing aids and the hearing aid delivery system. Its state chapters are familiar with the various requirements of state legislation affecting the hearing aid delivery system, and its members reflect the entire spectre of the American environment--from the urban metropolitan centers to the rural communities throughout the United States. NHAS also is in possession of relevant facts, documents and experience with respect to the issues the Commission is attempting to address in this proposed trade regulation rule.

It is clear that no other group--whether consumer, manufacturer, medical, clinical audiologist or, indeed, the FTC itself--can make a contribution equal to that of NHAS. As detailed below, since competing demands have forced NHAS to the brink of financial exhaustion, continued participation in this proceeding in a manner which is conducive to developing a full and adequate record is becoming impossible.

Effective representation in the hearings requires testimony from several diverse kinds of witnesses, expert and lay, ranging from medical doctors to consumers, including clinical audiologists, hearing aid dealers, representatives of consumer advocate groups, the Better Business Bureau and state licensing board participants. Contacting these individuals, discussing with them the proposed rule and gathering and presenting information on the role of the hearing aid dealer and the assistance he provides to hearing impaired persons is quite expensive. Once the search for such witnesses is conducted and individuals are found who are willing to testify, additional time and expense is required to assist in the preparation of testimony, arrange for schedules and travel to the hearing, and pay for such travel and lodging during the course of the hearing.

Obviously, no one can withstand the financial strength of a federal agency once that agency determines to commit the weight of its authority and the funds from its budget to dismember an industry. As previously noted, the hearing aid industry is small in and of itself, but individual dealers as a business generally make less than the FTC attorneys in charge of this investigation. In contrast, we have been advised that the resource commitment by the FTC's Bureau of Consumer Protection in this hearing aid trade regulation rule is surpassed by no other program or litigation. While NHAS and the FTC may have different concepts as to what is fair, it is clear that NHAS cannot match the resource commitment of the FTC. Indeed, it is now faced with the decision to terminate active participation in the rulemaking proceeding or face financial exhaustion. This latter alternative, of course, will not work to anyone's benefit--certainly not the consumer--and presumably not even the Federal Trade Commission. Without NHAS to assume the role of leadership among the hearing aid dealers, the industry will fragment and consumers will suffer irreparable harm.

NHAS would contemplate use of the funds in the following respects:

1. Representation by attorneys. NHAS will use a portion of the funds to defray legal expenses in connection with its participation in the trade regulation rule proceedings. There is no substitute for legal representation in these proceedings. Counsel would assist in preparation of testimony by NHAS witnesses, as well as conduct cross-examination on designated issues of fact. NHAS currently

is employing the services of Timothy J. Waters, a member of the law firm of Peabody, Rivlin, Lambert & Meyers in Washington, D. C. Mr. Waters spent a number of years at the FTC, including in the Office of the General Counsel, as Assistant to the Director of the Bureau of Competition, as an Attorney-Adviser to Chairman Miles W. Kirkpatrick, and as Assistant to the Chairman under Kirkpatrick. Mr. Waters is substantially familiar with FTC rulemaking proceedings and has been actively involved with FTC proceedings since leaving the Commission in February 1973. Mr. Waters has indicated that, if the fact of his previous representation of NHAS in connection with this proceeding in any way biases or prejudices consideration of this application, he will withdraw as counsel to NHAS.

In addition, attorneys and paralegals would assist in analysis and review of the written comments, testimony and post-record written comments to permit NHAS to respond to the Presiding Officer's initial findings of fact and summary of the record and to the staff report and recommendations which arise from the hearings.

2. Economic impact. NHAS would contract with an economist and an accounting firm to submit an expert presentation with respect to the economic impact of the proposed rule, particularly as it affects hearing aid dealers' costs of doing business, the economic impact to the consumer and the effect on the hearing aid delivery system. Preliminary discussions in this regard have been undertaken with Alexander Grant and Company and with Dr. William McElroy, an econometrician at Georgetown University. The lack of funds has to date prevented NHAS from obtaining such expert analysis.

3. Audiologists. NHAS would anticipate requesting a number of clinical audiologists to appear and testify. Most of these witnesses would not charge fees for their testimony but would require reimbursement for out-of-pocket expenses in conjunction with their appearance. Testimony by clinical audiologists is a critical issue in this proceeding. There is substantial conflict among clinical audiologists with respect to the issues raised by this proceeding, and a full discussion of these conflicts is required if the Commission is going to make a fair and adequate determination with respect to their position. At present NHAS has requested Herbert Rickenberg of Newark, New Jersey, Richard Iliff of Overland Park, Kansas, and Jan Williams, all Certified Clinical Audiologists, to testify.

4. Medical testimony. Another area which has received inadequate analysis thus far is the position of medical doctors, particularly otologists who are specialists in hearing health care. Again, NHAS does not contemplate payment of fees to these individuals, but out-of-pocket expenses and travel costs must be reimbursed. At present, Drs. Robert I. Oberhand, Richard M. Carter, James M. Anthony, Sam Houston Sanders, and John W. Heisse, all otolaryngologists, have agreed to testify.

5. Consumer witnesses. Inadequate concern is being placed upon the needs of the consumer in this trade regulation rule proceeding. The personal commitment, motivation and psychological barriers of consumers to make the necessary decision to purchase a hearing aid must be fully expressed to the Commission. The importance of such testimony can only be appreciated through presentation of witnesses--written comments do not suffice in conveying the very real need consumers place upon their hearing aid dealer. In some instances, affidavits will be obtained where consumers are unable to personally appear and testify.

6. Other witnesses. Assuming available funds, NHAS also would seek to produce individual members of various state licensing boards who could personally testify with respect to the effectiveness of such boards and their experiences in connection therewith. Representatives of local and state and/or national Better Business Bureaus or other complaint handling or receiving organizations also would be contacted and requested to appear and testify with respect to the absence of the alleged substantial complaints in this industry.

III. Statement of Financial Position.

A. Statement of Financial Condition.

In view of the overwhelming commitments placed upon NHAS in the past few years, both with respect to its on-going business affairs on behalf of its members (i.e., trade publications, seminars, etc.) and the never-ceasing series of hearings by the federal and state governments, NHAS has been forced to increase its dues in each of the past three years, as well as make special assessment of its membership in an effort to defray continuing expenses and remain solvent. There simply is no provision in NHAS'

budget for the cost of representation in the FTC's rule-making proceeding, particularly when it is anticipated that there will be no less than 60 days of hearings. NHAS will continue to make payments to defray all of the costs itemized below, but without the financial support of such compensation it will not be in a position to freely participate in the FTC proceeding.

B. Statement of Anticipated Expenses.

The following is an estimate of the costs involved in preparing and presenting the proposed testimony, participating in the examination of witnesses, collecting the necessary additional information on hearing aid wearers, and preparing post-hearing comments:

1. Expert witnesses.

(a) Fees for an econometrician to prepare and present testimony and assist attorneys in preparation of post-hearing comments (6 days at \$145 per day). \$ 870

(b) (1) Fees for economic survey of hearing aid dealers and evaluation of the economic impact on dealers and consumers of the right to cancel and fixed cancellation charge, including evaluation of the market for "used" hearing aids. Provision of expert witness for testimony on results of economic survey. \$30,000

(b) (2) Travel and lodging expenses for presentation of results of economic survey of impact of rule on dealers and consumers. \$ 250

(c) Travel and lodging expenses for otolaryngologists. (approx.) \$ 1,000

(d) Travel and lodging expenses for clinical audiologists. (approx.) \$ 600

2. Information on consumer needs and experiences.

(a) Travel and lodging expenses for consumers (hearing aid wearers representing the variety of socioeconomic and medical experiences). (approx.) \$ 2,000

(b) Travel and lodging expenses for hearing aid dealers who represent the average hearing aid dealer as to training and experience, and hearing aid dealers whose clientele represents the variety of socio-economic and medical groups from which hearing aid wearers are derived.
(approx.) \$ 2,000

(c) Travel and lodging expenses for members of hearing aid licensing boards.
(approx.) \$ 400

3. Legal expenses (Items 3, 4 and 5). \$31,129

(a) Fees for NHAS legal counsel:

(1) Timothy J. Waters, Partner: Peabody, Rivlin, Lambert & Meyers (\$27 per hour).

(2) Timothy L. Harker, Associate: Peabody, Rivlin, Lambert & Meyers (former Assistant General Counsel, EPA) (\$25 per hour).

(b) Fees broken down as follows:

(1) 100 hours of additional preparation in Washington, D. C. office prior to the hearings in Washington, Chicago and San Francisco:

50 hours Mr. Harker \$1,250

50 hours Mr. Waters \$1,350

(2) 12 weeks of hearings in Washington, D. C., Chicago, and San Francisco, with 10 hours of a lawyer's time utilized during each hearing day for direct testimony and cross-examination and for preparation for next day's hearings:

Total 600 hours:

250 hours Mr. Waters' time to supervise the NHAS effort; prepare testimony and cross-examination of witnesses: \$ 6,750

350 hours Mr. Harker's time to prepare testimony and cross-examination: \$ 8,750

(3) 125 hours of post-hearing time to prepare rebuttal submissions, review hearing record and prepare written submissions to the Presiding Officer and to the Commission in support of the position of hearing aid dealers and wearers:

75 hours Mr. Harker	\$ 1,875
50 hours Mr. Waters	\$ 1,350

4. Legal assistant, secretarial and copying.

(a) 100 hours of research assistant time at \$10 per hour.	\$ 1,000
(b) Secretarial -- 150 hours at \$6 per hour.	\$ 900
(c) Copying.	(estimate) \$ 1,500
Transcript of hearing.	(estimate) \$ 4,500

5. Travel and lodging for attorneys.

(a) (1) One attorney in Chicago for 20 days (\$35 per day).	\$ 700
(a) (2) Round-trip air fare (coach) from Washington, D. C. to Chicago.	\$ 136
(b) (1) One attorney in San Francisco for 20 days (\$35 per day).	\$ 700
(b) (2) Round-trip air fare (coach) from Washington, D. C. to San Francisco.	\$ 368

IV. Summary re Funding Petition.

The interests of hearing aid dealers stand to be seriously injured by the proposed trade regulation rule for the hearing aid industry. Such injury would constitute a disservice to an effective hearing aid delivery system and, ultimately, to the hearing impaired. Hearing aid dealers can muster substantial information and testimony which is necessary if the interests of the hearing aid wearers and of hearing aid dealers are to be effectively represented in this proceeding. Clearly, NHAS, on behalf of thousands of hearing

aid dealers who competently service hundreds of thousands of hearing aid wearers, should be permitted to continue to represent these important interests. NHAS, the only representative of such interests, has been strained to its financial limit and can continue adequate representation only if its petition herein is granted.

Respectfully submitted,

Anthony DiRocco
Executive Secretary

(Attachment 2)

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

April 26, 1976

Anthony DiRocco
Executive Secretary
National Hearing Aid Society
20361 Middlebelt
Livonia, Michigan 48152

Re: Request for Compensation --- Proposed
Trade Regulation Rule for the Hearing
Aid Industry.

Dear Mr. DiRocco:

This responds to your letter dated April 12, 1976, which was placed on my desk by special messenger on April 20, 1976. The letter constitutes your association's "Application for Compensation for Representation" in the above-noted proceeding. I am anxious to give this matter prompt consideration, but I must advise that your letter does not provide sufficient information on which a favorable recommendation could be based.

Unfortunately, your request comes at a late date in this proceeding and it takes time to review and process such matters. Also, application must be filed prior to the time when the costs for which compensation is sought are incurred. Nevertheless, for your careful review, there is enclosed an excerpt of the relevant portion of the Commission's Procedures and Rules of Practice (see Section 1.17). As you will note, the Commission is authorized to provide compensation for certain costs of participation to any person who has or represents an interest which would not otherwise be adequately represented. This first requirement will be difficult to reconcile with your request since, in my best professional judgment, your association's interest has had what must be considered amongst the finest representation available through its counsel, Timothy J. Waters, Esq., of the law firm of Peabody, Rivlin, Lambert & Meyers. In addition, the public record shows that individual dealers have presented voluminous comments.

In addition, a showing must be made that those who are compensated could not otherwise afford to pay the costs of making oral presentations, conducting cross-examination, and making rebuttal submissions. Verification of the assertion

that your association will need financial assistance in order to continue to participate is obviously necessary. Accordingly, it is requested that you advise in detail of the association's complete financial status including, but not limited to, all details relating to all reserves, assets, income, potential income, and actual and scheduled outlays for the last (1975) and current (1976) years. Also, please advise whether your association is nonprofit, and what salaries and other compensations are paid to its officers (in particular) and employees (in general).

Please carefully consider and advise in detail with regard to all of the considerations noted under Subsections 1.17(c)(3), (4), and (6). Please give particular attention to the feasibility of contributions to the costs of participation by individual representatives of the interest. In this regard, advise in detail of any efforts made to solicit contributions from any and all members and nonmembers (including dealers and others who share your interests, i.e., manufacturers) and the results thereof. (Please document.) Also, what other means of financing might be available?

Mr. DiRocco, I want to be quite candid with you. The most difficult obstacle to overcome before a favorable recommendation can be made on your application for compensation is, in my opinion, the presumption that a large number of small businessmen should be capable of supporting your program to prevent approval of the proposed Rule if they felt the effort was truly in their best interests.

Upon receipt of the above-requested information, I will process this matter as rapidly as your response and my current strenuous workload permit.

Sincerely,

G. Martin Shepherd
Presiding Officer

Enclosure

cc: Timothy J. Waters, Esq.

(Attachment 3)



NATIONAL HEARING AID SOCIETY

20361 MIDDLEBELT • LIVONIA, MICHIGAN 48152 • TELEPHONE: (313) 478-2610

NATIONAL HEADQUARTERS

Executive Secretary:
ANTHONY DIROCCO

May 4, 1976

G. Martin Shepherd
Presiding Officer
Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Shepherd:

Re: Request for Compensation; Proposed Trade Regulation
Rule for the Hearing Aid Industry

This is in response to your letter dated April 26. We appreciate your consideration of our request for compensation pursuant to the FTC Rules of Practice.

Pursuant to your request, the following are the details of the financial status of the National Hearing Aid Society ("NHAS") for the years 1975 and 1976.

In 1975 the total income of NHAS, a non-profit corporation, incorporated under the laws of the State of Illinois, was \$359,006.48. Expenses in 1975 amounted to \$435,436.01, or a deficit of \$76,429.58. NHAS has no reserves. The expenses generally are comprised of office administration and supplies, postage, rent, insurance, tax, telephone, travel, public affairs/educational, annual and Board of Director meeting expenses, publication costs and legal expenses. In 1975 NHAS' dues were \$100 per member. In 1976 dues were increased to \$150 per member. (There are approximately 2,200 certified members to whom this figure could apply; unfortunately, not all members have paid their dues. At present 300 members have not paid their dues.) Dues in 1973 were \$50 per member, and in 1974 \$65 per member. In 1974 NHAS also levied a special assessment at \$100 per member (Many members also refused to pay this assessment. In fact, some dealers withdrew from the Society as a result of this assessment). In 1975 a special survival fund request was forwarded to all NHAS members and non-member retail dealers. That request produced \$32,000 which is reflected in the income described in 1975. A copy of this request is enclosed.

As of April 30, 1976, NHAS had \$89,935.11 remaining in cash on hand, \$789 in accounts receivable and assets comprised of office equipment and lease deposits of \$11,970. Between \$150,000 and \$175,000 has been allocated already to previous deficits and administrative expenses. Liabilities of NHAS, as of April 30, included \$48,000 in accounts payable for legal services by Peabody, Rivlin, Lambert & Meyers, \$12,500 in contributions to the Better Hearing Institute, approximately \$2,500 in travel and expenses for NHAS witnesses appearing at the FTC rulemaking hearing in Washington, D.C., and \$2,500 in miscellaneous outstanding expenses. Other legal expenses on behalf of NHAS amount to \$7,500.

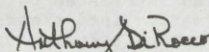
NHAS requires approximately \$15,000 per month for operating expenses, not including, of course, participation in the FTC proceeding, FDA proceedings, Senate investigations, and financial support for Better Hearing Institute and the Hearing Instruments Institute. No officer or employee of NHAS receives a salary in excess of \$25,000.

The manufacturers, as you know, currently are fully participating in the FTC rulemaking hearings. In addition to their own costs in this regard, NHAS has not deemed it appropriate to request that the manufacturers contribute to NHAS for purposes of this rulemaking proceeding. Other than continuing requests for donations or assessments from NHAS members and non-members, there is no other resource known to NHAS from which it might obtain the necessary funds to continue to participate fully in the FTC hearings.

I am also enclosing for your information a copy of the proposal submitted to me on February 13, 1976, by the Alexander Grant & Company to conduct a survey of the impact of the right to cancel on dealer distribution costs.

We appreciate your consideration of this request.

Sincerely,


Anthony DiRocco
Executive Secretary

Enclosures

(Attachment 4)

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580BUREAU OF
CONSUMER PROTECTION

Anthony Di Rocco, Executive Secretary
National Hearing Aid Society
20361 Middlebelt
Livonia, Michigan 48152

20 JUL 1976

Re: Proposed Hearing Aid Industry Rule

Dear Mr. Di Rocco:

This is in response to your April 12, 1976 application for compensation for your participation in the proposed Hearing Aid Industry Rule. Your application was delivered by N.H.A.S. to the Presiding Officer on April 20, 1976.

Pursuant to Section 1.17 of the Commission's Rules of Practice, I have determined that the National Hearing Aid Society meets the criteria established by Section 18(h) of the Federal Trade Commission Act, and have approved your application for reimbursement in part of the reasonable costs of participation in this proceeding.

When an interested person seeks compensation to introduce information into the rulemaking record, the statutory criteria require certain findings based upon the whole rulemaking record as it presently exists and upon what we can responsibly expect to occur at the hearings. I must determine, considering the whole record and the expected representation at the hearings, that the interest for which you speak will be inadequately represented. In particular, I must decide that production of the further information you propose to supply will be a substantial contribution to a fair determination of the rule or any of its major issues.

I have decided not to approve that part of your application which requests \$30,000 for a contracted survey.

As you may be aware from the staff report and subsequent written submissions on this rule, the present record contains considerable information submitted by hearing aid dealers. In addition, the Presiding Officer has informed me that he will not admit the survey to the record if the survey results are delayed beyond the closing of the record.

RECEIVED JUL 26 1976

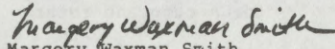
The Federal Trade Commission will reimburse your organization for allowable costs as defined in the attached budget. The amounts claimed for actual reimbursement will be subject to final audit for reasonableness and conformance to Federal regulations by the Federal Trade Commission and the General Accounting Office.

You will note that the amount authorized for attorneys has been revised to reflect standard rates paid under this program. Those rates are under review, and if they are revised upward, consideration will be given to making the new rates retroactive.

This authorization also excludes any time which was expended prior to the filing of your application. As you know, Rule 1.17 prohibits compensation for such expenses. The matter of compensation for the expenses of preparing an application is presently also under review and if the rule is amended to allow such expenses, consideration will be given to making that change retroactive, as well.

You should keep in mind that, pursuant to the Commission's rules, payment is authorized only for the actual cost of participation to your organization up to the maximum set forth in your approved budget. The figures set forth in that budget for rates of compensation are maximums. If your actual costs, including salary, benefits and overhead attributable to any person are less, only the lesser amount can be paid by the Commission.

Sincerely,


Margery Waxman Smith
Acting Director

Enclosure

Anthony Di Rocco

Attachment

National Hearing Aid Society

Budget*

For Participation in hearings,
Hearing Aid Industry proposed ruleLegal Expenses**: Preparation, Participation, Rebuttal

Senior Attorney (Mr. Waters)

350 hrs @ \$27/hr \$9450

Assisting Attorney (Mr. Harker)

450 hrs @ \$21/hr \$9450

Research Assistant

100 hrs @ \$9/hr \$ 900

Secretarial Assistance

150 hrs @ \$6/hr \$ 900

Copying, xeroxing, and transcripts

\$6000

Travel and Per Diem for AttorneysTravel: 1 coach fare, Washington, D.C.
to Chicago and return

\$ 136

1 coach fare, Washington, D.C.
to San Francisco and return

\$ 368

Per Diem: 40 days @ \$35/day

\$1400

ConsultantEconometrician, preparation &
representation assistance to
attorneys for post-hearing comment.
6 days @ \$145/day

\$ 870

WitnessesTravel and per diem

3 otolaryngologists and clinical audiologists:

- | | |
|---|--------|
| (1) travel | \$1000 |
| (coach fare <u>or</u> \$.15/mile) | |
| (2) per diem - Total 3 days of per diem | |
| for 6 people @ \$35/day/person | \$ 630 |

6 hearing aid wearers (consumers)

- | | |
|--------------------------------------|--------|
| (1) travel | \$1000 |
| (coach fare <u>or</u> \$.15/mile) | |
| (2) per diem - Total of 3 days' | |
| per diem, 6 people @ \$35/day/person | \$ 630 |

6 hearing aid dealers

- | | |
|--------------------------------------|--------|
| (1) travel | \$1000 |
| (coach fare <u>or</u> \$.15/mile) | |
| (2) per diem - total of 3 days' | |
| per diem, 6 people @ \$35/day/person | \$ 630 |

TOTAL.....	\$34,364
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*The total allowable amount below must be reduced by the total amount of member contributions you will have received between April 20th, 1976 - the filing date - and the time you submit your reimbursement claim. An affidavit attesting to the number of contributions you will have received during this time must accompany your claim.

**\$27/hr is the hourly billable rate allowed for an attorney with at least 10 years' experience. \$21/hr is the hourly billable rate allowed for an attorney with 5 to 10 years' experience. You must supply the attorneys' resumes, as well as the resume of the research assistant, when you submit your justification for reimbursement. The attorneys may not bill you at hourly rates in excess of these.

(Attachment 5)



NATIONAL HEARING AID SOCIETY

20361 MIDDLEBELT • LIVONIA, MICHIGAN 48152 • TELEPHONE: (313) 478-2610

NATIONAL HEADQUARTERS

Executive Secretary:
ANTHONY DIROCCO

August 4, 1976

Margery W. Smith, Esquire
Acting Director
Bureau of Consumer Protection
Federal Trade Commission
6th and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Ms. Smith:

We are in receipt of your letter dated July 20, 1976, concerning the application by the National Hearing Aid Society ("NHAS") for compensation in connection with its participation in the proposed hearing aid industry rule. We are very grateful for your consideration of our application and your decision to authorize \$34,464 to NHAS.

Unfortunately, the budget authorized for NHAS contains two provisos which substantially, if not entirely, foreclose use of the funds allocated to NHAS. The conditions listed in the budget attached to your letter, as you know, provide: (1) that the total allowable amount must be reduced by the total amount of NHAS member contributions, and (2) our attorneys may not bill NHAS at an hourly rate in excess of those identified in the budget (\$27 and \$21 per hour respectively). These conditions, in our opinion, effectively circumvent the purpose for which and circumstances under which interested persons may file for compensation under the Commission's Rules and 518 (b) of the Federal Trade Commission Act.

We were advised informally in preparing our application that NHAS must demonstrate that it has made every effort to collect funds to support its participation in a rulemaking proceeding. Now it seems that we are penalized for the very efforts which, we were informed, were a condition precedent to the filing of our application. This decision apparently is premised on the mistaken assumption that the special assessment forwarded to each of our members in 1976 was simply to cover legal fees and other expenses in connection with our participation in the FTC's rulemaking proceeding. Actually, although the FTC hearings have placed one additional and major drain on our resources, many other matters have required our attention, support and participation.

You are undoubtedly aware that various committees of the Congress, both in the House and the Senate, have been holding hearings in connection with the hearing aid industry. All of these committees have requested and obtained assistance from NHAS in respect to those hearings, either in the form of submissions of documents or testimony. In addition, the Food and Drug Administration, over the past two years, has held hearings in connection with a

task force report on the hearing aid industry and recently promulgated a proposed rule in connection with the sale and distribution of hearing aids. That proceeding also has required substantial effort and allocation of funds by NHAS. In addition, as noted in our application and supplemental statements in connection therewith, NHAS has contributed substantial sums of money to the Better Hearing Institute and the Hearing Instruments Institute for educational, informational and other important purposes which, in our opinion, work directly in the benefit and interest of the consumer. It would be ironic for the Commission to conclude that our efforts in this regard should be terminated in order to sustain our effort with respect to the Commission's proposed rule.

As I am sure is the case with the FTC, the cost of operation and support for the NHAS programs has increased over the past few years. And, while we receive support only from our members, the National Hearing Aid Society is actually representing the interests of all hearing aid specialists throughout the country in the FTC proceedings. Thus, it would seem inequitable for NHAS members to be required to bear the full cost to represent these broader interests which extend far beyond our actual membership. On the other hand, though, if NHAS had withheld this broader representation, these interests would have been entirely unrepresented, which was not your intent, nor that of those who appropriated funds to insure that all interested parties could be represented. As you know, at this time, the system is so designed that these interests can only be represented effectively by competent and experienced legal counsel, such as the firm of Peabody, Rivlin, Lambert and Meyers, who must be compensated, just as attorneys have been retained to represent other interested parties by FTC funds.

Even with the increase in membership dues and the numerous special assessments, NHAS has not been able to keep current with its costs, particularly in light of the extraordinary expenses required because of the various pending federal proceedings (and private litigation filed against NHAS such as by the American Speech and Hearing Association to revoke the NHAS Certification Mark). It should be obvious that the assessments by NHAS of its members relate to all of these various proceedings, as well as the general operation of the association. Even under normal circumstances, the operating costs of the National Hearing Aid Society are over \$15,000 a month, which illustrates the impossibility of diverting all contributions of members to the FTC proceedings. Membership contributions have traditionally been allocated to cover the expenses for various programs and services of the Society.

The assumption that the 1976 assessment is fully allocable to NHAS' participation in the FTC rulemaking proceeding is most inaccurate and unfortunate. NHAS is in the red and it will remain in the red for many years as a result of all of the unusual expenses which it has been forced to incur. We urge you, therefore, to reconsider the position of the Bureau of Consumer Protection in regard to this proviso.

The second proviso on maximum billable rates by our attorneys simply does not make sense, and constitutes a condition which is not articulated, to our knowledge, either in the Federal Trade Commission Act or its Rules of Practice. This proviso effectively precludes any organization from retaining outside counsel in connection with its participation in an FTC rulemaking proceeding. We know of no firm in the country that can sustain their overhead and maintain their firm on a \$27 hourly rate. If that figure is supposed to represent the "fee"

over and above the cost of doing business by a law firm, then we do not understand how the FTC would suggest that this figure represents the maximum billable rate.

Our counsel, Peabody, Rivlin, Lambert & Meyers, has been making an extraordinary effort on our behalf. They have been carrying their statements to NHAS for several months. Their average billable rate for attorneys working on this matter is approximately \$65.00 per hour, which is certainly a reasonable fee for Washington counsel. We cannot, of course, speculate as to the rationale for this proviso, but it seems to have failed to take into account the practical and business realities of the legal profession. If the FTC can find a law firm which has the capabilities, for what is in effect a multiparty litigation on behalf of NHAS, and which would be willing to charge only \$27 per hour, we would be estatic to retain their services. That is patently ridiculous, however.

Further, to impose such a condition at this time is grossly inequitable. The Bureau deliberated over the NHAS request for three months (and two-thirds of the hearings in this proceeding). To suggest now to our counsel that legal fees not exceed \$27 per hour for time already committed is clearly unjustifiable and inappropriate. If your concern is that these legal fees will be added to the current billable rate and, as such, represent a "windfall" profit to our counsel, we will be willing, in conjunction with our counsel, to state unequivocally that such fees will be applied only to fees incurred in connection with our existing arrangement.

We most urgently request that you reconsider this proviso.

With respect to the specific provisions of the proposed budget, we only make the following observations.

In connection with the proposed survey of the cost ramifications of the proposed rule, we note that the delay in submitting such a survey is directly attributable to the time taken by the Commission to rule on our request. In addition, as we have tried to emphasize to the FTC staff time and time again, no testimony is a valid substitute for a comprehensive and statistically valid survey of the economic impact of the proposed rule. We think the Commission itself should have undertaken the survey. Since the Commission did not, we think it is most unfortunate that the Bureau is not authorizing a survey which would be most useful to the Commission in its evaluation of this proposed rule.

In conclusion, our initial elation with your letter has been totally deflated by what we consider unusual and unwarranted caveats. The Commission cannot be unmindful of the fact that these conditions effectively prevent NHAS from making use of the proposed budget. We hope that that wasn't the intention of the Bureau, but for the reasons set forth above as to the merits for such provisos we respectfully request that you reconsider and eliminate them as a condition of your decision.

Sincerely,

Anthony DiRocco
Executive Secretary

AD:pw

(Attachment 6)

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580BUREAU OF
CONSUMER PROTECTIONAnthony Di Rocco
Executive Secretary
National Hearing Aid Society
20361 Middlebelt
Livonia, Michigan 48152

29 OCT 1976

Dear Mr. DiRocco:

This is in response to your letter of August 4, 1976, in which you protested my making the maximum budget of \$34,464 for your participation in the Hearing Aid rulemaking proceedings conditional on two factors. I am sorry for the delay in answering your letter. It was filed with your application before I was able to read and respond to it.

Your first concern was that "the total allowable amount must be reduced by the total amount of NHAS contributions." You add that "this decision apparently is premised on the mistaken assumption that the special assessment forwarded to each of our members in 1976 was simply to cover legal fees and other expenses in connection with our participation in the FTC's rulemaking proceeding."

Actually the footnote attached to your budget to which you refer states, "The total allowable amount below must be reduced by the total amount of member contributions you will have received between April 20th, 1976 - the filing date - and the time you submit your reimbursement claim..." It is true that I assumed that the special assessment poll you sent to your members on April 14th, 1976, and which you enclosed with your application, was solely for costs of participating at the FTC rulemaking proceeding. I enclose a copy of that assessment poll for your reference.

When the Presiding Officer, Mr. Shepherd, wrote you on April 26, 1976, he asked you for the results of this poll. Such information would have aided in determining "feasibility of contributions to the costs of participation by individual representatives of the (NHAS) interest." See Rules § 1.17 (C) (4) (iii).

The applicable statute provides that compensation can be awarded to those satisfying other criteria who are unable effectively to participate in a rulemaking proceeding because of inability to afford costs of making oral presentations, conducting cross-examination, and making rebuttal submissions. To the extent that you are able to afford such costs, I cannot, of course, find that you would meet that criterion. Therefore, as I understood that you had been polling your membership for your participation costs incurred in this proceeding, I asked that you subtract those contributions from the maximum amount you would otherwise bill the compensation fund. Before I can reconsider this decision, I need some additional information.

You must verify the amount you received in response to the April 14th, 1976 poll for \$100 contributions. Enclose any follow-up letters to your membership regarding this poll. Finally, detail how you allocated these particular contributions to purposes other than these proceedings.

Your second concern was that your attorneys "not bill NHAS at an hourly rate in excess of those identified in the budget (\$27 and \$21 per hour respectively)." You further state that "this proviso effectively precludes any organization from retaining outside counsel in connection with its participation in an FTC rulemaking proceeding. We know of no firm in the country that can sustain their overhead and maintain their firm on a \$27 hourly rate."

First, I want to let you know that these rates, based on government comparability rates for years of legal experience, are consistent with the rates we have determined to award each successful applicant for outside counsel. Of the nearly \$700,000 already obligated to these applicants, a sizeable portion has gone to outside counsel at the rates identical to those awarded to NHAS. The National Council for Senior Citizens, for example, hired counsel at \$21 or \$27 per hour, based on those same comparability rates, to represent its interests in this rulemaking proceeding.

Second, NHAS had already retained the firm of Peabody, Lambert & Meyers at \$75 per hour to represent its interest in this proceeding some time before it applied to the FTC for compensation. Therefore, I determined it was necessary to point out to you, in the approved budget, that your paying legal counsel at rates exceeding our allowable rates would violate the standard applied to, and used by, all other successful applicants.

Please let your attorneys know, however, that they may bill separately for secretarial help at \$6 per hour, and also for paralegal help. Customarily private attorneys' hourly rates include these expenses.

I hope that I have answered the questions you raised and that you understand my willingness to reconsider my proviso that your approved budget be considered in light of the response to your April 14, 1976 membership poll.

Sincerely,

Margery Waxman Smith
Margery Waxman Smith
Acting Director

Enclosure: Membership Poll

(Attachment 7)



NATIONAL HEARING AID SOCIETY

20361 MIDDLEBELT • LIVONIA, MICHIGAN 48152 • TELEPHONE: (313) 478-2610

NATIONAL HEADQUARTERS

Executive Secretary:
ANTHONY DIROCCO

January 25, 1977

Ms. Margery Waxman Smith
Acting Director
Federal Trade Commission
Washington, D.C. 20580

Dear Ms. Smith:

We need your assistance with a serious situation which has arisen as a result of misunderstanding about the conditions placed on the FTC grant to the National Hearing Aid Society which prevented us from accepting it. This has lead many people to believe NHAS participation was financed by the FTC, when, as you know, although the Commission granted funds, they placed two caveats on the grant which foreclosed NHAS from accepting them.

In a December column, Sylvia Porter, a nationally syndicated economics-writer, stated that the National Hearing Aid Society had received funds for our participation in the rulemaking procedure. Our members, who are paying a special assessment to NHAS, are thus lead to believe erroneously, that funds were actually available from another source, so that their payment is not necessary. Even the FTC attorneys believe that FTC funds have allowed us to pay for expert testimony, as indicated in a statement by Steven Newburg-Rinn at the hearings of August 11, 1976 (page 11050 of the hearing record.) Such statements are destroying our credibility.

This is creating hardship for us, and creating false impressions with the press, the Federal Trade Commission, the public, and especially our members. Because of the importance of the issue, we are asking you to write to Ms. Porter, to correct the misunderstanding, with a copy to us. We would like it to be clearly understood that our participation in the FTC's rulemaking procedures has been financed solely from our own resources. It is not fair or accurate for anyone to believe otherwise, and the earlier the misunderstanding is corrected, the better for everyone.

Your help will be very much appreciated.

Sincerely,

Anthony DiRocco
Executive Secretary

AD:pw

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

FEB 18 1977

Mr. Anthony Di Rocco
Executive Secretary
National Hearing Aid Society
20361 Middlebelt
Livonia, Michigan 48152

Dear Mr. Di Rocco:

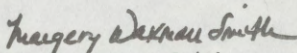
This is in response to your letter of January 25, 1977, in which you asked that I write Sylvia Porter to explain that the National Hearing Aid Society is not receiving funds under the compensation program.

I am somewhat confused by your letter. So far as the Bureau is concerned, the money has been set aside for your use should you meet the conditions appurtenant to the approved budget. Because we have never received any written rejection of the reimbursement from you, we assumed that either you were planning to submit your claim for reimbursement at a later date or you had collected sufficient funds from the solicitation of your members so as to make compensation unnecessary.

Your January 25 letter seems to say that you do not intend to apply for reimbursement at all and in fact have already rejected the compensation grant. If this is the case, I need a written confirmation of your rejection if I am to know what sort of explanation, if any, to give Sylvia Porter.

In the meantime, if you have any questions, please do not hesitate to call Bonnie Naradzay, the Special Assistant for Compensation, at (202) 523-3436.

Sincerely yours,


Margery Waxman Smith
Acting Director

(Attachment 8)

Study of Federal Trade Commission Trade Regulation Rulemaking

Suite 500
2120 "L" Street, N.W.
Washington, D.C. 20037

June 8, 1977

Mr. Anthony DiRocco
Executive Secretary
National Hearing Aid Society
Livonia, MI 48152

Dear Mr. DiRocco:

As we agreed in our telephone conversation of Monday, June 6, I am sending you a list of questions about your application for compensation to participate in the trade regulation rulemaking proceeding on the Hearing Aid Industry.

I would like at this time to urge you to take the time to answer this rather lengthy list of questions. As the National Hearing Aid Society is the only industry applicant to receive a compensation grant, your response to the enclosed questions are of special interest and importance to our study.

Sincerely,

Jamie Bennett

Jamie Bennett
Research Analyst

smp

Enclosure

RECEIVED JUN 16 1977



NATIONAL HEARING AID SOCIETY

20361 MIDDLEBELT • LIVONIA, MICHIGAN 48152 • TELEPHONE: (313) 478-2610

NATIONAL HEADQUARTERS

August 22, 1977

Executive Secretary:
ANTHONY DIROCCO

Mr. Jamie Bennett, Research Analyst
Study of Federal Trade Commission
Trade Regulation Rulemaking
2120 "L" Street, N. W., Suite 500
Washington, D.C. 20037

Dear Mr. Bennett:

We regret the delay in responding to your letter of June 8, 1977 and the attached list of twelve questions relating to our application for compensation to participate in the trade regulation rulemaking proceeding on the Hearing Aid Industry. The delay was occasioned by the fact that our small staff is heavily overloaded with critical projects, and your questions required much thoughtful research. You may or may not be aware that we were subpoenaed to appear before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee to testify on the same subject. This appearance was made on June 14, 1977. Ms. Margery Waxman Smith of the FTC testified on this subject before the same Subcommittee on June 21, 1977.

I will list each of your twelve questions below, and follow each question with our answer:

1. How was the decision to request funds from the FTC made--by you alone, or by a board of directors, or some other way?

Answer -- The decision was made by our Society's Executive Committee.

2. When you were making your decision to request compensation and preparing your application, did you have any contacts with the presiding officer or the FTC staff attorneys working on the rule? If so, how many contacts were made and what did these contacts involve?

Answer -- The office of the Executive Secretary in Livonia, Michigan had no contacts with the presiding officer or FTC staff attorneys during this period relative to the application. We understand that our Washington counsel did discuss the matter with the presiding officer and staff attorneys in the Bureau of Consumer Protection in an attempt to discover whether or not we might be eligible to receive funds. Our first knowledge about the program came when, in our normal review of the public record of the proceeding, we discovered the application of the National Council of Senior Citizens (NCSC) for compensation. No one from FTC advised us that such a program was available and that we might be eligible to participate.

August 22, 1977

3. Did you have any unusual time problems in preparing either your request for compensation or your submissions for the hearings?

Answer -- The answer is yes on both parts. Relative to the request for compensation, since the Washington hearing was about to commence when we first discovered the availability of such a program, and since guideline material was then very sketchy (detailed guidelines were not published in the Federal Register until June 14, 1977), we had only the copy of the NCSC application taken from the public record, and such suggestions as the FTC staff attorneys passed to our Washington counsel, as guides to our preparation of an application. Consequently the presiding officer held our application for further data as requested in his letter of April 26, 1976. Requested data was supplied in our letter of May 4, 1976; meanwhile the Washington hearing was nearing its conclusion. Since the presiding officer specified that costs incurred prior to the filing of our application could not be considered for reimbursement, we had no opportunity to recover the substantial legal costs incurred as we prepared for the series of hearings which began in Washington on April 12, 1976.

As to the time problem connected with our submissions for the hearings themselves, the hearing record contains ample evidence of our objections, through counsel, of the scheduling of the second and third hearings (at Chicago and San Francisco respectively) so closely on the heels of the preceding hearing that, with the limited facilities and personnel at our disposal, it was enormously difficult to meet the deadlines for the submission of written statements and accomplish other necessary preparatory matters for the upcoming hearing. The Washington hearing, after five full weeks, including some Saturdays, concluded on Saturday, May 15th, and the Chicago hearing began on June 7th, which dictated a deadline for written statements for the Chicago hearing almost immediately on the conclusion of the Washington hearing.

4. Did your organization make use of the comment record in the FTC public record room in Washington? (For any purpose--making the application, preparing the hearing, getting leads, etc.) If yes, (a) who actually performed the record search? (lawyer or non-lawyer); (b) about how much time was spent on record search?; (c) what kinds of information did you hope to get from the comment record?; (d) how useful was the information that you actually got from the comment record?

Answer -- The comment record was used extensively in all phases of our participation in the rulemaking proceeding. From this record we discovered the approved application for funds submitted by NCSC, and used their application in preparing our own. Comments placed in the record assisted us in the preparatory work necessary to representing our members in the proceedings. The actual search, for the most part, was performed by non-lawyer members of the NHAS staff. Total time spent in record search is estimated to be at least 120 man-days or 960 man-hours. NHAS staff was employed to mitigate legal man-hour costs; we would have preferred to utilize attorneys for this task, but an already overloaded budget would not permit it.

Information sought from the comment record included (1) statistical data to establish whether there was, in fact, evidence to support the

August 22, 1977

allegation that significant numbers of hearing aid consumers had been "abused by hearing aid sellers, (2) the basis used by the FTC as their justification for embarking on the rulemaking proceeding, and (3) statements by those who support the proposed rule which contain inaccurate information that should be corrected before the public comment record is closed. Information thus obtained was considered quite useful.

5. In preparing your application did you make use of any FTC documents or publications?

Answer -- The only such document or publication employed was the Federal Trade Commission Act, and the FTC's Rules of Practice.

6. (a) Were the FTC's criteria for awarding compensation reasonably clear to you? If not, what was unclear? (b) Do you have any suggestions for improving or modifying the criteria?

Answer (a) -- The only criteria available at the time we prepared our application was contained in the FTC's Rules of Practice, Section 1.17. Since that time, specifically on June 14, 1977, a much expanded guideline was published in the Federal Register. Section 1.17, Rules of Practice, is very broad in establishing the criterion, leaving much judgemental authority with FTC personnel. Under this judgemental option, FTC was able to, in effect, place conditions on the final award that effectively denied any funds at all to NHAS.

Answer (b) -- As a suggestion to improve the criteria, they should be established and administered by some agency other than the FTC to remove the potential opportunity to grant funds to those who support the FTC staff position, and deny them to opposing groups. Our experience leads us to conclude that, in proceedings such as these, the FTC is actually one of the adversaries in the proceeding.

7. Have you gotten an adequate statement of reasons from the FTC as to why they reached the decision they did on your compensation request?

Answer -- Not really. The reason for their requirement that we deduct a dollar from the grant for each dollar received from our members on the special assessment levy is impossible for us to comprehend. The special assessment was levied to replenish a treasury depleted by the extraordinary and unprecedented costs imposed by the acts of the FTC, the FDA, and various Congressional Committees. The proceeds from the assessment were needed for the ongoing activities of our Society, of which the FTC rulemaking proceeding was just one item. Furthermore, NHAS was responsible for the entire cost of legal services to participate in the hearing, while the attorneys we employed were designated by the presiding officer to represent "all hearing aid dealers". This meant that the members of NHAS, who number less than one-half of those licensed to dispense hearing aids in the various states, had to carry the entire legal expense burden; and we felt that assistance from a grant would be particularly appropriate in this area.

August 22, 1977

8. Do you have any comment on the reasonableness of the payments FTC will authorize for personnel and other costs of participation?

Answer -- Part of the FTC decision was based on our "refusal" to limit legal fees to a figure of \$27.00 per hour, which was stipulated in the letter from FTC's Margery Waxman Smith dated July 20, 1977. Our arrangement with our Washington legal counsel to represent us in the FTC proceedings predated by many months our knowledge of the possible availability of funds from the FTC. Our counsel spent many months becoming familiar with our industry, and in the process of preparing the extensive legal documents necessary in the beginning of such a proceeding. To substitute, at this point, an attorney who would accept \$27.00/hour for his services and office overhead would have been the height of folly; if indeed a qualified Washington attorney could be found who would consent to take the assignment at that figure. We are told that overhead costs for attorneys in the Washington area virtually preclude one being available at that price, especially one who could properly represent us in the FTC rulemaking proceeding. The impact the proposed rule would have on our industry, if it was implemented as proposed, would have caused, in our opinion, a major upheaval and the exodus of large numbers of dealers from the industry. It was for this reason that our Board of Governors voted to retain the most competent counsel we could identify to represent our interests. We would have been happy to have accepted a \$27.00/hour credit toward what we were actually paying our attorneys, but that option was not offered. The \$21.00/hour limit on associate attorneys fees is equally unrealistic. We were never informed as to the logic for the selection of \$27.00 and \$21.00/hour since the FTC Rules of Practice specify in Section 1.17 (e)(2) that fees up to \$50.00/hour may be considered reasonable.

9. What was the total cost of your participation in this proceeding? Please explain how you arrived at this figure (e.g., how much lawyer time, at what rate, how much for travel, overhead, etc.).

Answer -- Costs imposed on the National Hearing Aid Society by the actions of the FTC are as follows: (Period 1-1-75 through 3-31-77)

1,206.9 hours of lawyer time @ \$75.00/hour - - - -	\$ 90,517.50
1,230.2 " " " " " " \$50.00/hour - - - -	61,510.00
872.9 hours of para-legal time @ \$15.00/hour - - - -	13,093.50
Out-of-pocket expenses incurred by the attorneys in the performance of their duties - - - - -	16,323.77
Estimated additional lawyer time and expenses to be incurred before the rulemaking procedure is concluded - - - - -	70,000.00
Expert witness travel expenses - - - - -	6,720.00
Miscellaneous overhead:	
Staff salaries when working on FTC matter - -	20,000.00
Overhead including telephone toll calls - - -	10,000.00
Hearing transcripts - 12,000 pages @ 10¢ - - -	1,200.00
TOTAL ACTUAL AND ESTIMATED COST OF PARTICIPATION -	\$289,364.77

August 22, 1977

10. What would be your reaction if the statute was amended or the FTC changed its policy to provide that compensation was available only for preparing studies or written comments, and not for participation at hearings?

Answer -- This presents a problem in just how effective such participation would be. In our case participation at the hearing was essential, and no amount of studies or written comment would have been a satisfactory substitute. A study that we suggested be conducted by an independent survey group was deleted by the FTC when they responded to our application for funding. If the program remains, it should include participation in the hearings if the results are to represent a productive contribution to the rulemaking process.

11. Based on your experience, do you have any criticisms with the way the FTC is administering the program?

Answer -- Based entirely on our experience, it appeared to us, considering the prompt granting of funds to NCSC, and the effective denial of funds to NHAS, that the authority possessed by FTC was being used to encourage participation by those who support the FTC staff position, and deny funds to those who disagree with the staff position.

12. Do you think there are any significant problems in the compensation program that require action by the FTC or the Congress?

Answer -- Referring to preceding answers 11, and 6 (b), we would recommend that the authority to decide who will receive funds, and how much, be delegated to some agency other than the FTC, and thus remove the opportunity to use the funding primarily to reinforce the FTC staff position.

This concludes our responses to your specific questions. If you require amplification or clarification on any of our answers, please do not hesitate to contact us promptly.

Sincerely yours,

Anthony DiRocco
Executive Secretary

AD:rl

Additional Views Submitted for the Record on S. 270



July 8, 1977

Senator James Abourezk
Senate Judiciary Committee
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Sen. Abourezk:

On behalf of the Connecticut Citizen Action Group I would like to express strong support for the Kennedy-Mathias Bill S. 270, which will permit public interest groups and individual citizens to recover reasonable attorney's fees and other expenses incurred while participating in Federal regulatory agency proceedings. Public interest organizations and private citizens do not now have the realistic capability, as wealthy special interests do, to participate as a viable party in federal proceedings, thereby, prohibiting a full expression of citizen perspectives on critical consumer, environmental and other public issues that often vary drastically from those held by affected industries and government officials. Consequently, decisions are now made that have enormous impact upon the public without true opportunity for the public to have an impact on these decisions. Passage of this legislation will eliminate the current severe barriers to public participation in regulatory agency decision-making.

Although the Connecticut Citizen Action Group is actively supported by thousands of Connecticut citizens and has been deeply involved in determination of public interest issues at the state level, it has always been forced to curtail its activities at the federal level. While major decisions affecting Connecticut citizens have been made by such agencies as the Food and Drug Administration, the Consumer Product Safety Commission, and the National Highway Traffic Safety Administration, CCAG has been unable to participate fully. We have been restricted generally to filing written comments on proposed regulations simply because it has not been economically possible for us to participate in lengthy federal proceedings held in Washington, D.C. and other cities.

From our experience as intervenors in utility rate cases in Connecticut, it has become abundantly clear that effective representation of public interest positions, whether by groups such as CCAG or private citizens, cannot take place without the opportunity to directly challenge positions taken by business interests and public officials. Filing written comments is not a sufficient substitute for cross examination of utility company officials or direct argument to agency officials.

**CONNECTICUT CITIZEN
ACTION GROUP**

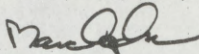
BOX 9, HARTFORD, CONNECTICUT 06106
OFFICES: 130 WASHINGTON ST., HARTFORD, CONN.
PHONE 203/527-7191

— 6 —

One of the greatest deficiencies currently existing in the airing of public views is the inability of the public to initiate action at the federal level. Rulemaking proceedings, license challenges and civil actions permit issues to be formulated from outside government offices and industry boardrooms. Existing forums provide a theoretical opportunity for issues to be resolved through legal processes, but even when citizen groups and individuals have standing to initiate these proceedings, it has been realistically impossible to harness the resources to begin, much less successfully continue, administrative actions involving complex determinations of the public interest.

We find that S. 270, which has President Carter's support, contains ample provisions both to evaluate the contribution a group or individual can reasonably make to a proceeding, as well as to control excessive costs. Agencies are called upon increasingly to make hard choices reconciling numerous and diverse interest. Public interest organizations, temporary associations of citizens, and even private individuals have the potential to provide information and viewpoints that can prove vital to a "full and fair determination" of important public issues. CCAG urges passage of S. 270 to allow the public voice to be more fully heard.

Sincerely yours,



MARC CAPLAN
Director



325 PENNSYLVANIA AVENUE, SOUTHEAST

WASHINGTON, DISTRICT OF COLUMBIA 20003

TELEPHONE (202) 546-2040, 546-2085

STATEMENT
on
S. 270
submitted to the
ADMINISTRATIVE PRACTICE AND PRECEDURE SUBCOMMITTEE
of the
SENATE JUDICIARY COMMITTEE
for the
NATIONAL TAXPAYERS UNION
by
Glenn Jackson
June 14, 1977

On behalf of the National Taxpayers Union, I thank the Subcommittee for this opportunity to present our views on S. 270.

The goal embodied in S. 270, improving the quality of bureaucratic decision-making, is certainly desirable and deserving of support. Congress has increasingly delegated federal agencies broad authority to formulate regulations and reach quasi-judicial/legislative decisions affecting all Americans. These agencies were created and continue to exist solely to further the public good. If our bureaucracy is failing to fulfill this fundamental responsibility, then clearly some action is necessary to remedy the problem.

Presumably, this is the motivating force behind S. 270. Apparently the sponsors of the bill believe that a direct relationship exists between the amount of direct public input into agency proceedings and deliberations and the quality of agency policy decisions. The reasoning follows, therefore, that government subsidization of such input will improve the decisions which follow. We at the National Taxpayers Union agree that public input is valuable, but the concept of providing government subsidies to certain

spokesmen who choose to appear at such proceedings is the wrong approach and such a plan will not improve the democratic process. We reach this conclusion for these following reasons:

First, the taxpayers are currently spending about \$400 billion to operate our government. Government is supposed to spend these funds advancing the public welfare, not making people worse off or responding to narrow interests. The ICC is given over \$50 million to fulfill its tasks. The Federal Trade Commission is allocated a similar amount. The Nuclear Regulatory Commission is budgeted nearly \$250 million. If these and other agencies cannot make the proper decisions with these resources at their disposal, why should taxpayers believe a few million more dollars will make any significant difference? Why are thousands of employees on the public payroll if not to develop the relevant information surrounding these decisions?

The truth is that poor agency performance frequently occurs because the legislation governing that agency is woefully inadequate. Regulation of airline fares by the Civil Aeronautics Board is a case in point. Taxpayers should not be forced to pay "intervenor" to argue for air fare rate reductions. The public needs Congress to permit price competition among airlines. By the same token, the broad authority granted OSHA has created more problems than it has solved. Rather than debating S. 270, Congress should carefully evaluate the legislation governing the operation of these agencies to discover why, given their substantial budgets, the regulators cannot reach proper decisions.

If Congress wants to improve the bureaucratic decision-making process, it should concentrate on improving the agency operations themselves, not adding yet another layer of insulation between the public and the government. The approach taken by S. 270 is comparable to the owner of an automobile assembly line who, upon discovering that the line is producing flawed cars, hires a team of mechanics to dismantle the finished automobile, correct the defect, and then reconstruct the car instead of correcting the problem at its source.

Of course, the public should and does participate in bureaucratic

decision-making. But members of the public do not represent any "public" interest. They represent personal views. The expression of private opinions should be funded by private money, not public money. Surely some wealthy interests can afford more lavish and sophisticated presentations than others, but the bureaucracy is paid to distinguish between truth and self-serving rhetoric. Furthermore, advocates of responsible views shared by even a relatively small percentage of the populace have demonstrated a remarkable ability to organize and press their case. Frankly, we doubt that many responsible opinions have gone unheard due to a lack of financial resources. On the other hand, subsidizing the viewpoints of "intervenor" with public funds will require the taxpayer to support the advocacy of views which frequently conflict with his own. This inevitable consequence of S. 270 is simply not equitable.

Public support of interest groups will also create administrative difficulties and encourage the bureaucratic co-optation of their relevant interest groups. The guidelines for determining which individuals or groups qualify for compensation are, at best, vague. If administered strictly, they will allow the agencies involved to discriminate among the groups competing for funds. The possibilities for abuse are obvious and the incentives for organizations to seek favorable treatment from agency personnel is equally obvious. If the rules are applied loosely, they will only serve to create an ever-expanding corps of public-interest intervenors who would clog the decision-making process rather than improve the quality of decisions. In either case, the benefits of this program would be far outweighed by its costs. Furthermore, passage of the bill would discourage individual American citizens from actively participating in the political process through membership in interest groups. After all, why should they contribute to an organization when the government will pick up the tab?

S. 270 cannot aid the cause of better government. It will side-track attention from the actual problems of bureaucratic operations and unfairly allocate public funds to help selected private individuals promote their causes. The legislation may actually weaken public participation in agency proceedings by extending the heavy hand of federal influence, either implicitly or explicitly, over the process of public participation

in the decision-making activities of federal agencies.

We thank you for your consideration of our opinions on this legislation.

Individual Views of George E. MacKinnon
11333 Willowbrook Drive
Potomac, Maryland

on
S. 270

My individual views have been requested on this bill for an Act to provide attorneys' fees and other costs to those who wish to participate in the proceedings of Federal agencies and who wish to bring lawsuits and appeals in such proceedings.

The first sentence of this bill sets forth what it claims is the need for the legislation:

"§ 558a(a)(1) The Congress finds that the effective functioning of the administrative process of Government requires Federal agencies to seek the views of all affected citizens."

My first suggestion concerning this bill is that the Committee should through the Chief Justice request the views of the Judicial Conference of the United States, or its appropriate committee. Those judges have been dealing intimately with this area of activity for many years and are thoroughly competent to express an opinion on the need for such legislation and how it would work in practice.

I

What this bill is really asserting is that interested citizens must be subsidized to present their views to Federal agencies. I see no substantial proof to support that assertion. I have not noted any deficiency in the willingness of the American people, given a just position, or even one that appears just to a minority, to participate in agency matters or any reluctance or inability of the agencies to act in the public interest as directed by the applicable Acts of Congress. It has been my experience that meritorious views generally attract their own financial support when they need it.

In practically every case I have seen where agency action is attacked by public interest protestants or litigants they are usually very well funded by voluntary organizations that enjoy tax-free status. There seem to be such volunteer organizations in most fields. Their voluntary

character is one of their principal advantages. If they were to be converted into federally subsidized litigants and participants they would lose a great deal of the moral and persuasive force that they presently possess. Subsidize them and you destroy their heart. And you will give them competition that they do not need. Remember - the only Carnegie Library that failed was the early one where Carnegie gave them all the money and did not require local contribution. The bill reminds me of the wealthy mother who wanted her son to have only the best and insisted on giving him cream and thereby denied him the essentially vital nutrients present only in whole milk. There is ample evidence in the extensive litigation they indulge in that responsible public interest groups are well funded now. Also, on this point, in late May I attended the commencement exercises of the law school at a prestigious Eastern university. The commencement speaker selected for the occasion was a recent graduate introduced as being active and successful in public interest law. Her message - join me in public interest law - the pay is good - from \$10,000 to \$40,000 a year.

Moreover, the present system of voluntary support for public interest law groups serves to screen out frivolous actions before the agencies and the courts. It is questionable whether views that cannot command enough financial support to even present their case should be encouraged by largesse out of appropriated tax funds. You will also have the problem if you pass this bill of being obliged to also subsidize the opposition to those who receive an award - otherwise you may be giving an unfair advantage on a preconceived basis to a position that in the public interest should eventually fail. After all very few bills of major import pass Congress without a substantial number of negative votes and there is much merit to be found many times in the opponents' position.

It is well known that some lawyers would like to make a career out of appearing for what they conceive to be public interest. Making attorneys' fees more available can only reinforce the regrettable trend of lawsuits stirred up principally for the lawyers' own interest. Where one's views cannot attract voluntary support it is because they too often represent purely personal views. Of course, the Federal Government should not

support such views and the bill seeks to avoid this, but the havoc such individuals can cause for what they thoroughly believe to have merit can become very disruptive. The present bill will open additional avenues to such proponents. Our agencies and courts presently have a substantial number of such cases and they should not be required to tolerate more. I see no need for adding to the voluntary financial support that meritorious views presently attract.

Is more public participation actually needed now before Federal agencies? From my vantage point it seems that we have just about legislated the country to a standstill. Nothing seems to be moving forward - only debate. True, some may have a valid point but the present processes adequately permit these to surface - in great numbers.

If all the prodders and objectors were to be given the added encouragement of possible, or actual, Federal subsidies in my opinion they would generate a great deal of needless proceedings and litigation since they are required to make a strong showing to justify "the payments or specific award . . . made." Section 558a(b)(1). Today, it is my observation that the cases with merit, that ought to be brought, are being brought and the record shows that many cases without merit, or with very little merit, are pursued to the bitter end before agency and courts. Those with the least merit many times persist the longest. Offering subsidies in this field in the millions of dollars, in my opinion, is not necessary for the meritorious cases and of course is not justified for the others. I believe that in actual practice the bill would work out to give tax support to many proceedings and cases that should not be supported.

II

In addition, the prospect of subsidies will actually prolong agency actions and litigation, once commenced. Many proceedings and cases that do not receive an initial award will nevertheless be prosecuted to the

bitter end in what in most cases will be the forlorn hope of eventually prevailing. The attractiveness of the eventual award, once victory is attained, will cause participants to press their case to the last inch in the hope of attaining the gold at the end of the rainbow. In my view this will cause agency proceedings and litigation to snowball far beyond what the sponsors of this legislation presently contemplate and beyond the willingness of Congress to supply the necessary administrative personnel and judges to properly handle the resulting caseload. Even without this proposed subsidizing of litigators that has been the case. The United States Courts of Appeals who, in most cases, handle the initial appeals from agency action, have been loaded with cases beyond their capacity for a number of years and the end is not in sight. And agency cases are the most important and time consuming of their cases. So by subsidizing more litigation in this area I fear the Congress will be creating further backlogs and delay.

The extra step involved in establishing the proper amount of subsidy to be paid will also consume a great deal of administrative and judicial energy. In many cases where an initial award is not paid you will be doubling the litigation in those cases where the party prevails. First, there will be the agency proceeding and lawsuit, and then will follow a second lawsuit over the proper award. Lawsuits and appeals are also authorized if an applicant is denied an award or receives what he considers to be an insufficient award. See 558a(f)(a)(A). This will lead to cases seeking fees or greater fees. In England where the prevailing party is entitled to recover extensive costs the subsequent litigation is extensive and that in turn has its own costs.

There are other procedural and substantive problems presented by the bill. Since some parties will be entitled to an award of costs and expenses "prior to timely participation in the proceeding by that person" that advance recognition will be taken in some cases as a preliminary determination of merit to his position and will give him a preferred standing throughout the administrative proceeding and any

subsequent litigation that might be most unfair to other participants.

Perhaps the most difficult issue raised by the bill is the criteria it would establish for determining whether the subsidy is to be paid. The bill provides that participants are entitled to recover attorneys' fees and costs of experts, and other litigation costs from the United States if - (1) the court affords such person the relief sought in substantial measure; [or] (2) such action served an important public policy . . . (etc.) You should consider the breadth and indefiniteness and propriety of these standards. Admittedly, such standards cannot be mathematical, but what one person or one court might consider to be an important public policy might not be so important to others. For instance, some might consider just participating in a proceeding served an important public policy, while others would consider the participation to be a disservice to the public interest. The Alaska Pipe Line litigation is a case in point.

In that case the Wilderness Society opposed the Alaska Pipe Line on legal and environmental grounds. Its activities succeeded in delaying the project for several years during which time (1) the construction cost increased \$1 to \$2 billion; (2) the Court of Appeals refused to consider its objections to the Environmental Impact Statement (EIS), Wilderness Society v. Morton, 161 U.S.App.D.C. 446, 495 F.2d 1026 (1974), rev'd, 421 U.S. 240 (1975), and over the court's finesse Congress had to direct the project to proceed on the existing EIS, Pub. L. 93-153, Nov. 16, 1973, Sec. 203(d), (87 Stat. 585); and (3) the nation was deprived of the North Slope oil for several years while it suffered under the sharply increased fuel prices brought on by the nation's vulnerability to foreign oil. The final result was that the obtainment of needed supplies of natural gas from the North Slope was pushed years into the future when most assuredly the cost of obtaining it will be even more sharply increased.

Thus, practically nothing that the Wilderness Society set out to accomplish was eventually achieved. The right of way and construction and operational rights were expanded by Congress substantially beyond what Alyeska had originally requested and these far-reaching changes were made permanent for all pipelines in the future. The environmental

interests feel they suffered a permanent defeat. In addition the increased cost to the nation occasioned by the delay brought on by the Wilderness Society ran, is running, and will continue to run, into the billions of dollars. Should that type of opposition be subsidized by the Federal government? Should such parties receive a substantial financial reward because on one ground they were temporarily successful in holding up a vitally needed project and might be considered - on one temporary point - to have achieved a "substantial measure . . . [of the] relief" they sought when the permanent detriment to the public interest far exceeds the value of the temporary "relief" they obtained? Did the delay in the project actually "[serve] an important public policy"? Some might argue that it did. The court awarded them a fee but the Supreme Court held the law did not permit the payment of any fee. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975). In any event the bill in its present form will encourage such opposition. Should not the right to compensation in such cases be based at least in some part on a balancing test, i.e., whether in the last analysis the public interest benefited more than it was harmed? And the test should be whether the alleged benefit is permanent and substantive. It is too easy for highly imaginative minds to find "public benefit" in highly speculative ephemeral considerations that in the long run do not benefit anyone. The nation will never recover from the tremendous additional cost imposed on the price of oil as a result of the delay the objectors caused in the building of the Alaska Pipe Line. It will be reflected in the increased price of oil as long as oil flows from the North Slope. We will be paying for it the rest of our lives. And if natural gas from that area ever reaches the lower 48 states its price to the public will also reflect the increased cost resulting from such delay.

Another current case which is demonstrating the extreme cost to the public of the opposition of single individuals or small groups to tremendous projects is reflected in Silentman v. Federal Power

Commission (No. 76-1192, D.C. Cir. 1977). Here two people have held up any progress on the construction of a \$1 billion public utility in the energy field. During the delay, which has continued for more than two years, the construction cost has been increasing because of inflation at about \$5-1/2 million a month - \$66 million a year. Certainly the benefit to the public that the objectors seek should be of great value in order to overcome the staggering additional cost that they are creating for the public to pay. There are a number of similar situations throughout the country. In practically any other country except the United States the law would be sufficiently clear to minimize the cost of such proceedings to the public interest.

There is an additional point in the whole Alaska Pipe Line case. The real party at fault was not the Interior Department or the pipe line or the courts. It was the failure of Congress to act over a period of many years that created the whole problem - the failure to modernize the Mineral Leasing Act to correct a wagon trail right-of-way for slender pipe lines to the widths necessary for heavy modern caterpillar construction equipment and heavy pipes four feet in width. Here is a good example of where Congress would be directing its legislation at the wrong department when it seeks to subsidize the executive agency objector when the key to the solution lies in the legislative branch.

III

This leads to a final point. In many cases, the perceived unresponsiveness of the "system" to the interests of individual citizens results most often not from administrative or judicial insensitivity, but from legislative causes. The drafted report on the bill states that "most Americans feel powerless to affect the course of agency decisions." If so, their feeling of inadequacy in some cases might be more justifiably directed to Congress which is the true creator of the policies that the agencies attempt to implement. And to the extent that these policies are stated ambiguously, in conflicting language, in abstract terms and compel unattainable results it is Congress and not the executive agencies that are the root of the problem.

Too often an idealistic statute with difficult enforcement aspects is sabotaged in its administration by an inadequate appropriation. In such instances the public may blame the agency, but it is not at fault. It only has so many employees. The Freedom of Information Act is a recent case in point where a statute with conflicting standards was forced on executive agencies with inadequate appropriations to guarantee the benefits it promises to the public. The result was that demands by citizens suffer backlog and delay in many agencies - for which the agencies are not responsible. And because the time requirements of the statute are impossible of accomplishment the courts have been flooded with lawsuits that the wisdom of Solomon could not point the way to statutory compliance. The result is that the arbitrary, inadequately funded time limits in the Act must be extended because insufficient appropriations for personnel make compliance impossible. Open America v. The Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

The congressional statute prohibiting Government agencies from discriminating in employment is another current example. The lack of wisdom of Congress in requiring new trials in United States District Courts is clogging the courts but criticism is misdirected at agencies and courts for delay. The statute requires a hearing before the agency. If the employee is not satisfied by the result there, he appeals to the District Court. The second trial must be de novo and the first trial before the agency is thus completely duplicated. Chandler v. Roudeshush, 425 U.S. 840 (1976). Obviously, with such lack of respect for the agency proceeding, its hearing may degenerate into a pro forma trial on the way to a body that has some authority to make a decision that might be respected. At present there are 191 such cases for de novo retrial pending before the United States District Court for the District of Columbia and as of today 8,000 cases involving Federal employees are backed up in the agencies. This duplication of trials causes interminable delays but the agencies are not to blame.

The inadequate personnel that Congress has made available to enforce the Occupational Safety and Health Act is another case in point. See AFL-CIO v. Marshall, Secretary of Labor (No. 75-1506, pending in D.C. Cir. 1977). And National Congress of Hispanic American Citizens v. Usery (No. 76-1009, D.C. Cir., decided April 19, 1977), represents another instance where Congress loaded a department with administrative tasks and time limits that were impossible of attainment, because of insufficient personnel, within the congressionally-prescribed time limits.

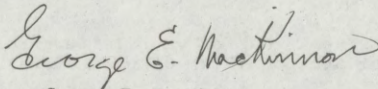
Nevertheless, I do not believe that Congress needs subsidized public prodding to improve its machinery in order to write laws in the public interest. But there is every bit as much justification for subsidizing citizens to promote congressional enactments in the public interest as there is to provide general support for those promoting Executive action in the public interest. If you pass the latter you may be soon faced with a demand for the former - federally subsidized lobbyists to add to federally subsidized litigants. But I do not believe that the agencies need generally subsidized clients and lawyers to get them to carry out their statutorily assigned functions any more than Congress needs it.

True justice attempts to solve problems in the terms of the individual but with so many conflicting views every person cannot prevail. To the extent that compensation should be paid in some cases it is my view that the present specific statutes are generally adequate and there is no need for a general enlargement. I would suggest a selective approach to the problem where a particularized need is shown. And I believe Congress should approach with great caution the proposal to award fees and costs in advance of agency proceedings.

Congress could also serve a real public need by closely monitoring the indefinite standards it provides in some of these situations so as to write standards with sufficient clarity and definiteness that they will not constitute an open inducement to endless proceedings and

litigation. This could be accomplished by statutes that more clearly state definite policies rather than acts that represent a congressional compromise that runs in two or three different directions and the agencies, and eventually the courts, are expected to try to work it out. When congressional intent is duplicitous this is a difficult task - the guideline is just not there or is highly obscured. A Revisor of Statutes as exists in the State of Wisconsin could materially aid in the task of improving laws on the books to reflect problems that arise in their enforcement. Half of the appropriation here suggested would more than do the job.

Respectfully submitted,


George E. MacKinnon

June 10, 1977

Additional Material Submitted by Senator Laxalt

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

April 28, 1976

Mr. Michael Hirsh
Executive Producer/Public Affairs
Chicago Public Television
5400 North St. Louis Avenue
Chicago, Illinois 60625

Dear Mr. Hirsh:

Thank you for your letters requesting compensation under Section 18(h) of the Federal Trade Commission Act to represent the interests of consumers in the rulemaking proceeding on funeral industry practices. Although the presiding officer for the proceeding, Mr. Kahn, has recommended against approval of your request, final determinations on such requests are made by the Director of the Bureau of Consumer Protection in her discretion, under Rule 1.17(d) (2) of the Commission's Rules of Practice.

I regret that I cannot approve your request on the basis of the information you have submitted. You have submitted neither a specific statement of the expenses to be incurred for which you seek compensation, nor an estimate of your total anticipated expenses, as required by Rule 1.17(c)(5). You state that you cannot estimate your expenses without knowing how many days or weeks the hearings are expected to take. Since hearings have been scheduled, I do not understand why an estimate of expenses cannot be submitted.

In addition, I cannot determine, as required by Section 18(h) and Rule 1.17, that the interest you represent would not otherwise be adequately represented in this proceeding. While no other consumer representative has been authorized compensation for participation in the Chicago hearings, three applicants have been authorized compensation to represent the interests of consumers in the proceeding (New York Public Interest Research Group for the New York hearings, the Consumer Affairs Committee, Greater Washington Chapter, Americans for Democratic Action, in conjunction with the National Council of Senior Citizens for the Washington hearings, and Consumers Union for the submission

Mr. Michael Hirsh

of written comments). In addition, the Continental Association of Funeral and Memorial Societies has been authorized compensation to represent the interests of funeral and memorial societies in the Washington hearings. The statute does not require compensation of a consumer representative at every individual hearing for which such a representative applies, since the Commission's determination on the proposed rule will be based on the entire record and not on the portion of the record adduced at any single hearing site.

Moreover, I cannot determine that the interests of consumers would not otherwise be adequately represented because you have submitted little information about the substance of your projected participation. A determination that consumers' interests would otherwise not be adequately represented cannot be made without a reasonable description of how a compensation applicant intends to spend the money he receives. In any case, we have an inherent obligation to require reasonable assurances that public monies will be used well before we commit ourselves to disbursing them. This description need not be precise, but should at least include a statement of the issues in the rulemaking proceeding you intend to address and the kinds of evidence you intend to place on the record.

If all you intend is to question other witnesses at the hearings, then it becomes all the more difficult for me to conclude that consumers' interests would not otherwise be adequately represented. In that case, you will not be producing evidence on any issue for which the record might otherwise be inadequate, either in support of or in opposition to the rule. Moreover, you would be performing a function that three other consumer representatives (and the Commission staff) are prepared to do. In short, while the introduction of evidence is not a prerequisite to compensation under Section 18(h), it is certainly a factor which I am obliged to consider in applying the statutory standard.]?

Finally, while I am not prepared to say that Rule 4.1 prohibits persons who are not attorneys from participating in rulemaking proceedings, I believe the fact that you are not an attorney is relevant to my determination if all

Mr. Michael Hirsh

you propose to do in the proceeding is to examine witnesses. I find it difficult to conclude that consumers' interests can be adequately represented only if a non-attorney can conduct direct and cross examination.

For all the foregoing reasons, I must regretfully, deny your request.

Sincerely,

Joan Z. Bernstein
Joan Z. Bernstein
Acting Director

cc: David Goldberger, Esq.

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

FROM GALE P. GOTSCHALL
COUNSEL FOR
FEDERAL-STATE COOPERATION
FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580
(TEL. 202-962-4319)

: Gale Gotschall

DATE: July 11, 1974

FROM : Arthur Angel, Attorney *ARA*
Bureau of Consumer Protection
Division of Special Projects

SUBJECT: Anti-Consumer State Funeral Itemization
Regulations

As you know, the staff of the FTC has, for some time, been conducting a nationwide investigation of funeral practices, and I am directing that investigation. Two very important consumer problems revealed by our investigation are first, insufficient knowledge on the part of consumer buyers of what is involved in a funeral service and what components are covered in the price of the funeral, and second, the packaging or tying together of services and facilities on the part of many funeral directors which prevents consumers from obtaining price reductions for unwanted services.

Following the FTC's pilot funeral price survey in the District of Columbia, Congressman Charles Diggs proposed Federal legislation (H.R. 13492) for the District of Columbia aimed at remedying the problems of insufficient knowledge of the services included and the tying together of services and facilities. This legislation would require funeral directors to give their customers a written breakdown of services and facilities, with a separate price for each, at the time arrangements are made.

The FTC staff testified in support of Congressman Diggs' bill on April 24, 1974 (with three proposed amendments to strengthen the law) and in opposition to H.R. 13969, an alternative proposal introduced by Congressman Broyhill. H.R. 13969 would require a written statement at the time arrangements are made, but would allow a single unit price for the funeral, with a listing of the services and facilities included for that price. Such a law would allow continuation of the tying together of funeral services and facilities which, based on our investigation, seems to be one of the most serious problems confronting consumer funeral buyers. As we indicated in our testimony, the staff's position is that consumers should

be allowed to decline unwanted funeral services without having to pay for them. The major funeral trade associations opposed the full itemization law and favor a law permitting single unit pricing.

Shortly after our testimony, the Conference of Funeral Service Examining Boards issued a "Urgent Memorandum" urging states to adopt a single unit pricing law similar to the Broyhill bill as a state board regulation. I have received information that several states have already taken this action.

Such a regulation is very much contrary to consumer's interests and is more a step backward than a genuine reform in funeral price disclosures. We have studied this matter in depth, including the validity of the claim by funeral directors that full itemization will produce higher funeral prices, and we are convinced that adoption of the measure recommended by the Conference on the state level would exacerbate the problems of the funeral consumer and create a greater need for regulatory action by the FTC.

Is there any way that state attorneys general can be informed of the problems that inhere in the Conference's directive?

The Conference's memorandum states "Regulatory agencies external to funeral service have expressed serious public concern as to how funeral service agencies are conducting their affairs in the public interest." That indirect reference to the FTC's testimony implies that the Conference's recommendation is in accordance with the FTC's expressed concerns. In fact, as indicated, the recommendation is seriously deficient and anti-consumer.

TO: Ann Brown

DATE: March 25, 1975

FROM: Arthur R. Angel, Attorney and
Thomas C. Nelson, Research Associate
Federal Trade Commission
Bureau of Consumer Protection
Division of Special Projects

SUBJECT: Funeral Regulations for the District of Columbia

INTRODUCTION

This memo contains our comments on Regulation 74-37, relating to funeral directing in the District of Columbia, which was vetoed by Mayor Washington on December 13, 1974. The comments represent the informal analysis of the staff, not the official statement of the Federal Trade Commission. We are providing our comments to assist you and the other members of the task force responsible for recommending new funeral regulations to the Mayor.

In general, we believe that the substance of Regulation 74-37 offered significant new consumer protections, in four important areas: consumer representation on the licensing board; the affirmative disclosures required; the required itemization of prices; and the prohibitions against certain improper practices. These protections in Title VIII of Regulation 74-37 made it one of the most progressive mortuary licensing programs in the country.

Although there were some drafting problems (omissions, ambiguities, etc.) in the proposed regulation, these could be cleared up with some additional effort to provide an efficacious regulation which would greatly improve the practice of funeral directing in D.C. Our more specific comments on individual sections follow.

Title II

The definition of undertaking as it is presently written in Title I could be interpreted to apply not only to funeral directors, but also to the organizers of memorial societies and similar groups. To correct this ambiguous language the definition could read as follows:

"Practice of undertaking": engaging in the care and disposal of the dead body of a deceased person and/or the preserving by embalming or otherwise the body of a deceased person for funeral services, transportation, burial or cremation.

If part of the intent of the broad language was to bring persons selling pre-need packages and items under the jurisdiction of the board, this could be more effectively accomplished through a separate provision within the regulation.

Title IV

Title IV was perhaps one of the most significant components of Regulation 74-37. Consumer representation on state licensing boards is as Mr. J. Thomas Rosch, Director of the FTC's Bureau

of Consumer Protection has stated a "badly needed reform in the funeral service industry" (statement of J. Thomas Rosch, Director, Bureau of Consumer Protection, Federal Trade Commission before the House Committee on the District of Columbia on H.R. 13492 and H.R. 13969, April 24, 1974) (See Appendix A). Section 1 of Title IV which deals with the composition of the board is particularly important since it insures that consumer representation would balance industry representation rather than merely being an ineffective and out-voted minority. We recognize the doubts that have been voiced regarding the inability of the consumer representatives to discharge the technical responsibilities of administering and evaluating licensing examinations. It appears that this is a question which could readily be dealt with by the board rather than needing special attention in the regulations. Perhaps an ad hoc committee could be set up to handle such examinations.

Section 2(b) which is titled Investigation and Inspections authorized the Board to investigate funeral directors but does not spell out for what (e.g. to determine whether the funeral director has violated these regulations and to determine what, if any, enforcement actions by the Board are necessary).

Section 3 of Title IV dealing with the mechanism for handling complaints and enforcement powers was, we believe, one of the reasons given for the Mayor's veto of 74-37. It is, of course, important that the office charged with responsibility for investigation and "preliminary action" have sufficient staff and funds to carry out these duties. If the Office of Consumer Affairs does not have the capabilities then the office should receive additional monies and manpower or another division within the city government should be given the task. The idea of providing a variety of avenues for consumer redress is a good one, and should not simply be abandoned. The ability to issue cease and desist orders (Sec. 3(b), 1) provides the board with an important additional interpretive and enforcement power.

Titles V, VI, VII

These provisions which deal with the licensing of undertakers and apprentice undertakers appear adequate to insure technical competence and familiarity with relevant regulations. We are aware of the discussion that has focused on the exemption for apprentices licensed prior a specific date who do not meet educational requirements for licensure as a undertaker. We are not in a position to comment on this particular issue other than to note that it does appear reasonable to permit a waiver of the licensing requirements for some of those individuals who have been involved in the funeral industry for many years

although they continue to possess only the apprentice undertakers license. We have no basis for recommending any particular cutoff date for such an exemption.

Title VIII

Disclosure

The various sections of Title VIII possess the potential to remedy many of the problems consumers encounter as they make funeral arrangements and to correct many of the troublesome practices which were uncovered in the FTC's survey of funeral prices in the District of Columbia (which was designed more to obtain basic price-related data, than to identify abuses).^{*/}

Section 1

The disclosure document required by Section 1 provides the customer with valuable information that previously has either en difficult to obtain or on occasion misrepresented by the funeral director. However, the actual language of the disclosures should be spelled out in the statute. This will permit easier compliance checks, and insure that the format is understandable to consumers and comparable from one establishment to the next.

Paragraph (a) is inconsistent with the full itemization requirement of Title VIII, section 2(c). The present language may be aimed at package prices for immediate cremations and

^{*/} "FTC Survey of Funeral Prices in the District of Columbia, Staff Findings and Analysis." (Appendix B).

such practices as requiring a casket for cremation. While such intent is not totally unreasonable, the existing language is too broad and suggests a general right of the funeral director to package goods and services. One of the primary aims of an itemization requirement is to break up such packaging arrangements. The disclosure might be rewritten to read:

- a) You are free to select only those goods or services you desire. Depending upon the circumstances of death, or type of service you select, you may be required to purchase additional services or merchandise. In that event the funeral director will specify below the reason such additional services are required.

We are somewhat perplexed by the original version of (b) since our research indicates that embalming is never absolutely required in Washington even in the case of "certain diseases." As the statement is presently written the words "prior to final disposition" or some such should be inserted prior to "under the law." Present language suggests that bodies could just be left. The statement could simply read:

- b) "Embalming is not required under the law of the District of Columbia."

I would suggest adding a brief definition of "immediate cremation" to paragraph (c).

- c) "Immediate cremation usually consists of transportation of the corpse to the crematory, the securing of the necessary permits and certificates and the crematory process."

12-2066
D.C. Reg.

Anthony
Chelicon
Plague

Although we are not aware of many difficulties involving the purchase of burial clothing this statement (d) would be useful if there is evidence of such problems in D.C.

Perhaps it would be clearer and more precise if statement (e) regarding a casket for cremation was as follows:

- e) A casket is not required for cremation under the law of the District of Columbia.

We would also suggest that the task force consider drafting a provision which would prohibit the requiring of a casket for cremation by a crematory or funeral home. This would enable the consumer to obtain an inexpensive means of disposition without being forced to purchase a casket. It is our opinion that there is little justification for requiring a casket for cremation on either practical or aesthetic grounds. A bill was recently introduced in New Jersey which deals with the problem of a casket required for cremation (see copy of Assembly Bill, No. 1679, Appendix C).

We believe that the statement on burial containers (f) should be expanded to inform customers that cemeteries may offer outer enclosures for sale and that the customer should check to see what the cemetery requires. Both of these pieces of information should be available to the consumer, in addition to the offerings of the funeral home, to insure an informed choice.

The following language could be used for this purpose.

- f) "Some cemeteries require that the casket be placed in an outer enclosure. This requirement can usually be satisfied by either a vault or a less expensive liner. These may also be available from your cemetery. You should determine the requirements of your cemetery and its offerings."

In subsection (g) the language used is "you." This contrasts with "customer" which appears in (a) and (b).

Since the entire disclosure statement to be presented to the customer is relatively lengthy and detailed it might be useful if the board undertook to have the statement printed and then furnished a supply, at cost, to each funeral home for their use. This would avoid the possibility of any inaccuracies and would assure a standard layout and printing.

Section 2

Section 2 of Title VIII insures that the customer will receive an itemized contract and will know what has been purchased, the cost of each of the components and the total charge. It will also aid the consumer in putting together the kind of funeral he or she desires. We would recommend that in the drafting of new regulations consideration be given to including a requirement that prices be printed on the itemization list for each item. A hypothetical list might read something like the following:

embalming	\$100
restoration or other preparation of body	\$75
use of facilities for standard funeral service	\$150
use of facilities for viewing (1 night at \$75)	_____
transportation (within 50 mile limit):	_____
transfer of remains	\$25
hearse	\$25
limosine	\$35 (each)
flower car	\$25
other _____	_____
arrangement and conduct of funeral	\$100
casket (as selected)	_____
other merchandise (as selected)	_____
_____	_____
_____	_____
D.C. sales tax	_____
cash advances	_____
_____	_____
_____	_____
_____	_____

This would discourage the variation of prices according to the assets of the customer. A statement might appear on the contract to the effect that these prices may be reduced at the discretion of the funeral director but may not be increased.

It appears somewhat unclear in subsection (d) of Section 2 as to who must sign if any changes are to be made. This is a simple matter of language and the insertion of "by the customer" after "signed" would take care of the confusion.

Section 4

The problems associated with casket selection are dealt with in a limited way in section 4 of Title VIII but this needs to be supplemented with a casket price which would be furnished each customer. The list, ordered according to price, should include all of the caskets offered for sale by an establishment and a brief description of each unit. This list will facilitate price comparisons, and enable the consumer to ask for a particular casket if he doesn't see it on display. Something similar to the following provision might be used.

Every funeral services establishment operator shall provide each customer, before the customer is shown the available caskets, a written list of all caskets offered for sale by the establishment. The written list shall include the retail price of each casket and a brief description of the casket. The list shall be in order of price, beginning with the least expensive casket.

We would recommend that funeral homes also be required to display, in the same general manner as the other caskets offered for sale, or disclose the availability of (in those establishments which do not have caskets on display) the least expensive casket used in the standard adult funeral service. Further funeral homes should also be required to disclose to customers either on the casket price list or below the posted price on each casket the availability of the least expensive casket in colors

other than that which is on display. The staff is aware that the least expensive casket is often not displayed, displayed in a disparaging manner, or displayed in a color that is selected to be unappealing. This type of sales tactic effectively limits the consumers options and warrants a regulatory provision. The following language could be used to include a prohibition regarding the least expensive casket in Section 5 of Title VIII.

Fail to display the least expensive casket available for use in an adult funeral service and to display such casket in the same general manner as the other caskets offered for sale.

Fail to inform customers that the least expensive casket may be obtained in colors other than that which is on display if such is the case and to furnish such a casket if requested to do so by the customer.

Section 5

An important addition we would recommend in paragraph (d) of section 5 would be to require the funeral director to indicate any out-of-pocket expenses incurred in conjunction with cash advance items. This might be accomplished by requiring that out-of-pocket expenses can only be charged if they are indicated as such on the written contract. It should be noted that the present language does not prevent funeral directors from merely changing the label of "cash advances" to "other charges" or some other similar term and thereby continue to profit on monies advanced. To prohibit this it might be wise to consider including

a more comprehensive prohibition of profiting on cash advances.

The remaining provisions of section 5 appear useful and except for several questions regarding language appropriate for inclusion in future regulations.

Title IX

Title IX, section 1 should be stated in such a way that it is clear that except in a death from contagious disease, the services of an undertaker are not required by D.C. law. The paragraph could simply be amended to read:

"In all other circumstances the services of an undertaker are not required by D.C. law. All permits and certificates must be properly executed by the person responsible for the disposition."*/

Mervoid Seintz

*/ The above has been suggested without the detailed research into existing regulations that would be necessary before such language could be incorporated into any regulations.

LAW OFFICES

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June 7, 1976

FEDERAL TRADE
COMMISSION
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SPECIAL ASSISTANT
DIRECTOR
FOR BOOKING

ZONA F. HOSTETLER
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Mr. Jack Kahn
Presiding Officer
Federal Trade Commission
Pennsylvania Ave. at 6th St., S.W.
Washington, D.C. 20580

Re: Supplemental Application for
Compensation for Representation
in Proceedings on Funeral
Industry Practices

Dear Mr. Kahn:

This is an application for supplemental compensation in the above-named proceeding, filed on behalf of the Consumer Affairs Committee of the Greater Washington (D.C.) Chapter, Americans for Democratic Action and the National Council of Senior Citizens, Inc. This supplemental request is intended to cover additional costs incurred for representation through counsel at the recently concluded Chicago hearings and for representation at the Washington, D.C. hearings.

In correspondence between applicants and the Commission dated February 23, 1976, and April 23, 1976, applicants were granted a right to compensation for representation and participation in the Washington, D.C. hearings. On Friday, May 7, 1976, in a series of telephone conversations between yourself, Mark Silverman, Thomas Nelson, James DeLong, and the undersigned it was agreed that a portion of this approved funding could be used to compensate counsel to participate at the Chicago hearings which began on May 10, 1976. It was further agreed at that time that an application for supplementary compensation would be submitted to the Commission to restore the funding authorized for the Washington hearing.

During the conversations on May 7th the undersigned also told the Commission staff that the initial application

Mr. Jack Kahn
June 7, 1976
Page Two

filed by applicants significantly underestimated the length of the Washington, D.C. hearings and, hence, the number of hours for which representation by counsel would be required. The initial assumption was that the hearings would last only two days. It is our present understanding that two weeks of hearings are likely. Therefore adequate representation at the hearing will require considerably more time. Additional funds are sought for this purpose. */

<u>Item Description</u>	<u>Cost</u>
Restoration of Washington, D.C.; Authorization Required as a Result of Participation in the Chicago Hearings.	
Attorney fees	
Preparation and participation at Chicago hearings (139.5 hours at \$19 per hour)	\$2650.50
Preparation of rebuttal statement-estimated (5 hours at \$27 per hour; 75 hours at \$19 per hour; 20 hours paralegal at \$9 per hour) **/	980.00
Travel	
1 round trip to Chicago	136.00
Per diem expenses, including fare to/from airports, May 9 - May 21, 1976 (receipts available)	599.67
Subtotal Cost	<u>\$4366.17</u>

*/ Applicants' counsel are working closely with counsel for another interested party to the Washington, D.C. hearings, the Continental Association of Funeral and Memorial Societies. It may be possible to share the burden of preparing for and conducting cross-examination, in order to reduce the hours of attorney time that would otherwise be required of each group individually. While the degree to which such cooperation is possible cannot now be reliably estimated, Any such economies will, of course, be reflected in applicants' final bill.

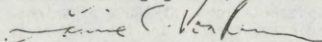
**/ It is understood that any allocation of time for preparation of rebuttal submissions depends upon receipt of prior authorization from the presiding officer, pursuant to the Commission's Rules of Practice Section 1.13(d)(5).

Mr. Jack Kahn
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<u>Item Description</u>	<u>Cost</u>
Additional Compensation Sought for Representation at Two Week Washington, D.C. Hearings	
Attorneys fees - Total Requirements	
Preparation for hearings (20 hours at \$27 per hour; 130 hours at \$19 per hour; 40 hours paralegal at \$9 per hour)	\$3370.00
Participation at hearings (15 hours at \$27 per hour; 70 hours at \$19 per hour)	1735.00
Preparation of rebuttal statement (5 hours at \$27 per hour; 35 hours at \$19 per hour; 20 hours paralegal at \$9 per hour) */	980.00 \$6085.00
Less Amount Previously Allocated in Initial Budget (15 hours at \$27 per hour; 30 hours at \$19 per hour; 20 hours paralegal at \$9 per hour)	1155.00
Subtotal Cost	\$4930.00
Total Supplemental Compensation Requested	\$9296.17

If any further information would assist your consideration
of this supplemental application, please contact me at your
convenience.

Sincerely yours,


Lonnie C. Von Renner

LCVR/ckj

cc: William R. Hutton
Ann Brown

*/ It is understood that any allocation of time for preparation
of rebuttal submissions depends upon receipt of prior authoriza-
tion from the presiding officer, pursuant to the Commission's
Rules of Practice Section 1.13(d) (5).



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APPENDIX

Statement in Accordance with
Sec. 1.17(c), Title 16, Ch. 1, Part 1, Subpart B
F.T.C. Procedures and Rules of Practice

Insofar as the particulars requested by Sec. 1.17(c), 1-6, have not been supplied by the foregoing proposal, the following is submitted:

1. Description of the Interest Represented

Three studies by NYPIRG have brought us into contact with many consumers of funeral services and given us an insight into the practices of the funeral industry as they impact on consumers. Our over 100,000 members and their families have occasion to use the services of the funeral industry in New York State. Accordingly, NYPIRG feels confident of its ability to represent the interests of consumers at large in the effective regulation of the funeral industry.

2. Necessity of Consumer Representation

As a broad-based, state-wide consumer organization, NYPIRG is able to represent the interest of affected consumers. The necessity for such representation is the inability of individual consumers to represent their own interest and the need for two informed adversaries if the rule-making proceeding is to function properly. An additional indicator of need is the disparity in the resources available to consumers as opposed to the industry's.

3. Why Such Interest Would Not Otherwise be Represented

The experience in past hearings indicates an absence of effective consumer representation. NYPIRG's experience with the funeral industry indicates that we are the only state-wide consumer group in New York with extensive prior experience with the funeral industry, its practices, services, and costs. NYPIRG is also thoroughly familiar with the theory, administration, and enforcement of N.Y. State consumer laws affecting the funeral industry. Consequently, we believe that our participation will represent an interest that otherwise would not be heard adequately.

4. Reasons Compensation is Needed

- a) The funeral industry is a multi-million dollar business. The proposed rule would affect substantially the way in which the industry does business. Consequently, it is fair to state that the economic state of the interest involved is huge. NYPIRG's proposed compensation totals only \$8,557.

APPENDIX - 2

- b) Individual contributions for this rule-making proceeding are not feasible. Because of prior funeral studies, NYPIRG has attracted support from consumer interests concerned with funeral practices. But it is not economically feasible to solicit additional contributions at this time.
- c) NYPIRG's resources are budgeted on a fiscal year beginning September 1 and ending August 31. Duties of staff and organizational priorities are determined months in advance of the time money is to be spent. This year no allocation was set aside to support an intervention in a trade regulation rule proceeding. Like most other grassroots, community-supported organizations, we operate near to deficit. Consequently, without support, NYPIRG will not be able to intervene at the New York City hearings.

5. Statement of Expenses to be Incurred

The total funding requested is \$8,557. An itemized breakdown appears in our detailed proposal.

6. Organizational and Financial Status

NYPIRG, as noted previously, is a broad-based membership corporation organized under the laws of New York State. It is a not-for-profit corporation registered with the New York Attorney General's Office, and the New York State Division of Social Services. NYPIRG has received a determination of tax-exempt status from the Internal Revenue Service.



